Justice Harry A. Blackmun: A Retrospective Consideration of the Justice's Role in the Emancipation of Women

INTRODUCTION

The emancipation of women in 1990's America is a reality, albeit an evolving one.[1] The growing recognition of women's socio-economic significance and independence is a relatively recent phenomenon.[2] While women today have gained a measure of respect and equality, their advancement is not wholly attributable to divine providence or women's valiant efforts.[3] Women's emancipation owes much of its success to the noble jurisprudence of Justice Harry A. Blackmun.[4] The opinions of Justice Blackmun evince a profound reverence for women's individuality, autonomy, and social worth.[5] From the Justice's first major decision, *Roe v. Wade*,[6]

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[1] *See* Elizabeth F. Defeis, *Equity and Equality for Women—Ratification of International Covenants as a First Step*, 3 SETON HALL CONST. L.J. 363, 363 (1993) (recognizing that while women have progressed more in social status in the last 20 years than in the past 200 years, full equality is still not a reality). Professor Defeis noted that "the legal status of women in the United States has developed in an amazingly slow fashion." *Id.*

[2] *See* JoEllen Lind, *Symbols, Leaders, Practitioners: The First Women Professionals*, 28 VAL. U. L. REV. 1327, 1327 (1994) (explaining the emergence of the first group of American female professionals and its role in the battle to transform women's social status from inferior to equal). Professor Lind recognized that, in particular, women attorneys played a unique role in paving the way for the successes of future professional women. *Id.*

[3] *See id.* Lind noted that the emergence of female professionals in the socio-political arena accompanied the widespread post-Civil War effort to improve women's social status in America. *Id.* Lind termed women's social evolution and ongoing battle for equality a 'phenomena' and a 'crusade.' *Id.* at 1327-28 (citations omitted).

[4] *See* Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527, 527-28 (1993) (stating that Justice Blackmun's "major contribution to American law" was his sensitive treatment of the "poor, powerless, and oppressed"). Karlan celebrates Justice Blackmun's advocacy of the rights of insular minorities and impassioned defense of individuals' freedom of choice. *Id.*

[5] *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (granting women an unfettered right to jury participation by holding that gender-based peremptory challenges are prohibited by the Equal Protection Clause); UAW v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991) (holding that Title VII and the Pregnancy Discrimination Act proscribe employer implementation of fetal protection policies that discriminate against women solely on the basis of women's childbearing potential); Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) (expressing fear for the fate of women's liberty and equality in light of restrictive abortion regulations that legislatures enacted to create test cases for the courts to consider); Califano v. Westcott, 443 U.S. 76, 85, 89 (1979) (championing women's role in the workplace by striking an anachronistic gender-based classification of the Social Security Act); Roe v. Wade, 410 U.S. 113, 153

through his final opinion, *J.E.B. v. Alabama ex rel. T.B.*,[7] the issue of women's rights has been a dominant theme.[8] In light of Justice Blackmun's recent retirement from the United States Supreme Court, an examination of the Justice's role in the emancipation of women is particularly appropriate.[9]

Part I of this Comment outlines Justice Blackmun's appointment to the Court. Part II examines the Justice's most controversial abortion decision and its significance in proclaiming women's autonomy. Part III considers two of Justice Blackmun's opinions concerning women in the workplace and explores the impact of these decisions on women's expanding role in society. Part IV analyzes one of the Justice's decisions regarding women in the civic arena and theorizes about its contribution to gender equality. Part V concludes that Justice Blackmun has enriched women's lives with an overdue and profoundly noble recognition of their social value that has paved the road to emancipation.

I. SETTING JUSTICE BLACKMUN'S PLACE ON THE SUPREME COURT

On April 14, 1970, in the wake of political turmoil marked by the resignation of Justice Abe Fortas,[10] President Richard M. Nixon appointed Harry A. Blackmun Associate Justice of the United States Supreme Court.[11] Justice Blackmun's subsequent confirmation marked what Nixon believed to be a victory in his crusade to

(1973) (recognizing women's fundamental privacy right to choose whether to carry a pregnancy to term).

6 410 U.S. 113 (1973).

7 114 S. Ct. 1419 (1994).

8 *See supra* note 5 (listing cases in which women's rights is a dominant theme).

9 *See Sensitivity for Downtrodden Defines Legacy of Blackmun*, CLEVELAND PLAIN DEALER, Apr. 7, 1994, at 15A [hereinafter *Sensitivity for Downtrodden*] (reflecting on the Justice's tenure on the Court and quoting Blackmun's view of abortion as "'a step that had to be taken as we go down the road toward the full emancipation of women'"); *see also* Ruth Marcus, *Blackmun Set to Leave High Court*, WASH. POST, Apr. 6, 1994, at A1 (announcing Justice Blackmun's retirement from the Supreme Court).

10 *See generally* LAURA KALMAN, ABE FORTAS—A BIOGRAPHY 370-76 (1990) (detailing the resignation of Justice Fortas from the Supreme Court). The resignation of Justice Fortas culminated a period of intense investigation, media hype, and charges of impropriety in the Justice's relationship with Louis Wolfson, a financier who was eventually convicted for his involvement in illegal business dealings. *Id.* at 363, 369, 371, 373. President Nixon lavished the thought of Fortas's resignation, for the vacancy would allow Nixon to nominate his own conservative choice and end liberal control of the Court. *Id.* at 362, 363. On May 14, 1969, Justice Fortas delivered his terse resignation letter to Chief Justice Earl Warren, thereby leaving the vacancy Nixon prized. *Id.* at 373.

11 Michael Pollet, *Harry A. Blackmun*, *in* 5 THE JUSTICES OF THE SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 3 (Leon Friedman & Fred L. Israel eds., 1980).

restructure the Court in his own image and to temper the judicial activism and liberalism of the Warren era.[12] What Nixon sought in Blackmun was an advocate of judicial restraint, a strict constructionist, and a conservative like himself.[13] Blackmun received an overwhelming multilateral endorsement, winning even the approval of those far outside the Nixon camp who lauded Blackmun's finely tuned legal mind and striking sense of fairness.[14]

From his early days on the Eighth Circuit Court of Appeals, Justice Blackmun earned a reputation as a flexible conservative—moderate in civil liberties matters, somewhat progressive in the civil rights area, prosecution-favoring in criminal cases, and deferential to Congress, the President, and the states.[15] Despite his early

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[12] *Id.* at 3-4. The Constitution gives the President the power to nominate Judges of the Supreme Court with the advice and two-thirds approval of the Senate. U.S. CONST. art. II, § 2, cl. 2. For more on nomination to the Supreme Court, see CHRISTOPHER E. SMITH, CRITICAL JUDICIAL NOMINATIONS AND POLITICAL CHANGE 1 (1993).

Blackmun was not Nixon's first choice to replace Fortas. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS—A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 4 (1974). Upon the advice of Attorney General John N. Mitchell, President Nixon first proposed Chief Judge Clement F. Haynsworth, Jr. of the Fourth Circuit Court of Appeals. *Id.* Haynsworth reflected the conservative values Nixon sought to restore to the Court. *Id.* at 4-5. Much to Nixon's disgust, however, the Senate Committee on the Judiciary uncovered evidence of Haynsworth's financial indiscretions, which doomed his nomination. *Id.* at 5. Nixon blamed anti-conservative and anti-constructionist liberals for the defeated appointment and sought to find another strict conservative to fill the vacancy. *Id.* Once again, Nixon followed the advice of John Mitchell and proposed Judge G. Harrold Carswell. *Id.* Carswell was a former Florida District Court Judge and had served six months on the Fifth Circuit Court of Appeals. *Id.* at 5-6. Initially, Carswell seemed "too good to be true." *Id.* at 6. This image was quickly shattered by the media's discovery that Carswell was a self-proclaimed white supremacist. *Id.* Though Carswell's racist admission was made twenty years earlier, the judge's attempt to retract his previous remarks was unconvincing. *Id.* at 6-7. Ultimately, Senators refused to sanction mediocrity and prejudice on the Court and struck down Carswell's appointment on April 9, 1970. *Id.* at 7. After two bitter defeats, Nixon's nomination of Blackmun reflected a concerted effort by the President to combat the staunch liberals of the media and Senate. *Id.* at 7, 9. Haynsworth and Carswell were both southerners, and Nixon hoped that turning north for a candidate would bring a successful appointment. *Id.* at 8, 9.

[13] Pollet, *supra* note 11, at 4.

[14] *Id.* Blackmun's credentials earned him the support of prominent liberals in the Senate, including Hubert Humphry, Ted Kennedy, and Walter Mondale. *Id.* Former Executive Director of the American Civil Liberties Union, John deJ. Pemberton, also offered his support for Blackmun's confirmation despite Pemberton's non-alliance with the Nixon Administration. *Id.* The American Bar Association's Committee on the Federal Judiciary launched an unprecedentedly extensive investigation of Blackmun's qualifications. *Id.* They too sung Blackmun's praises. *Id.* Upon the recommendations of the ABA Committee and urging of prominent senators, the Senate Judiciary Committee voted unanimously to confirm Harry A. Blackmun the 99th Associate Justice of the United States Supreme Court. *Id.*

[15] *Id.* at 5. Blackmun's Supreme Court opinions also reflect the Justice's deference

public political image, Justice Blackmun resisted media attempts to cast him in one philosophical role.[16] Justice Blackmun's refusal to ally himself with either conservatives or liberals earned him a reputation as a "swing" Justice.[17]

Despite President Nixon's dream of securing to the Court a justice who would mirror his own conservative propensity for strict constructionism and opposition to civil liberties, Blackmun's trail of decisions reflects instances of departure from Nixon's ideology.[18] As early as 1972, Justice Blackmun questioned the principles of judicial restraint for which he had been renowned.[19]

In spite of Justice Blackmun's reputation as a flexible con-

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to the government. *Id.* at 8. Specifically in the area of sex discrimination, Justice Blackmun yielded to government claims that sex-based statutes were intended to benefit women. *See* Anne E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 929 & n. 78 (1983) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734-35 (1982) (Blackmun, J., dissenting) (lamenting that the Court's ruling "places in constitutional jeopardy any state-supported educational institution that confines its student body . . . to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant"); Michael M. v. Superior Court, 450 U.S. 464, 482-83 (1981) (Blackmun, J., concurring) (supporting the constitutionality of a statutory rape law targeting only males as "a sufficiently reasoned . . . effort to control the problem at its inception"); Califano v. Webster, 430 U.S. 313, 321 (1977) (per curiam) (Blackmun, J., joining Burger, C.J., concurring) (questioning whether the validity of facially discriminatory statutory schemes should be judged on whether a given scheme can be categorized as "offensive" or "benign"); Califano v. Goldfarb, 430 U.S. 199, 225-26 (1977) (Blackmun, J., joining Rehnquist, J., dissenting) (arguing that a statutory scheme that makes it easier for widows than widowers to obtain benefits should not receive strict scrutiny review because such a scheme does not perpetuate economic disadvantage)) (other citation omitted).

16 *See* Pollet, *supra* note 11, at 5. Challenging the press, the Justice warned, "'I've been called a liberal and a conservative. Labels are deceiving.'" *Id.*

17 Freedman, *supra* note 15, at 929. A "swing" justice does not commit to either position and brings personal perspectives to bear in considering the issues. *Id.*

18 Pollet, *supra* note 11, at 7-8. Blackmun's *Roe v. Wade* decision is the most notable example of the Justice's departure from conservative jurisprudence. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that women possess a substantive due process right in the decision whether to terminate a pregnancy). One commentator labeled the *Roe* opinion "the rankest kind of insupportably excessive judicial activism" and accused Blackmun of usurping legislative authority by effectively writing a federal abortion statute. Henry J. Abraham, *Line Drawing Between Judicial Activism and Restraint: A "Centrist" Approach and Analysis, in* SUPREME COURT ACTIVISM AND RESTRAINT 212-13 (Stephen C. Halpern & Charles M. Lamb eds., 1982).

19 Pollet, *supra* note 11, at 19 (citing Sierra Club v. Morton, 405 U.S. 727, 755-56 (1972) (Blackmun J., dissenting)). Blackmun developed a reputation for judicial restraint during his tenure on the Eighth Circuit Court of Appeals. *Id.* at 8. Blackmun's adherence to this philosophy was notably palpable in criminal and civil liberties cases. *Id.* at 6, 7 (citing Maxwell v. Bishop, 398 F.2d 138, 149 (8th Cir. 1968) (upholding capital punishment because determination of penalty's appropriateness is a policy issue best left to the legislature or executive), *vacated per curiam*, 398 U.S. 262 (1970) ; *In re* Weitzman, 426 F.2d 439, 454 (1970) (per curiam) (Blackmun, J., dissenting)

servative, his opinions concerning gender issues reveal an emancipating liberalism.[20] What Nixon envisioned in 1970 as a wholly conservative appointment ultimately emerged as a liberal leap down the road to gender equality.[21]

II. RECOGNIZING WOMEN'S PERSONAL LIBERTY: THE ABORTION DECISION

Roe v. Wade has been hailed as Justice Blackmun's most significant Supreme Court decision.[22] The *Roe* opinion marked the beginning of a debate of dramatic proportions.[23] Holding that a

(declaring unconstitutional the denial of citizenship to an alien whose opposition to war was grounded in moral precept rather than in religious belief)).

Blackmun first began to question such restraint in his dissent in *Sierra Club v. Morton*, in which the Justice advocated the expansion of established notions of standing under federal environmental laws. *Id.* at 19 (citing *Sierra Club*, 405 U.S. at 755-56 (Blackmun, J., dissenting)). Rebuking the majority for its unyielding conservatism, Blackmun remarked, "[m]ust our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?" *Sierra Club*, 405 U.S. at 755-56 (Blackmun, J., dissenting). At the time, this conviction seemed out of character for Justice Blackmun, who was generally considered to be "imbued with the theology of judicial restraint and . . . reluctant to make new law." Pollet, *supra* note 11, at 19.

20 *See, e.g.*, *Roe*, 410 U.S. at 153 (recognizing a woman's fundamental right to choose whether to procure an abortion). When Nixon chose Blackmun, the President hoped his nominee would mirror the conservative philosophy of Blackmun's childhood friend, Chief Justice Warren Burger. DAVID G. SAVAGE, TURNING RIGHT—THE MAKING OF THE REHNQUIST SUPREME COURT 175 (1992). The press was well aware of the long-time friendship between Blackmun and Burger and dubbed the pair the "Minnesota Twins." *Id.* at 233. By the mid-70s, however, Blackmun diverged from the philosophy of his colleague and became a vocal proponent of equal rights for blacks, homosexuals, and women. *Id.* at 233-34. Blackmun's 1973 *Roe v. Wade* opinion, the most controversial decision of the decade, went far afield of the Nixon-Burger conservatism. *Id.* at 175. One theorist saw a lesson for future presidents in this liberal swing and cautioned: "[b]eware of moderate Republicans whose judicial philosophy is not clear." *Id.* For a study on the Burger Court with a detailed analysis of its prevailing constitutional and legal philosophies, see generally BERNARD SCHWARTZ—THE ASCENT OF PRAGMATISM, THE BURGER COURT IN ACTION (1990).

21 *See* SAVAGE, *supra* note 20, at 233-34. Liberals attribute Justice Blackmun's departure from conservatism to the Justice's growth during his early years on the bench and his developing appreciation and expanding vision of constitutional tenets. *Id.* at 234. Conservatives denounce Blackmun's liberal twist as the product of the brainwashing lure of Brennan philosophy. *Id.* Still others propose that Nixon and the media may have mischaracterized Blackmun and selectively chosen to ignore the glimmer of liberalism in the Justice's early opinions. *Id.*

22 Pollet, *supra* note 11, at 13.

23 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 379 (1985). Justice Ginsburg proposed that the *Roe* decision would have been more acceptable if the Court had limited the ruling to the facts of the extreme statute at issue. *Id.* at 385; *see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2812 (1992) (recognizing that nineteen years after *Roe*, the issue of abor-

woman's right of personal privacy encompasses the right to obtain an abortion, *Roe v. Wade* rendered unconstitutional forty-six of fifty state abortion laws.[24]

Roe, an unmarried pregnant woman, filed an action challenging the Texas abortion law that criminalized the procurement or attempt to procure an abortion other than when necessary to save the life of the woman.[25] Roe sought a judgment declaring the law facially unconstitutional and enjoining its enforcement.[26]

Justice Blackmun, writing for the majority, held that the fundamental right to privacy encompasses a woman's decision whether to carry a pregnancy to term.[27] In so holding, the Justice invalidated the Texas statute's wholesale proscription of abortion at any stage of pregnancy and the statutes' overbroad exception for saving the life of the mother.[28] Further, Justice Blackmun defined a trimester framework: during the first trimester, the termination decision rests ultimately with the woman and her physician; after the first trimester, the state may regulate, and even prohibit, abortion for reasons reasonably related to maternal health; at the point of fetal viability, a state may further regulate abortion to protect the potential life of the fetus.[29]

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tion as a fundamental liberty interest remains controversial, provoking widespread and sustained debate). For a criticism of *Roe*'s extension of the privacy right to unprecedented and ambiguous lengths, see John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) (citations omitted).

24 *Roe*, 410 U.S. at 153; Pollet, *supra* note 11, at 13. For an extensive list of criminal abortion statutes in force in 1973, see *Roe*, 410 U.S. at 118 n.2.

25 *Roe*, 410 U.S. at 120.

26 *Id.* Roe averred that the statute was vague and infringed upon her personal privacy rights under the "First, Fourth, Fifth, Ninth, and Fourteenth Amendments." *Id.* Roe further challenged that the absence of a threat to her life precluded her from legally obtaining an abortion in Texas, and that the costs of traveling to another state to undergo the procedure were prohibitive. *Id.*

The district court held that the Texas statute was unconstitutionally vague and infringed too broadly upon Roe's Ninth Amendment rights. *Id.* at 122. The court, however, finding that injunctive relief was inappropriate, offered only a declaratory remedy. *Id.*

Roe appealed directly to the United States Supreme Court, contesting the district court's ruling on injunctive relief. *Id.* District Attorney Wade, for the state of Texas, filed a cross-appeal from the lower court's order of declaratory relief. *Id.* The Supreme Court, per Justice Blackmun, first addressed the procedural questions and found Roe's direct appeal appropriate. *Id.* at 123. The Justice further held that Roe's natural termination of her pregnancy did not render her case moot, explaining that suits concerning pregnancy are exceptions to the general rule requiring an actual controversy at the review stage. *Id.* at 125. Blackmun reasoned that pregnancy is a condition "capable of repetition, yet evading review." *Id.* at 125 (citations omitted).

27 *Id.* at 153.

28 *Id.* at 163-64.

29 *Id.* at 164-65. While recognizing the fundamental privacy right encompassing

First, Justice Blackmun acknowledged that the Constitution does not literally enumerate a right of privacy, but cited a line of decisions, beginning in 1891, in which the Supreme Court recognized that the Constitution guarantees a right to certain zones of personal privacy.[30] Whether rooted in the Ninth Amendment, as asserted by the district court, or in the Fourteenth Amendment, as Justice Blackmun believed, the Justice announced that the right of personal privacy is expansive enough to protect a woman's choice to seek an abortion.[31]

Justice Blackmun recognized, however, that this right to choose whether to carry a pregnancy to term is not absolute.[32] The Justice declared that at some point during pregnancy, state interests in both maternal health and the potential life embodied in the fetus become so compelling that regulation of abortion is justified.[33] First, Justice Blackmun held that the concern for maternal

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the abortion decision, Justice Blackmun conceded that this privacy right is not absolute. *Id.* at 154-55. Where fundamental rights are at issue, the Justice noted, state interference with such rights may be justified by a "'compelling state interest.'" *Id.* at 155 (citations omitted). In the abortion context, Justice Blackmun identified two compelling state interests that arise at different points in the course of a pregnancy: the interest in protecting the health of pregnant women and the interest in protecting the potential human life embodied in the fetus. *Id.* at 162. The Justice concluded that the state's interest in the mother's health does not become "compelling" until the completion of the first trimester. *Id.* at 163. The Justice explained that this is because abortion mortality during the first trimester is less than mortality in natural childbirth. *Id.* The state's interest in potential life, Justice Blackmun proffered, becomes "compelling" at the point of fetal viability. *Id.* The Justice resolved that, at this point, the fetus is capable of having a meaningful life outside of the womb. *Id.*

30 *Id.* at 152-53 (citing Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891)). The Justice noted that the Court has historically grounded such a right in the First, Fourth, Fifth, and Ninth Amendments, in the Bill of Rights penumbra, and in the Fourteenth Amendment's concept of ordered liberty. *Id.* at 152. (citations omitted).

31 *Id.* at 153. Next, Justice Blackmun recognized that a state's wholesale ban of abortion might pose serious risks to the mental and physical health of the woman. *Id.* The Justice proffered that such concerns were best left to the woman and her doctor. *Id.*

32 *Id.* at 153-54. To support this proposition, the Justice pointed to prior opinions in which the Supreme Court recognized a privacy right but declined to leave it unqualified or unbounded. *Id.* (citations omitted). The Justice also cited a series of state and federal decisions that recognized a need for limitation on the privacy right. *Id.* at 154-55 (citations omitted). Justice Blackmun reiterated that a degree of state regulation in protected privacy areas is appropriate. *Id.* at 155.

33 *Id.* at 155-56. Next, Justice Blackmun considered the amount of latitude to be afforded state action that restricts the privacy right. *Id.* at 155. Citing a string of prior Supreme Court decisions, the Justice affirmed that government restraints on the fundamental right of privacy must be narrowly drawn to achieve the state's compelling interest. *Id.* at 155-56 (citations omitted). The Justice was unwilling to accept appellants' claim that no state interest justified limiting a woman's privacy right. *Id.* at 156. Blackmun was equally unwilling to adopt appellee's broad assertion that protection of potential life from the point of conception is a sufficiently compelling state interest.

health becomes compelling at the end of the first trimester.[34] The Justice thus determined that prior to this point, a woman and her physician must be free to reach an abortion decision without government intrusion.[35] Second, Justice Blackmun held that the state interest in potential life becomes compelling at viability, when the fetus is capable of "meaningful life" outside the womb.[36] The Justice declared that protection of a viable fetus may justify a state's proscription of abortion, except when essential to preserve maternal life or health.[37]

After articulating the legal principles, Justice Blackmun applied those standards to the Texas statute.[38] The Justice concluded that the statute's failure to differentiate among abortions sought at various stages of pregnancy and the overbroad exception for "saving" the woman's life rendered the law unconstitutional.[39]

Id. Moreover, the Justice declined to accept appellee's unprecedented proposition that a fetus is a "person" deserving of Fourteenth Amendment protection. *Id.* at 156-59 (citations omitted). Blackmun reasoned that the law has never accorded the unborn "personhood" status, and that judicial determination of the point at which life begins would be inappropriate considering the continuing debate among those skilled to address such a question. *Id.* at 157, 158, 159. The Justice adhered, however, to the belief that at some point the state acquires a valid interest in a woman's pregnancy. *Id.* at 159.

[34] *Id.* at 163. The Justice explained that until this point, mortality in childbirth may be greater than mortality in abortion. *Id.*

[35] *Id.* Conversely, the Justice declared that following the compelling point, a state may choose to regulate the abortion practice to the extent that any imposed restraints reasonably serve the interest in maternal health or life. *Id.*

[36] *Id.*

[37] *Id.* at 163-64.

[38] *Id.* at 164.

[39] *Id.* After this announcement, Blackmun proffered that the instant decision was consistent with medical and legal history, as well as with contemporary social concerns. *Id.* at 165. The Justice stressed that the decision permits the state to impose restraints on a woman's abortion decision commensurate with the state's interests. *Id.* Further, Justice Blackmun reminded that prior to the compelling points, the abortion decision must remain a medical one for which the physician bears basic responsibility. *Id.* at 166.

Lastly, Justice Blackmun explained that striking only the statutory provision which allowed abortion to save the mother's life would leave the state with an unconstitutionally wholesale ban on abortion. *Id.* Believing that the Texas authorities would heed the instant decision, Blackmun found it unnecessary to determine whether the lower court's denial of injunctive relief was appropriate. *Id.* Thus, based on the foregoing reasons, Justice Blackmun affirmed in part and reversed in part the decision of the district court. *Id.* at 166-67.

Justice Stewart, in a concurring opinion, joined the Court's interpretation of the Due Process Clause. *Id.* at 170-71 (Stewart, J., concurring). The Justice pointed to years of Fourteenth Amendment case law and urged that past decisions demanded the logical extension of the privacy right to embrace abortion choice. *Id.* at 167-70 (Stewart, J., concurring) (citations omitted).

After denouncing the Texas statute as an affront to the announced privacy right,

Justice Stewart addressed the proposed state interests. *Id.* at 170 (Stewart, J., concurring). First, the Justice questioned whether the legitimate concerns for the health and safety of the mother and potential life could withstand the level of scrutiny afforded state action that violates fundamental rights. *Id.* The Justice acknowledged the validity of these state concerns and admitted that at some point they warrant state infringement of a woman's privacy. *Id.* That notwithstanding, the Justice declined to further explore the legitimacy of such state action, reasoning that such legislation was not before the Court. *Id.* Focussing on the instant matter, Justice Stewart echoed the majority's rejection of appellee's overbroad interest in saving the mother's life. *Id.* at 170-71 (Stewart, J., concurring). The Justice concluded that such a wide-open interest could not justify an otherwise wholesale abrogation of a woman's right to due process. *Id.*

Justice Rehnquist, in a highly charged dissent, rebuked the majority for its unprecedented interpretation of Fourteenth Amendment guarantees. *Id.* at 173 (Rehnquist, J., dissenting). Justice Rehnquist professed that neither the privacy generally accorded medical abortions nor the privacy protected by the Fourth Amendment are the same species of privacy defined by the majority. *Id.* The Justice noted, however, that if the Court intended to define privacy as a form of Fourteenth Amendment liberty, then such a claim was well-supported by precedent. *Id.* Moreover, Justice Rehnquist agreed with Justice Stewart's observation that the liberty protected by the Due Process Clause encompasses more than the Bill of Rights guarantees. *Id.* at 172-73 (Rehnquist, J., dissenting). Nevertheless, Justice Rehnquist clarified, such liberty is not absolute, but only free of invasion without due process. *Id.* at 173 (Rehnquist, J., dissenting).

Further, the Justice explained that state infringements of personal liberty have historically been held to a rational basis standard, which requires merely a rational link between the infringement and the state's concern. *Id.* (citation omitted). Thus, the Justice acknowledged that the Due Process Clause does restrict government action, but only to a limited degree. *Id.* Accordingly, Justice Rehnquist declared that the majority's total prohibition of any restraints on first trimester abortions could not survive the rational basis test. *Id.* Moreover, the Justice challenged that the majority's substitution of strict scrutiny for the proper standard was an inappropriate transposition of Equal Protection theory to a Due Process issue. *Id.* at 173, 174 (Rehnquist, J., dissenting). The Justice declared this action a judicial usurpation of legislative authority. *Id.* at 174 (Rehnquist, J., dissenting).

Next, Justice Rehnquist chastised the Court for apparently ignoring that most states have restricted abortion practices for nearly a hundred years. *Id.* The Justice posited that these nationwide restraints and the ever-present abortion debate undermine the majority's assertion that the abortion right is fundamental to the American conscience. *Id.* (citation omitted). Moreover, Justice Rehnquist proffered that the Amendment's authors were well aware of the abortion statutes in force at the time and did not intend to rob the states of the authority to enact laws governing abortion. *Id.* at 174-77 (Rehnquist, J., dissenting) (citations omitted). Thus, unyielding in scrutiny, Justice Rehnquist further condemned the majority's finding of a Fourteenth Amendment right never contemplated by the Amendment's framers. *Id.* at 177 (Rehnquist, J., dissenting).

In a final attempt to reconcile the majority's decision with constitutional theory, Justice Rehnquist examined the Court's sweeping invalidation of the Texas statute. *Id.* For the sake of argument, the Justice accepted the premise that the statute was unconstitutional as applied to Roe. *Id.* The Justice noted, however, the majority's concession that, in later stages of pregnancy, those once unconstitutional provisions might be permissible. *Id.* Thus, Justice Rehnquist reminded that a statute held invalid as to one individual, but not wholly unconstitutional, must not be struck down. *Id.* at 177-78 (Rehnquist, J., dissenting) (citations omitted). Instead, the Justice declared,

In the years since *Roe*, the notion of women's qualified right to abortion has become axiomatic despite the opposition that the issue has engendered.[40] Only three years after the seminal *Roe* decision, Justice Blackmun again considered the question of an abortion statute's constitutionality in *Planned Parenthood v. Danforth*.[41] Invoking *Roe*, Justice Blackmun reiterated the fundamental privacy right that encompasses the abortion decision.[42] The Justice extended the *Roe* doctrine to invalidate a statutory provision requir-

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precedent demands that such a law be held unconstitutional only with regard to the case at hand. *Id.* at 178 (Rehnquist, J., dissenting) (citations omitted). Because Justice Rehnquist found the majority's decision an unprecedented interpretation and application of Fourteenth Amendment principles, the Justice respectfully dissented. *Id.*

[40] *See* Pollet, *supra* note 11, at 13-14. The concept of abortion choice as a qualified privacy right remains a topic of national and international debate. *See* Selina K. Hewitt, Note, Hodgson v. Minnesota: *Chipping Away at* Roe v. Wade *in the Aftermath of* Webster, 18 PEPP. L. REV. 955, 1009-10 (1991) (exploring the movement toward narrowing and eventually overturning *Roe*); Barbara Crossette, *Population Meeting Opens with Challenge to the Right*, N.Y. TIMES, Sept. 6, 1994, at A1 (discussing the World Population Conference, at which the Clinton Administration was under fire by abortion opponents who challenged that the Administration's stance on abortion encouraged the practice as a means of combatting the global population explosion).

[41] 428 U.S. 52 (1976). Two physicians and Planned Parenthood Corporation filed suit in the Eastern District of Missouri against the Attorney General of Missouri and Circuit Attorney of St. Louis, challenging the constitutionality of the revised Missouri abortion statute. *Id.* at 56, 57, 57-58. Specifically, the plaintiffs attacked: (1) the statutory provisions defining viability and requiring a woman's consent, spousal consent, and parental consent for unmarried minors; (2) the statute's requirement that physicians exercise care to preserve fetal life, neglect of which gave rise to criminal and civil penalties; and (3) the statute's provisions concerning infant survivors of abortion, saline amniocentesis procedures, and recordkeeping and reporting requirements. *Id.* at 58-59. The plaintiffs sought a declaratory judgment and injunction of the enforcement of the law. *Id.* at 57. The district court upheld the statute, striking only a portion of the physician care provision as overbroad. *Id.* at 59. The plaintiffs appealed directly to the United States Supreme Court. *Id.* at 60.

[42] *Id.* Justice Blackmun, writing for the Court, affirmed in part and reversed in part the decision of the district court. *Id.* at 84.

Justice Blackmun first affirmed the definition of viability, reasoning that it was consistent with *Roe*. *Id.* at 63. Second, the Justice declared the woman's consent provision constitutional. *Id.* at 67. Justice Blackmun reasoned that the central role of women in abortion justified the state's interest in mandating women's prior consent. *Id.* Third, Justice Blackmun struck the requirements of spousal consent and parental consent requirement for minors, finding the provisions unconstitutional in their delegation of decision-making power to someone other than the woman and her doctor. *Id.* at 70, 75. Fourth, the Justice struck the provision forbidding saline amniocentesis after twelve weeks of pregnancy. *Id.* at 79. Justice Blackmun denounced the provision as an "unreasonable or arbitrary regulation" aimed at discouraging abortion. *Id.* Next, the Justice upheld the reporting and recordkeeping provisions, finding them useful and non-burdensome. *Id.* at 80-81. Finally, Justice Blackmun struck the physician care requirement as impermissibly broad in its failure to distinguish between the level of care afforded pre- and post-viability fetuses. *Id.* at 83.

ing spousal consent to abortion.[43]

Justice Blackmun specifically addressed the state's claim that its spousal consent provision reflected the government's view of marriage as an institution in which significant decisions require bilateral input.[44] The Justice was sensitive to the significance of marriage, husbands' profound concerns regarding their wives' pregnancies, and the probable impact of the abortion decision on the marital union.[45] Nevertheless, Justice Blackmun was unwilling to perpetuate the intolerable notion of men's single-handed control over decisions affecting the family.[46] The Justice reasoned that upholding the consent requirement would effectively grant husbands veto power over their wives' choices regarding whether to carry a pregnancy to term.[47] Justice Blackmun refused to submit women's ultimate act of autonomy to the final approval of their husbands.[48] Nowhere, concluded the Justice, does the Constitution sanction the government's grant of unilateral power to husbands when the government itself does not possess such deadhand control.[49]

The issue of control is a palpable factor permeating the *Roe* and *Danforth* decisions.[50] Justice Blackmun's clear delegation to

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43 *Id.* at 71. The spousal consent provision of the Missouri statute provided: "[n]o abortion shall be performed prior to the end of the first twelve weeks of pregnancy except . . . [w]ith the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother." *Id.* app. at 85.

44 *Id.* at 68. Plaintiffs challenged this theory, charging that the spousal consent requirement was tantamount to granting husbands veto power over their wives' decisions, regardless of the actual paternity of the fetuses. *Id.* at 68-69 (citations omitted).

45 *Id.* at 69-70 (citations omitted).

46 *Id.* at 70 & n.11 (citation omitted).

47 *Id.*

48 *Id.* The Justice acknowledged the validity of Missouri's goal of engendering mutual participation in marital affairs, but questioned whether according husbands veto power over their wives' abortion decisions would serve this aim. *Id.* at 71. Stressing that women carry the fetuses and are more directly affected by pregnancy than their husbands, the Justice declared that when partners cannot agree on the abortion issue, the scales tip in women's favor. *Id.* (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).

49 *Id.* at 70 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)). Justice Blackmun reminded that the privacy right implicitly grants the individual freedom from unwarranted government intrusion into decisions as fundamentally personal as the choice to have children. *Id.* at 70 n.11 (quoting *Eisenstadt*, 405 U.S. at 453).

50 *See* Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1400-03, 1404 (1990) (asserting that recognizing fathers' rights in the abortion decision would violate the privacy concepts inherent in *Roe* and *Danforth*). After examining *Roe v. Wade* and cases asserting paternal rights surrounding the abortion decision, Sharrin concluded that subverting women's rights to those of fathers violates women's equal protection rights and constitutes the most vile form of sex discrimination. *Id.* at 1403-04. Sharrin vehemently asserted that

women of qualified control over their own bodies can be viewed from two perspectives—one moral and one philosophical.[51] From a religious and moral standpoint, *Roe* and *Danforth* are highly suspect.[52] They present an irreconcilable conflict for persons of firm religious conviction who fundamentally oppose abortion but support the Justice's recognition of women's autonomy.[53]

Putting aside religious concerns, the decisions in *Roe* and *Danforth* are philosophical gems.[54] Viewing *Roe* from a strictly theoretical angle, one must credit Justice Blackmun with great insight for recognizing that the right to obtain an abortion falls within the privacy right implicit in this nation's concept of liberty.[55] One

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placing restrictions on the right to abortion undermines women's right to self-determination. *Id.* at 1401 (citations omitted). Moreover, Sharrin noted, "'[t]he right to equal citizenship encompasses the right "to take responsibility for choosing one's own future . . . . [T]o be a person is to respect one's own ability to make responsible choices in controlling one's own destiny, to be an active participant in society rather than an object."'" *Id.* at 1402 (quotation omitted) (alteration in original).

51 *See* SAVAGE, *supra* note 20, at 236-37. The reaction of both advocates and opponents to *Roe* was tremendous. *See id.* Women's rights proponents have praised Justice Blackmun's liberating genius. *Id.* at 236. They attribute much of the Justice's pro-women philosophy to his wife, who has been described as a feminist. *Id.* at 237. By contrast, right-to-life supporters denounce the Justice's philosophy as a moral outrage. *Id.* at 236.

52 *See id.* Anti-abortion organizations exploited the questionable moral foundation of Justice Blackmun's abortion stance. *Id.* at 237. In response to *Roe*, Blackmun received death threats from one religious group, the "Army of God." *Id.* Other abortion opponents labeled Blackmun the "'Butcher of Dachau,' 'Pontius Pilate,' 'King Herod,' [and] a child murderer." *Id.*

Other vocal dissenters have rigorously denounced the Justice's refusal to recognize the fetus as a person. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 483 (1990) (quotation omitted) ("The equality argument also ignores the fact that women are not the only traditionally powerless group whose interests are at stake here. . . . '[N]o fetuses sit in our legislatures.'"). Koppelman argues that no one can prove or disprove the personhood of a fetus and that denying women the choice to abort is tantamount to slavery in contravention of the Thirteenth Amendment. *Id.* at 483-85.

53 *See* Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 697-98 (1992) (examining abortion from a moral perspective by addressing the arguments of pro-life and pro-choice proponents and the struggle between privacy rights and the alleged immorality of abortion). For further reading on the moral struggle associated with abortion, see generally James R. Bowers & Ummuhan Turgut, *Classic Liberalism, the Constitution and Abortion Policy: Can Government Be Both Pro-Choice and Anti-Abortion?*, 17 U. DAYTON L. REV. 1 (1991) (discussing abortion as a "clash of absolutes" and a continuing tension between the poles of fetal life and female self-governance).

54 *But see* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 262, 263 (1992) (recognizing that scholars have questioned the solidity of *Roe*'s constitutional foundation).

55 *See* Roe v. Wade, 410 U.S. 113, 152-53 (detailing the reasoning behind *Roe*'s holding that the fundamental right to privacy includes the abortion decision). A full

must also applaud Blackmun's enunciation of the trimester framework and women's abortion rights therein.[56]

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appreciation of the impact of the *Roe* decision on contemporary constitutional philosophy requires an understanding of abortion history. *See id.* at 117. Justice Blackmun prefaced the *Roe* opinion with such an examination. *Id.* During the era of the Persian Empire, anti-abortionists were vocal and abortions were punished harshly. *Id.* at 130 (citation omitted). Ancient Greece and Rome were battlegrounds for disputes over the legality of abortion. *Id.* (citation omitted). Although the procedure was freely practiced, anti-abortionists generally grounded their protests in the theory that abortion violated a father's right to his progeny. *Id.* (citation omitted).

The English common law did not stray far from its ancient predecessors. *Id.* at 132-33. Drawing on philosophical, religious, civil, and canon law notions of the point at which life begins, English theorists narrowed the point to somewhere between conception and birth, with little agreement therein as to the exact moment of animation. *Id.* at 133-34 & n.22 (citations omitted). Whatever the point of animation, or "quickening," as early physicians called it, common law thinkers generally agreed that prequickening, the fetus was still part of the woman and pregnancy termination was thus not criminal. *Id.* at 134. The degree of criminality accorded the termination of a quick fetus at English common law remains in dispute. *Id.* at 134-35. Decisions of American courts relying on English law indicate that abortion, at any time during the pregnancy term, was probably never regarded as a common law offense. *Id.* at 135-36 (citations omitted). English statutory law wavered in its perspective on the legality of abortion, moving from making the termination of a quick fetus a capital crime to eventually permitting the procedure according to statutory guidelines. *Id.* at 136-38 (citations omitted).

American law echoed English doctrine well into the mid-nineteenth century, when the quickening notion gradually began to lose force and most states made abortion a serious offense carrying stiff penalties. *Id.* at 138-39 (citations omitted). By the mid-twentieth century, a majority of states prohibited all abortions but those necessary to preserve the woman's life. *Id.* at 139. By the time of *Roe v. Wade*, nearly all fifty states had criminal abortion statutes on the books. Pollet, *supra* note 11, at 13. In light of this historical evolution, Justice Blackmun remarked that abortion practice engendered less opposition throughout ancient and common law times than it did in 1973. *Roe*, 410 U.S. at 140. The Justice thus construed women's past right to abort as grounds for resurrection of this right. *Id.* at 140-41.

For further discussion on the impact and soundness of *Roe*, see Mark E. Chopko, Webster v. Reproductive Health Services: *A Path to Constitutional Equilibrium*, 12 CAMPBELL L. REV. 181, 220 (1990) (claiming that *Roe* upset the legal and political balance on abortion that was beginning to evolve in this country); *see also* Koppelman, *supra* note 52, at 480-85 (challenging that the Court's grounding of the abortion right in the Fourteenth Amendment was unsound and proposing that the Thirteenth Amendment provides a more defensible basis).

56 *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 271-72 (1979) (noting that Justice Blackmun looked to medicine in developing the trimester framework, considering the manner in which doctors divided the stages of pregnancy). Justice Blackmun's trimester framework was not the original formula proposed by the Justice. *See id.* at 271-76 (describing the different schemes that Justice Blackmun considered in drafting the *Roe* decision). In the initial copy of Blackmun's *Roe* draft, the Justice placed the point of compelling state interest at viability. *Id.* at 273. Justice Brennan rejected this framework because it effectively permitted unrestricted abortions up to viability, or the end of the second trimester. *Id.* at 273, 274. On Justice Brennan's suggestion, Justice Blackmun revamped the pregnancy structure into three periods and assigned various degrees of state interest to each. *Id.* at 274-75. Moreover, after considering the suggestions of Justice Marshall, Justice Blackmun arrived at the final

Equally deserving of approbation, but seemingly lost amidst the more vocalized of Blackmun's praises, is the liberating resonance that the Justice's *Roe* decision sounded for women.[57] What was received in 1973 as purely an extension of the Due Process Clause was, in retrospect, the first victory cry for women in the fight to claim emotional and legal independence in a male-dominated world.[58] *Roe* offered hope on a much broader scale than re-

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formula: during the first trimester, the state has no compelling interest, thus no government interference with abortion is permissible; during the second trimester, Justice Blackmun proposed that state interest grows and reasonable abortion regulation is allowed for the purpose of protecting maternal health; during the third trimester, the Justice submitted that abortion regulation, including proscription, is constitutional due to the state's compelling interest in protecting potential life. *Id.* at 275-76. With this formula, the viability threshold was eliminated and the reins drawn in on governmental control over second trimester abortions. *Id.* at 275.

Viability as a pivotal point was rendered unworkable by advances in modern science. *Id.* at 273-74. Advances in medical technology could move the point of viability to earlier stages in pregnancy, thus reducing the period in which abortion is a legally available option. *Id.* at 273-74, 275. Nevertheless, Justice Marshall encouraged Justice Blackmun to return to the viability arrangement. *Id.* at 275. Justice Marshall feared that indigent women in rural areas would suffer under the new trimester framework because they would not likely see a physician within the first twelve weeks of pregnancy. *Id.* The viability mark, Justice Marshall submitted, would better serve the needs of poor rural women because the point of viability would be established later in those areas where medical technology was not highly advanced. *Id.* Justice Blackmun respected Justice Marshall's concerns and incorporated them into the final trimester draft. *Id.*

57 *See* Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 110-12 (1989) (recognizing that the appeal of *Roe*'s privacy analysis lies in its liberation of women from sexual and social oppression); *see also Sensitivity for Downtrodden*, *supra* note 9, at 15A (quoting the Justice's view of *Roe* as "'a step that had to be taken as we go down the road toward the full emancipation of women'").

58 *See* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 721-23 (1981) (noting that *Roe v. Wade* liberated women from encroachments on their rights of privacy and autonomy, but that subsequent Supreme Court decisions immediately began gnawing away at those freedoms).

Though the *Roe* decision was, from Blackmun's perspective, firmly rooted in precedent, it was the first official abortion endorsement demonstrating a respect for women's decision-making and self-governing capacities. *See* David Von Drehle, *"Roe" Opinion Reshaped Nation's Public and Private Life*, WASH. POST, Apr. 7, 1994, at A10 (quoting Kate Michelman of the National Abortion and Reproductive Rights Action League on *Roe v. Wade*: "'It was probably the most important decision affecting women and their role, their autonomy, their dignity . . . . [*Roe*] played a central role in our ability to win equality and respect'"). To appreciate the magnitude of the *Roe* decision, one must necessarily understand the subservient role accorded the female throughout history. *See* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 786 & n.15 (1993) (quoting Bradwell v. Illinois, 16 Wall. 130, 141-42 (1872) (Bradley, J., concurring)). Women have long been viewed as objects of men's protection, devoid of independent legal identity, and relegated to the harmonious sphere of home and hearth. *Id.* at 786 n.15 (quoting *Bradwell*, 16 Wall. at 141-42 (Bradley, J., concurring)). Nature and religion were used to justify women's restricted social status, and

productive freedom—it pulled respect within women's grasp and promised recognition of women as independent beings.[59] By granting women control over their own reproductive choices, Blackmun took the first step in freeing women to shape their own destinies.[60]

Danforth affirmed *Roe*'s emancipation of women.[61] Blackmun's invalidation of the spousal consent mandate marked a major turning point in women's self-governance, for it signified a rite of passage from the little girl world of obedience into the untrammeled territory of individual decision-making.[62] Though facially *Roe* and *Danforth* spoke only of reproductive freedom, women who heard their message heard more than just the articulation of a new privacy right—they heard the promise of a bright future.[63]

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the idea of women in the workplace was regarded as repulsive to the family structure in which the Divine Creator had assigned women the noble mission of wife and mother. *Id.* (quoting *Bradwell*, 16 Wall. at 141-42 (Bradley, J., concurring)). Whatever the rationale for subjugating women, the prevailing common law view discouraged women from participating in morally-debasing public life. *Id.* (quoting *Bradwell*, 16 Wall. at 141-42 (Bradley, J., concurring)). Common law thinkers reasoned that the "natural and proper timidity and delicacy which belongs to the female sex" rendered women unsuitable for, if not incapable of, performing civil activities. *Id.* (quoting *Bradwell*, 16 Wall. at 141 (Bradley, J., concurring)). Remnants of this narrow view spilled over into modern American jurisprudence, but were met with increasing disfavor as some courts and justices began to question the historical notions that had conscribed women to home life. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 684-85 & n.13 (1973) (describing the "unfortunate history of sex discrimination" in the United States and that "[as] a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes" that compared to such distinctions made on the basis of race during the pre-Civil War era).

59 *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 424-31 (1993) (hailing consent and autonomy as paramount feminist values).

60 *See* Webster v. Reproductive Health Servs., 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part, dissenting in part) ("For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.").

61 *See* Sharrin, *supra* note 50, at 1386 (noting that arguments in favor of paternal rights in the abortion decision "attempt to create a loophole . . . to circumvent *Roe* and *Danforth*. . . . [S]uch manufactured avenues do not exist in reality"). Sharrin urged that *Roe* and *Danforth* are dispositive on the issue of paternal rights. *Id.* She further asserted that any grant of veto power to fathers in the abortion decision would signal a regression to invidious stereotypes in contravention of equal protection jurisprudence. *Id.* (citation omitted).

62 *See* Roe v. Wade, 410 U.S. 113, 153 (recognizing women's substantive due process right in the abortion decision) (1973). *But see* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 594 n. 30 (1991) (citation omitted) (revealing that 36% of American adults are still unaware of the parameters of abortion rights and believe that abortion during the first three months of pregnancy is legal only under "extreme circumstances").

63 *See* Von Drehle, *supra* note 58, at A10 (quoting Kate Michelman of the National

Justice Blackmun's expansion of the privacy right in *Roe* and extension of the doctrine in *Danforth* had serious implications in the sphere of women's independence.[64] Within twenty years of these decisions, women won recognition as distinct social beings with their own place in society.[65] Justice Blackmun was a catalyst for this much needed change.[66] With the promise of *Roe*, Justice Blackmun planted for women the first seeds of justice, which needed only an enlightened social consciousness to germinate.[67] Although Justice Blackmun's Supreme Court colleagues were not as eager to join in the emancipation of women,[68] the dignity and sanctity of women's autonomy continued to gain recognition as women developed a growing appreciation of their own self worth.[69]

III. Acknowledging Women's Contributory Role: The Workplace

Six years after *Roe* and three years after *Danforth*, the value of women as economic generators gained favorable recognition in *Califano v. Westcott*.[70] In *Westcott*, Justice Blackmun struck down, as a violation of equal protection, a provision of the Social Security Act that only provided for assistance where a family's primary wage

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Abortion and Reproductive Rights Action League on *Roe v. Wade*) (noting the importance of the *Roe* decision in terms of women's autonomy, dignity, and respect).

64 *See id.*

65 *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (recognizing that government may no longer define women's roles and declaring that women must now shape their own destinies from their individual conceptions of their spiritual and social needs).

66 *See id.* at 2845 (Blackmun, J., concurring in part, dissenting in part) (citation omitted) (noting that *Roe* gave birth to a liberty concept that has freed women to enjoy not only reproductive choice but also self-definition).

67 *See* Von Drehle, *supra* note 58, at A10 (acknowledging that *Roe v. Wade* brought "seismic changes" in the status of women and proposing that *Roe* sparked a growth in "women going to college, delaying marriage, starting careers, [and] having children later in life").

68 *See* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 758, 759-60 (1993) (holding that the aim of abortion prevention was not an "invidiously discriminatory animus" targeted specifically at women and that anti-abortion protests incidentally impeding women's interstate travel were not dispositive of a conspiracy to deprive women of their rights); *see also Casey*, 112 S. Ct. at 2821 (affirming the fundamental privacy right recognized in *Roe*, but replacing the trimester framework and strict scrutiny review in favor of a viability threshold and "undue burden" analysis).

69 *See* Von Drehle, *supra* note 58, at A10 (recognizing *Roe*'s tremendous impact on women's status). Justice Blackmun put abortion on the constitutional map with *Roe*, and abortion has since become a major point of contention in American politics. *Id.* "*Roe* has been, depending upon your point of view, liberating, corrupting, energizing, divisive, healthy, a holocaust." *Id.*

70 443 U.S. 76 (1979).

earner was a man.[71] Not unlike the decision in *Roe*, the Justice's *Westcott* opinion acknowledged the expanding social role and contributions of women.[72]

Cindy and William Westcott, unemployed parents of an infant, sought assistance from the Massachusetts Department of Public Welfare pursuant to the Social Security Act's Aid to Families with Dependent Children, Unemployed Father (AFDC-UF) program.[73] Although Mrs. Westcott was the couple's principal wage earner, her unemployment did not qualify the couple for assistance because of Mrs. Westcott's gender.[74] Challenging the regulations of

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71 *Id.* at 80, 89.

72 *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1203 & n. 112 (1992) (citations omitted). Justice Ginsburg noted that the historical background of the Supreme Court's gender discrimination cases was the 1961-1971 growth in women's non-domestic employment, the Civil Rights Movement, and the surge of feminism spurred on by Simone de Beauvoir's riveting book, *The Second Sex*. *Id.* at 1203-04 (citations omitted). Justice Ginsburg further instructed that in the sex discrimination cases, often the Supreme Court did not condemn the challenged legislation at the outset but urged lawmakers to reassess ancient perspectives instead. *Id.* at 1204.

73 *Westcott*, 443 U.S. at 80. The Welfare Department determined that the couple did not qualify for benefits because Mr. Westcott's previous period of employment fell short of the duration required by the program regulations. *Id.*

The Aid to Families with Dependent Children program (AFDC) offers monetary aid to needy families with dependent children and is administered, in compliance with federal regulations, by participating states. *Id.* at 79 (citations omitted); *see also* 42 U.S.C. §§ 601-616 (1988 & Supp. V 1994) (setting forth the current version of the AFDC program). The AFDC program was originally implemented in 1935 to assist families with children in need caused by the death, absence, or disability of a parent. *Westcott*, 443 U.S. at 79 (citations omitted). Congress implemented temporary extensions of the AFDC program in 1961 and 1962, allowing aid to families where the children's need was the result of a parent's unemployment. *Id.* (citations omitted). Under such a provision, the term "dependent child" was expanded to include an underprivileged child who had "'been deprived of parental support or care by reason of the unemployment . . . of a *parent*.'" *Id.* (quotation omitted) (alteration in original).

In a 1968 revision of the Social Security Act, Congress permanently adopted the 1961 and 1962 extensions for aid to dependent children of an unemployed parent. *Id.* Section 407, defining "dependent child," was amended to include an indigent child who had "'been deprived of parental support or care by reason of the unemployment . . . of his *father*'." *Id.* at 79-80 (quotation omitted) (alteration in original). This amended provision is known as Aid to Families with Dependent Children, Unemployed Father (AFDC-UF). *Id.* at 80.

74 *Westcott*, 443 U.S. at 80. The other plaintiffs in *Califano v. Westcott*, Susan and John Westwood, were married with an infant and sought public assistance from Medicaid. *Id.* at 80-81 (citations omitted). In states that participate in both AFDC and Medicaid programs, families who qualify for AFDC aid are also entitled to Medicaid assistance. *Id.* at 81 n.2 (citations omitted). The Department also denied the Westwoods benefits based on the husband's prior length of employment. *Id.* at 81. Though Susan Westwood was the couple's primary income source, her unemployment did not qualify the couple for aid. *Id.*

AFDC-UF as unconstitutionally discriminating on the basis of sex, plaintiffs filed a class action suit in the District Court of Massachusetts against the Secretary of the Department of Health, Education, and Welfare (Secretary) and the Commissioner of the Department of Public Welfare (Commissioner).[75] The plaintiffs sought an injunction and a declaration that section 407 of the Social Security Act violated the Fifth and Fourteenth Amendments.[76]

Justice Blackmun, writing for the majority, first addressed the Secretary's contention that the gender-based classification of section 407 did not discriminate against women as a class, but impacted equally upon one man, one woman, and their children.[77] Justice Blackmun found the distinction between gender-basis and gender-bias unconvincing.[78] The Justice explained that women who were heads of households were denied aid solely because of their gender.[79] Accordingly, Justice Blackmun found that section

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75 *Id.*

76 *Id.* Finding that the gender classification of § 407 was not "substantially related" to the realization of a significant government interest, the court granted summary judgment for the appellees. *Id.* at 81 (citation omitted). The court determined that the provision's gender distinction was rooted in the outmoded belief that women in two-parent households are not principal wage earners and that loss of their salaries would not significantly impact their families. *Id.* at 81-82 (quotation omitted). Based on this reasoning, the district court found the statute's wholly sex-based classification unconstitutional. *Id.* at 82 (quotation omitted). On the issue of relief, the court determined that extension of § 407 benefits to all families otherwise meeting the criteria would most closely serve the government's aim of aiding needy children. *Id.* The district court ordered an injunction prohibiting the Commissioner from withholding benefits from families made needy by the mother's unemployment under § 407. *Id.* (citation omitted). The court also enjoined the Secretary from denying matching funds for the payment of such benefits. *Id.* (citation omitted).

Initially, the Commissioner agreed with the imposed remedy, but later filed a post-judgment motion seeking modification of the order. *Id.* (citation omitted). The Commissioner challenged that the appropriate remedy would require assistance only to families rendered needy by the unemployment of the primary income earner. *Id.* (citation omitted). The district court believed that any further reformation of the statute must be left to the legislature, and denied the motion. *Id.* at 83 (citation omitted).

The Secretary and Commissioner filed separate but direct appeals to the Supreme Court based, respectively, on the declaratory judgment and the denied motion. *Id.* (citation omitted). Noting probable jurisdiction, the Supreme Court, per Justice Blackmun, consolidated the cases. *Id.* (citing Califano v. Westcott, 439 U.S. 1044, 1044 (1978); Sharp v. Westcott, 439 U.S. 1044, 1044 (1978)).

77 *Id.* at 83-84.

78 *Id.* at 84.

79 *Id.* Justice Blackmun explained that the Supreme Court has repeatedly struck down discriminatory practices where families are awarded or denied relief based on the gender of one parent. *Id.* (citing Frontiero v. Richardson, 411 U.S. 677, 688, 690-91 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975); Califano v. Goldfarb, 430 U.S. 199, 209-10 (1977)) (other citation omitted). Specifically, Justice Blackmun declared that the instant provision, like those struck down in the past, adversely af-

407 discriminated on the basis of sex.[80]

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fects only those families in which the wife is the primary income source. *Id.* (quoting *Goldfarb*, 430 U.S. at 209).

Justice Blackmun further declined to accept as a justification for § 407 the Secretary's assertion that the provision's adverse impact was different from the effects of the provisions in the earlier cases. *Id.* at 84-85. The Justice, however, was willing to accept the Secretary's claim that § 407 was distinguishable in that it did not ridicule the efforts of women whose incomes contribute largely to the family budget. *Id.* at 85 (citing *Wiesenfeld*, 420 U.S. at 645; *Goldfarb*, 430 U.S. at 206-07). Nevertheless, the Justice refused to accept this distinction as a sanction of the gender-conditional availability of public assistance. *Id.* Justice Blackmun viewed the Secretary's claim as an invitation to return to the archaic notion that welfare is a privilege outside the reach of the Equal Protection Clause. *Id.* (citing Graham v. Richardson, 403 U.S. 365, 374 (1971)). Moreover, the Justice condemned § 407 as "more pernicious" than the gender-biased deprivations in the earlier cases because § 407 benefits are subsistence payments. *Id.*

[80] *Id.* Next, Justice Blackmun addressed the Secretary's second claim that the gender classification of § 407 must be upheld because it is substantially related to the realization of two significant government goals. *Id.* (citations omitted). First, the Justice considered the purported statutory aim of aiding children who have been denied life essentials due to the unemployment of a parent. *Id.* (citation omitted). Justice Blackmun noted that the Secretary did not assert that the gender distinction of § 407 served the sustenance goal. *Id.* at 86 (citation omitted). Moreover, the Justice opined that such an assertion would be without merit because families in which the wife loses her job often need the aid as much as families in which the father is unemployed. *Id.*

Second, Justice Blackmun considered the statute's goal of remedying a shortcoming in the original aid program. *Id.* The Justice noted that the former provision was viewed as an encouragement for fathers to abandon their families to qualify for relief. *Id.* Further, the Justice explained, the gender distinction implemented in § 407 was intended to discourage parental desertion and thereby foster family stability. *Id.* Though Justice Blackmun recognized Congress's concern for parental abandonment, the Justice pointed out two fatal weaknesses in the Secretary's contention that such an objective is substantially related to the sex classification of § 407. *Id.* (citations omitted). First, Justice Blackmun found no evidence that the classification was structured to remedy paternal abandonment. *Id.* (citing *Wiesenfeld*, 420 U.S. at 648). The Justice reasoned that the original AFDC and the AFDC-UF programs were not gender-conditional. *Id.* at 86-87. Justice Blackmun ascertained that the gender classification was part of Congress's aim to restrict eligibility and cut costs. *Id.* at 87 (quotation & citation omitted). Hence, the Justice concluded that Congress was perpetuating outmoded notions of the "traditional family" in which women who worked, if at all, contributed only incidentally to the family budget. *Id.* at 88. The Justice found nothing to indicate that the sex-based distinction was directed at remedying paternal desertion. *Id.* at 88 & n.7 (citations omitted).

Addressing the second flaw in the Secretary's claim of substantial relation, Justice Blackmun proffered that even if reducing fathers' abandonment was the aim of the gender distinction, such a distinction failed to substantially achieve that goal. *Id.* at 88. The Justice pointed to the lack of evidence to support the claim that a father has less encouragement to leave when the higher salaried wife loses her job than where the reverse is true. *Id.* The Justice professed that in either circumstance, need will be high as will incentive for the father to create eligibility by leaving. *Id.* at 88-89.

Justice Blackmun further rejected the Secretary's assertion that § 407 should be upheld as "one firm step" toward reducing the abandonment incentive. *Id.* at 89 (quotation omitted). The Justice reminded that the legislature may not enact step-by-

After further examining the Secretary's claims that the gender classification of section 407 was substantially related to legitimate government concerns, Justice Blackmun concluded that: section 407 carried the dead weight of anachronistic gender stereotypes; its sex-based classification was not substantially related to any significant government objective; and the provision was therefore invalid under the Fifth Amendment Due Process Clause.[81]

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step legislation when those steps use gender as a proxy and result in the exclusion of one group of families from government assistance. *Id.* (citation omitted).

[81] *Id.* (quotation omitted). Next, Justice Blackmun addressed the Commissioner's claim that the unemployment of either the mother or father should qualify an indigent family for aid, but only when the qualifying parent is both unemployed and the main income earner. *Id.* at 91. Justice Blackmun first explored the propriety of extending public assistance to those harmed by the exclusion versus nullifying the entire provision. *Id.* at 89, 91. The Justice noted that in the past, the Court has considered extension to be the proper course in cases concerning equal protection challenges based on underinclusiveness. *Id.* at 89 (citations omitted). Further, the Justice noted that equitable considerations as well as the Act's severability clause supported extension. *Id.* at 90 (citations omitted). Justice Blackmun declined to enumerate the circumstances under which nullification would be warranted. *Id.* The Justice reasoned that all parties had initially agreed that extension was proper and furthered that the propriety of nullification was not before the Court. *Id.* at 90, 91 (citations omitted). The Justice also noted that because the authority to order extension was within the district court's domain, the Supreme Court would not be inclined to address the issue unless properly presented. *Id.* at 91.

Lastly, Justice Blackmun addressed the possible effects of the Commissioner's proposed reformation. *Id.* The Justice posited that adoption of the Commissioner's suggestion would result in the termination of assistance to a number of families. *Id.* at 92. The Justice noted that no one contested the validity of providing aid to needy families of every unemployed father. *Id.* Further, the Justice held that absent proof of invalidity, the Court would not discontinue assistance to a family just because the out-of-work father could not establish that he was the primary wage earner. *Id.* The Justice also professed that the suggested reform would entail complex statutory restructuring that would threaten separation of powers violations. *Id.* at 92-93 (quoting Batterton v. Francis, 432 U.S. 416, 425 (1977)). Although cognizant of the reduced costs the Commissioner's plan would entail, the Justice did not find that factor controlling. *Id.* at 93. Moreover, the Justice reminded that the AFDC program is not mandatory, and that states wishing to withdraw due to the program's added costs were free to do so. *Id.* (citation omitted). Accordingly, Justice Blackmun found the district court's simple substitution of a gender-neutral equivalent for the sex-based provision an appropriate and equitable remedy because it avoided disturbance of the assistance program. *Id.*

Justice Powell, concurring in part and dissenting in part, agreed with the Court's finding that § 407 violated the Fifth Amendment's equal protection provision. *Id.* (Powell, J., concurring in part and dissenting in part). Notwithstanding this accord, the Justice denounced the Court's affirmation of the extension remedy, reasoning that it resurrects the assistance program Congress buried with the 1968 amendment of § 407. *Id.* at 94 (Powell, J., concurring in part and dissenting in part).

Attempting to articulate the proper remedy, Justice Powell identified two means by which courts may rectify statutory underinclusiveness. *Id.* (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)). First, the Justice noted that courts may nullify the entire provision and deny benefits to all. *Id.* (quoting *Welsh*,

Justice Blackmun's 1979 decision in *Westcott* reflected the growing reality of women's changing role in modern society.[82] Particularly, the opinion recognized the significant financial contributions women were making to the family unit, which was once under the sole dominion of male wage-earners.[83] No longer were many women confined to maternal and domestic duties.[84] *Westcott* thus heightened social consciousness about the reality of women's success in the work force.[85] By revising section 407 of the Social Security Act, Justice Blackmun demonstrated a commitment to invalidating pretextual government action that perpetuates invidious notions that stigmatize women.[86]

Two years following *Westcott*, Justice Blackmun again addressed the issue of gender bias in the employment context.[87] This time, a

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398 U.S. at 361 (Harlan, J., concurring)). Second, the Justice stated that courts may broaden the statute's scope to include those persons harmed by the underinclusion. *Id.* (quoting *Welsh*, 398 U.S. at 361 (Harlan, J., concurring)). The ultimate duty of courts, Justice Powell reminded, is to select that remedy which best reflects the collective policies and Congressional intent behind the statute. *Id.* (citing *Welsh*, 398 U.S. at 365-66 & n.18 (Harlan, J., concurring)).

Next, Justice Powell accepted the Court's observation that the § 407 gender classification was part of an effort to restrict eligibility and cut costs. *Id.* (quoting *id.* at 87). The Justice criticized, however, that the Court's decision mandated payment of precisely those benefits the statute intended to exclude. *Id.* at 94-95 (Powell, J., concurring in part and dissenting in part). Moreover, Justice Powell asserted that revision of the AFDC-UF program must be left to the legislature, who is ultimately responsible for the program's creation and administration. *Id.* at 95 (Powell, J., concurring in part and dissenting in part). Further, because Congress possesses the authority to ameliorate any hardships that an injunction might yield, Justice Powell rejected the Court's extension and would have enjoined further payments until Congress could act. *Id.* at 96 (Powell, J., concurring in part and dissenting in part).

82 *See generally* Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604 (1989) (recognizing law as a significant tool in effecting social change, particularly in the areas of women's rights and civil liberties, in both America and Japan).

83 *See* Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082-91 (1994) (examining women's subjugation to their spouses under the antebellum laws concerning marital property).

84 *See supra* note 58 (trailing women's battle for social and legal independence).

85 *See* Ruth Bader Ginsburg, *Tribute to Justice Harry A. Blackmun*, 43 AM. U.L. REV. 692, 692 (1994). Justice Ginsburg praised her colleague for his wisdom, noting particularly the sex discrimination cases. *Id.* (citing Califano v. Westcott, 443 U.S. 76, 89 (1979)). Justice Ginsburg applauded Justice Blackmun's tenderness toward women and noted that such sensitivity was particularly fitting for a man who cherished his own daughters so deeply. *Id.* For a series of articles in praise of Justice Blackmun, see generally *A Tribute to Justice Harry A. Blackmun: "The Kind Voice of Friends,"* 43 AM. U. L. REV. 687 (1994) (bidding farewell to the retiring Justice with a collection of letters from esteemed colleagues and friends).

86 *See Westcott*, 443 U.S. at 89, 93.

87 *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 190 (1991).

private employer was the responsible party.[88] In *UAW v. Johnson Controls, Inc.*,[89] Justice Blackmun questioned the constitutionality of an employer's sex-based classification that excluded women from certain jobs because of women's childbearing potential.[90] The Justice, writing for the Court, struck down the policy as violative of Title VII of the Civil Rights Act of 1964.[91]

Petitioners, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), filed a class action suit against Johnson Controls (Johnson).[92] Johnson was a battery manufacturer whose business involved contact with lead, exposure to which poses serious health risks.[93] In 1982, Johnson revised its employment policy to exclude women from lead-exposure jobs.[94] Specifically, Johnson's policy of fetal protection provided that pregnant women or those capable of pregnancy would not be considered for positions involving lead exposure.[95] Those women who

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88 *Id.*

89 499 U.S. 187 (1991).

90 *Id.* at 190.

91 *Id.* at 211.

92 *Id.* at 192. Petitioners included a woman who voluntarily underwent sterilization to avert job loss, a woman whose salary was reduced when she was transferred from a lead-exposure position, and a man who unsuccessfully requested temporary leave to reduce his lead levels so he could become a father. *Id.*

93 *Id.* at 190. In the years prior to petitioners' suit and following the enactment of the Civil Rights Act of 1964, Johnson implemented a warning policy regarding the employment of women in lead-exposure positions. *Id.* at 191 (citation & quotation omitted). Prior to the Civil Rights Act, Johnson excluded women from all battery manufacturing positions. *Id.* (citation omitted) The Act, however, invalidated this policy. *Id.* at 191. Johnson then implemented a policy of warning, which was changed to a policy of exclusion in 1982. *Id.*

The relevant portion of the Act provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988)).

94 *Johnson Controls*, 499 U.S. at 191. Johnson announced this decision after eight pregnant workers in the preceding three years showed critical levels of lead in their blood. *Id.* at 191-92 (citation omitted). The Occupational Safety and Health Administration (OSHA) standards indicated that a lead blood level in excess of thirty micrograms per deciliter, like those of the pregnant employees, was critically high. *Id.* (citing 29 C.F.R. § 1910.1025 (1989)).

95 *Id.* at 192 (quotation omitted). The policy provided, in pertinent part: "'[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bear-

could medically document their sterility were exempt from the exclusion policy.[96]

Petitioners filed suit in the federal district court, averring that Johnson's gender exclusion policy violated Title VII of the Civil Rights Act of 1964.[97] On appeal, Justice Blackmun, writing for the Supreme Court majority, held that Johnson's gender-based policy overtly discriminated against women by classifying them on the ba-

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ing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights.'" *Id.* (quotation omitted) (alteration in original).

96 *Id.* (quotation omitted).

97 *Id.; see supra* note 93 (setting forth the relevant provisions of the Act). The district court certified the class as "'all past, present, and future production and maintenance employees'" in Johnson's plants "'who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982.'" *Johnson Controls*, 499 U.S. at 192-93 (quotation omitted) (alteration in original). Employing the business necessity defense used in other districts, the court granted summary judgment for Johnson. *Id.* at 193 (citation omitted). The court reasoned that although disagreement propounds over the exact effects of lead on the unborn, studies yield that exposure affects the reproductive capacities of men and women and impacts fetuses even more severely. *Id.* (quotation omitted). The district court further declared that petitioners were unable to suggest an alternative to Johnson's policy that would protect potential life. *Id.* (quotation omitted). Thus, the lower court upheld Johnson's business necessity defense and declined to needlessly address the bona fide occupational qualification (BFOQ) issue. *Id.* (quotation omitted).

Affirming the decision of the district court, the Seventh Circuit Court of Appeals, sitting en banc, upheld Johnson's business necessity defense. *Id.* (citation omitted). The court of appeals reached this decision after examining the fetal protection opinions of other circuits, which outlined the business necessity defense as a three-part inquiry. *Id.* at 193-94 (citations omitted). Courts applying the defense considered: (1) whether there is a significant health hazard to the fetus; (2) whether only women can transmit the danger to the fetus; and (3) whether a less discriminatory policy could offer equivalent protection to the unborn. *Id.* at 194 (citation omitted). The Seventh Circuit found that business necessity was the appropriate standard for evaluating Johnson's policy since it effectively balanced the interests of both employer and employees consistent with Title VII of the Civil Rights Act. *Id.* (quotation omitted).

In addition, the court of appeals found no triable fact question since both parties agreed that lead exposure posed a substantial hazard to fetuses. *Id.* (citation omitted). Moreover, the court found that evidence of fetal harm due to the father's lead exposure, unlike the mother's, was merely speculative. *Id.* (quotation omitted). The court held that petitioners' failure to propose less discriminatory alternatives operated as a waiver of the issue. *Id.* (citation omitted).

Lastly, the appellate court addressed the BFOQ defense. *Id.* at 195 (citation omitted). The court declared that even if this defense were applicable, the industrial safety concerns vital to Johnson's business justified the fetal protection policy. *Id.* The court of appeals reasoned that more was at issue than simply a woman's individual choice to accept the hazards of employment. *Id.* (quotation omitted).

The United States Supreme Court granted certiorari to review the Seventh Circuit's unprecedented holding that a fetal protection policy targeting only females because of their pregnancy potential can be sustained as a BFOQ. UAW v. Johnson Controls, Inc., 494 U.S. 1055, 1055 (1990).

sis of their capacity for pregnancy.[98] Further, Justice Blackmun announced that the absence of gender-based animus did not justify the facially discriminatory policy.[99] Moreover, the Justice concluded that the overt discrimination inherent in Johnson's policy precluded Johnson's use of the business necessity defense and demanded application of the bona fide occupational qualification (BFOQ) analysis, which Johnson could not satisfy.[100] Concluding that Johnson's assertion of fetal protection did not justify the exclusion of women, Justice Blackmun held that Johnson's policy was invalid under both Title VII and the Pregnancy Discrimination Act (PDA).[101]

First, Justice Blackmun addressed the bias perpetuated by Johnson's policy of offering only fertile men and not fertile women the choice to endanger their reproductive health to maintain employment.[102] Justice Blackmun emphasized that Johnson's employment policy classified on the basis of sex.[103] The Justice further declared that the alleged benign motive of fetal protection could not justify sex discrimination.[104]

To support the finding of facial discrimination, Justice Blackmun invoked the PDA.[105] Under the PDA, the Justice found Johnson's treatment of all women as "potentially pregnant" evidence of

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98 *Johnson Controls*, 499 U.S. at 197.

99 *Id.* at 198.

100 *Id.* at 199-200, 206.

101 *Id.* at 211. The Pregnancy Discrimination Act (PDA), which added a subsection to the 1964 Civil Rights Act, provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (1988).

102 *Johnson Controls*, 499 U.S. at 198.

103 *Id.* at 199.

104 *Id.* Noting that Johnson's policy distinguished employees on the non-neutral bases of sex and potential for pregnancy, the Justice proffered that Johnson's objective was not really protection of all its workers' unborn children. *Id.* at 198. The Justice posited that Johnson's disregard of evidence concerning the adverse effects of lead on men indicated that Johnson was interested solely in the risks to the unborn of its women workers. *Id.* (citations omitted). As further evidence of Johnson's discriminatory intent, Justice Blackmun pointed to the provision requiring only women to prove their infertility. *Id.*

105 *Id.* at 198-99 (quotation omitted). The Justice explained that the statute expanded the Title VII definition of de facto sex discrimination to include classification on the basis of pregnancy or related conditions. *Id.* (quotation omitted).

explicit sex discrimination.[106] Justice Blackmun further declared that the absence of gender-based animus could not transform an otherwise facially discriminatory policy into a benign policy with merely a discriminatory impact.[107] The Justice explained that the express terms of the classification, not the underlying motive, determine whether an employment policy effects disproportionate ends through facially discriminatory means.[108] The Justice clarified that overt sex-based discrimination in the workplace may be justified only when the reason for the discrimination is a bona fide occupational qualification.[109] Accordingly, because Johnson's fetal protection policy failed to provide equal gender treatment, Justice Blackmun condemned it as violative of Title VII, absent the establishment of a BFOQ.[110]

Next, Justice Blackmun considered whether Johnson's policy could qualify as a BFOQ exception to Title VII's non-discrimination mandate.[111] Justice Blackmun stressed that a qualification must relate to the "essence" or "central mission" of the employer's

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106 *Id.* at 199.

107 *Id.*

108 *Id.* (citation omitted).

109 *Id.* at 199-200. Justice Blackmun noted that the official policy of the Equal Employment Opportunity Commission (EEOC) adopted this same view. *Id.* at 200. The Justice further informed that the EEOC issued policy guidelines in direct response to the court of appeals decision in the instant case. *Id.* (citation omitted). According to these policies, the Justice explained, Title VII forbids requiring a plaintiff to carry the burden of proof in an action where there is explicit evidence of facial discrimination. *Id.* (quotation omitted).

110 *Id.*

111 *Id.* at 200-01.

Section 703(e)(1) allows an employer to discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1988).

Initially, Justice Blackmun emphasized that the Supreme Court has narrowly interpreted the BFOQ exception based on the plain language and legislative history of § 703. *Johnson Controls*, 499 U.S. at 201 (citing Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977)) (other citations omitted). To illustrate the provision's limited scope, the Justice enumerated its restrictive terms, pointing to "occupational" as demanding a strong nexus between classification and job performance. *Id.*

Justice Blackmun continued by rejecting the concurrence's notion that all employer-imposed discriminatory conditions are "job related." *Id.* The Justice charged that such an interpretation would render "occupational" mere excess baggage and would undermine legislative intent. *Id.*

The Justice was unwilling to accept Johnson's contention that its fetal protection policy was justifiable under the safety exception to the BFOQ. *Id.* at 202, 204. The Justice instructed that claims of sex discrimination for safety purposes have been rigidly scrutinized. *Id.* at 202. Justice Blackmun concluded that fetuses are not customers or other third parties whose safety is primary to the battery-manufacturing business. *Id.* at 203. The Justice noted that "[n]o one can disregard the possibility of

business to qualify as a BFOQ.[112] After defining the narrow parameters of the BFOQ safety exception, Justice Blackmun declined to apply it to fetal protection policies that disproportionately penalize women.[113] Rephrasing the BFOQ standard, Justice Blackmun declared that women equally capable of performing their jobs may not be compelled to choose between parenting and employment when their male colleagues are not so mandated.[114]

Accordingly, Justice Blackmun announced that Johnson's fetal protection policy did not qualify under the defined BFOQ exception.[115] In particular, the Justice indicated that fertile women per-

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injury to future children; the BFOQ, however, is not so broad that it transforms this deep social concern into an essential aspect of battery making." *Id.* at 203-04.

112 *Johnson Controls*, 499 U.S. at 203 (quoting *Dothard*, 433 U.S. at 333) (other quotation omitted). Next, Justice Blackmun rebuked the concurrence for its failure to consider the "essence of the business" test. *Id.* The Justice posited that by focusing only on expense and safety concerns, the concurrence attempted an unprecedented expansion of the narrow BFOQ exception. *Id.* The Justice further criticized the concurrence for its effort to convert this action into a customer safety case. *Id.* Though cognizant of the risk of fetal harm caused by lead exposure, Justice Blackmun cautioned that the BFOQ exception is not so expansive that it converts this profound social concern into a vital element of battery manufacturing. *Id.* at 203-04.

113 *Id.* at 204. The Justice reasoned that elasticizing the exception to this degree would defy the plain language of the BFOQ and contradict the legislative history and terms of the PDA. *Id.* Further, Justice Blackmun instructed that the PDA amendment to Title VII incorporates its own BFOQ standard that demands equivalent treatment for all employees unless they differ in their ability or inability to perform. *Id.* (quoting 42 U.S.C. § 2000e(k) (1988)).

114 *Id.* Accordingly, Justice Blackmun refuted the concurrence's theory that the PDA standard did not change the BFOQ exception. *Id.* The Justice submitted that the concurrence could only arrive at such a conclusion by disregarding the second clause of the PDA which requires employers to treat equally pregnant and non-pregnant workers of the same ability. *Id.* at 204-05 (quoting 42 U.S.C. § 2000e(k) (1988) (providing that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work")). Thus, Justice Blackmun refused to sanction the concurrence's restructuring of the PDA. *See id.* at 204-05.

Next, Justice Blackmun examined the legislative history of the PDA. *Id.* at 205. Pointing to Senate and House Reports, the Justice explained that the PDA standard was implemented to ensure that female workers would not receive disparate treatment or forced unemployment because of their child-bearing capacity. *Id.* (quotation & citation omitted). Moreover, the Justice warned that the legislative history of the PDA advises against expanding the BFOQ to cover fetal protection policies and accords the choice between pregnancy and employment to women. *Id.* at 205-06. Thus, Justice Blackmun concluded that the BFOQ provision, PDA, legislative history, and case precedent forbid an employer from discriminating against women on the basis of their pregnancy potential, unless their reproductive capacity renders job performance impossible. *Id.* at 206. Further, the Justice reiterated that an employer must tailor its interests in women's safe and thorough job performance to those areas of employment that form the central mission of the business. *Id.*

115 *Id.*

form battery manufacturing duties as well as any of their colleagues.[116] The Justice rejected Johnson's assertion that its noble and legitimate interest in the well-being of potential life warranted a BFOQ of female infertility.[117] Regard for the integrity of the unborn, the Justice declared, could not be deemed the soul of Johnson's business.[118] Moreover, the Justice reiterated Congress' intent that such concerns must be addressed by the future parents, not their employers.[119] Thus, Justice Blackmun held that Title VII and the PDA forbid termination of women who refuse to be sterilized.[120] The Justice further concluded that Johnson's purported apprehension of fetal harm, regardless of how genuine, could in no way justify its belief in the ineptitude of all fertile females.[121]

Lastly, Justice Blackmun reiterated the precedented ruling that Title VII prohibits gender-based fetal protection programs.[122] The Justice observed that the purported interest in the safety of children has long been the rationale for discriminating against women in the workplace.[123] Nevertheless, the Justice, like Congress, refused to accept this excuse and emphasized that the instant decision does no more than uphold the mandate of the PDA.[124] In a closing statement, Justice Blackmun urged that the judiciary should not define the parameters of women's maternal and income-earning roles.[125] The Justice reminded that Congress has ac-

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116 *Id.*

117 *Id.*

118 *Id.* at 207.

119 *Id.* at 211.

120 *Id.* at 207. Next, Justice Blackmun dismissed Johnson's contention that the impossibility of knowing which women would get pregnant justified exclusion of all fertile women. *Id.* Justice Blackmun, alluding to the eight reported pregnancies, accused Johnson of having an interest in only a handful of women. *Id.* To support this accusation, the Justice cited national statistics revealing that each year only a small percentage of women actually become pregnant. *Id.* (citation omitted).

121 *Id.* Justice Blackmun also rejected the dissent's position that a BFOQ could be grounded in the increased costs, arising from escalating tort liability, that could result from permitting women to work in lead-exposure positions. *Id.* at 208. The Justice noted that, because Johnson Controls complied with OSHA standards for lead exposure, a finding of tort liability absent negligence would be unlikely. *Id.* Concluded Justice Blackmun: "If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." *Id.* The Justice further noted that "[w]e . . . are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business." *Id.* at 210-11.

122 *Id.* at 211.

123 *Id.* (citation omitted).

124 *Id.*

125 *Id.*

corded that responsibility to women themselves.[126]

Taken collectively, *Westcott* and *Johnson Controls* evince Justice

126 *Id.* In a lengthy concurrence, Justice White approved the Court's determination that Johnson's policy was facially discriminatory, but rejected the majority's limitation of the BFOQ exception. *Id.* (White, J., concurring) Justice White first proposed that the language of Title VII only requires Johnson's policy to be "reasonably necessary" to the "normal operation" of its "particular business." *Id.* at 212 (White, J., concurring) (quoting 42 U.S.C. § 2000e-2(e)(1) (1988)). The concurring Justice acknowledged the difficulty of meeting that challenge, but found unsupported the majority's proposition that fetal protection schemes could never qualify as a BFOQ. *Id.* Further, the Justice suggested that avoidance of substantial tort liability could justify a sex-based policy. *Id.*

In a continuing attack on the Court's analysis, Justice White challenged that the majority erred in stating that the increased cost of employing women is an invalid defense to Title VII mandates. *Id.* at 214-15 (White, J., concurring). Justice White proffered that previous interpretations of the BFOQ defense yield that the provision is extensive enough to encompass the cost and safety concerns behind fetal protection plans. *Id.* at 215 (White, J., concurring). Moreover, the concurring Justice found useless and irrelevant the majority's limitation of the BFOQ exception to situations in which gender or pregnancy impedes job performance. *Id.* at 217. (White, J., concurring) (quoting *id.* at 204). Ultimately, Justice White posited that the BFOQ exception reflects the legislature's refusal to compel employers to alter the essence of their businesses. *Id.* at 218 (White, J., concurring) (citation omitted).

Next, Justice White chided the Court for its determination that the PDA narrows the boundaries of the BFOQ defense. *Id.* (citing *id.* at 204). Instead, the Justice proffered that the PDA merely notified that pregnancy and related conditions fall within the scope of Title VII. *Id.* The Justice denied that the PDA changed the guidelines for employer defenses. *Id.* at 219 (White, J., concurring) (quotation omitted). Ultimately, Justice White concluded that neither legislative intent, case law, nor the statute's plain language supported the Court's myopic interpretation of the BFOQ defense. *Id.* at 219 & n.8.

Justice White recognized that the newness of the fetal protection issue necessitates its case-by-case review at trial. *Id.* at 222 (quotation omitted). Cursory disposal through summary judgment, acknowledged the Justice, invites less wary employers to implement fetal protection policies that achieve minimal safety at the expense of countless women. *Id.* (quotation omitted). Thus, because the case was too quickly disposed, the concurrence would have reversed the Court of Appeals grant of summary judgment. *Id.*

Justice Scalia, concurring in the judgment, substantially agreed with the majority's analysis, but objected to certain lines of reasoning. *Id.* at 223 (Scalia, J., concurring). To begin Justice Scalia found the evidence concerning men and lead exposure to be irrelevant. *Id.* (quoting *id.* at 198). The Justice reminded that even in the absence of such evidence, disparate treatment of women and men for reproductive reasons is wholly impermissible. *Id.* (quoting 42 U.S.C. § 2000e(k) (1988)). Next Justice Scalia emphasized that because of the PDA, all fertile women have the option to risk fetal health for employment. *Id.*

Lastly, Justice Scalia rebuked the majority for its announcement that the increased expense of employing females could not justify a BFOQ defense. *Id.* at 223, 224 (Scalia, J., concurring). Justice Scalia, agreeing with Justice White, noted that precedent does not support this conclusion. *Id.* at 224 (Scalia, J., concurring). Thus, although Justice Scalia found excess cost a valid BFOQ, the Justice agreed that Johnson did not meet the standard. *Id.* Accordingly, Justice Scalia joined the majority in reversing the court of appeals's grant of summary judgment. *Id.*

Blackmun's clear recognition of women's essential role and rights in the workplace.[127] Although more than a decade passed between the two decisions, and nearly two between *Roe* and *Johnson Controls*, the battle for women's emancipation waged on.[128] By 1979, women as a group had left the home and secured a position in the employment arena.[129] In *Westcott*, Blackmun granted women a victory over government-perpetuated stereotypes of women's economic inferiority.[130] Blackmun's recognition that females are significant wage earners, and not uniquely mothers and wives, was a logical outgrowth of *Roe*.[131] While *Roe* recognized women's self-governance, *Westcott* reaffirmed that recognition by acknowledging the fruits of such independence.[132]

Yet, despite Blackmun's command that government accord women and men equal recognition for a job well done, women's battle in the workplace was just getting started.[133] Thirteen years after *Westcott*, discrimination in the workplace was still a reality.[134] As Justice Blackmun observed in *Johnson Controls*, women had not yet won acceptance in the work force.[135] Johnson's pretextual fetal

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127 *See* David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 102 (1992) (quotation omitted) (proclaiming *Johnson Controls* a "'victory for women and for safety in the workplace [which] makes it clear that women have the right to make critical work and family decisions for themselves and for their children'") (alteration in original).

128 *See* Defeis, *supra* note 1, at 363. Professor Defeis noted that despite the progressive position taken by the United States at the 1993 World Conference on Human Rights, the evolution of women's legal status in America and globally is painfully slow. *Id.*

129 *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983) (noting that despite the successes of women in the battle for equality, subordination to men is still a reality attributable to the flawed assumptions in which the ideology of social reform is grounded).

130 *See Johnson Controls*, 499 U.S. at 206 (asserting that fertile women are generally capable of performing their job duties as well as their male counterparts).

131 *See* Christine Neylon O'Brien & Margo E. K. Reder, *Modeling an Employment Policy to Unify Workers' Rights with Fetal Protection*, 24 ARIZ. ST. L.J. 1149, 1150 (1992) (citations omitted). The authors noted that medical advances in fetal care and birth control accompanied the growing feminist movement that urged women to shed the traditional garb of domestic servility and economic inferiority. *Id.* (citations omitted).

132 *See* Califano v. Westcott, 443 U.S. 76, 84, 85 (1979).

133 *See* Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 1-5 (1990) (offering a First Amendment perspective on the shocking, vulgar, and degrading innuendos and ridicule that women endure in the workplace).

134 *See* Jennifer Morton, Comment, *Pregnancy in the Workplace—Sex-Specific Fetal Protection Policies—*UAW v. Johnson Controls, Inc.*—A Victory for Women?*, 59 TENN. L. REV. 617, 624 (1992). Morton noted that fetal protection policies not only violate women's rights but also effectively exclude women from desirable, high paying positions. *Id.* at 618.

135 *See Johnson Controls*, 499 U.S. at 211 (citation omitted) ("Concern for a woman's

protection policy attested to the fact that women were primarily identified as mothers.[136] By invalidating Johnson's scheme and rejecting the claim that women's child-bearing potential renders them incapable on the job, the Justice once again damned the historical misconceptions that have stigmatized women.[137]

While women's unique child-bearing capacity should not be denied, it should not be their hallmark.[138] Nor should it be a brand of ineptitude.[139] With *Westcott* and *Johnson Controls*, Justice Blackmun demanded government and private recognition of women's self-governing capacity.[140] *Westcott* and *Johnson Controls* reaffirmed the promise of *Roe* and fertilized the seeds of gender justice by freeing women to reap the benefits of their abilities.[141]

IV. According Full Participatory Rights in the Civic Arena: The Final Decision

In his final Supreme Court opinion, Justice Blackmun paid crowning homage to the nobility of women in public life.[142] With

existing or potential offspring historically has been the excuse for denying women equal employment opportunities.").

136 *See* Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95, 96 (1993) (footnotes omitted) ("Motherhood, like sexuality, plays a critical role in women's subordination. . . . A woman's status as a childbearer determines her identity.").

137 *See* O'Brien & Reder, *supra* note 131, at 1149-50 (averring that gender-specific fetal protection schemes reflect employers' continuing perception of women as fungible and insignificant contributors who cannot make sound reproductive choices).

138 *See* Morton, *supra* note 134, at 620-21 (citation omitted) (noting that commentators have criticized gender-specific employment schemes for failing to acknowledge women's procreative self-governance).

139 *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285-86, 288-89, 290 (1987) (citations omitted). Justice Blackmun joined the majority in upholding a California law that singled out pregnant women for special treatment in alleged violation of the PDA. *Id.* at 278, 292. The Court upheld the law, despite its special treatment of women, because the law was enacted to assist, not deprive, pregnant women. *Id.* at 285-86, 288-89, 290.

140 *See* Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. 1546, 1549-1553 (1991) (celebrating women's historic and ongoing struggle for public and private recognition in the legal profession); *see also* Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 Val. U. L. Rev. 1161, 1162 (1994) ("[F]or many of our people, an individual's sex is no longer remarkable, or even unusual, with regard to his or her qualifications to serve on the Supreme Court.").

141 *See* Kirp, *supra* note 127, at 102 (quotation omitted) (recognizing *Johnson Controls* as a coup for women in the workplace). *But see* Morton, *supra* note 134, at 619 (arguing that *Johnson Controls* was only a limited victory for women because the decision demonstrated the inadequacy of choices available to working women).

142 *See* Joanna L. Grossman, Note, *Women's Jury Service: Right of Citizenship or Privilege of Difference?*, 46 Stan. L. Rev. 1115, 1160 (1994) (arguing that the Court's recognition of the irreparable harm inflicted by gender-based jury exclusion is crucial to women's struggle for equal rights).

J.E.B. v. Alabama ex rel. T.B.,[143] Justice Blackmun reiterated the right of women to participate in jury service and, in so doing, reavowed the celebrated individuality and autonomy of women first proclaimed in *Roe*.[144]

In *J.E.B.*, the state of Alabama filed suit in the District Court of Jackson County on behalf of the mother of a minor.[145] The petitioner, J.E.B., was named as the defendant in the state's suit to establish paternity and seek child support.[146] Jury selection commenced on October 21, 1991 at which time the assembled panel of potential jurors consisted of twelve men and twenty-four women.[147] After the elimination of three jurors for cause, ten members of the remaining panel were men.[148] The state then exercised all but one of its peremptory challenges[149] to eliminate male jurors, and petitioner acted likewise to remove female jurors.[150] The resultant jury consisted entirely of female jurors.[151]

The petitioner disputed Alabama's peremptory challenges, alleging that the state's exercise of strikes solely against men on the basis of gender violated the Equal Protection Clause.[152] Petitioner charged that the holding of *Batson v. Kentucky*,[153] forbidding race-based peremptory challenges, extended to prohibit gender-based strikes.[154] Rejecting this assertion, the district court proceeded to trial with the all-female jury.[155] A verdict was returned in favor of the state, and the court accordingly ordered petitioner to provide child support.[156]

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143 114 S. Ct. 1419 (1994).

144 *See* Note, *Beyond* Batson*: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1928-29 (1992) (recognizing women's right to jury service as the right to participate in the democratic process that is inextricably linked to the right of suffrage).

145 *J.E.B.*, 114 S. Ct. at 1421.

146 *Id.*

147 *Id.*

148 *Id.* at 1421-22.

149 A peremptory challenge encompasses "[t]he right to challenge a juror without assigning, or being required to assign, a reason for the challenge." BLACK'S LAW DICTIONARY 1136 (6th ed. 1990).

150 *J.E.B.*, 114 S. Ct. at 1422.

151 *Id.*

152 *Id.*

153 476 U.S. 79 (1986). The *Batson* Court held that the Equal Protection Clause prohibits states to strike a prospective juror on the basis of the juror's race. *Id.* at 97.

154 *J.E.B.*, 114 S. Ct. at 1422.

155 *Id.* (citation omitted).

156 *Id.* In a post-judgment motion, petitioner raised the *Batson* argument for a second time, and the court again declined to extend its ruling to prohibit gender-based strikes. *Id.* (citation omitted). On appeal, the Alabama Court of Civil Appeals affirmed the judgment of the lower court, and the Alabama Supreme Court subse-

The Supreme Court granted certiorari to address the issue of whether the Fourteenth Amendment's Equal Protection Clause prohibits gender-based peremptory strikes.[157] Writing for the majority, Justice Blackmun announced that intentional state-imposed gender discrimination violates the Equal Protection Clause and propagates malicious and antiquated misconceptions about the capabilities of the sexes.[158]

At the outset, Justice Blackmun noted the relative newness of invidious gender discrimination in peremptory strikes.[159]

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quently denied review. *Id.* (citations omitted). The United States Supreme Court granted certiorari. J.E.B. v. T.B., 113 S. Ct. 2330, 2330 (1993).

157 *J.E.B.*, 113 S. Ct. at 2330.

158 *J.E.B.*, 114 S. Ct. at 1422.

159 *Id.* The Justice reminded that the exclusion of women from juries well into the twentieth century precluded the use of sex-based challenges. *Id.*

Justice Blackmun examined at length the exclusion of women from the civic arena. *See id.* at 1423-24. The Justice noted the depth to which this prejudice pervaded American thought, remarking that even after blacks were granted seats on juries, women were still excluded. *Id.* at 1423 (citing Fay v. New York, 332 U.S. 261, 289-90 (1947)) (other citation omitted). Justice Blackmun further instructed that women had still not gained widespread admittance to juries despite winning the suffrage right. *Id.* at 1423 & n.3 (citations omitted). The Justice noted that the minority of states that gradually did allow women jurors created numerous deterrents to discourage their participation. *Id.* at 1423 (citing *Fay*, 332 U.S. at 289) (other citation omitted).

Justice Blackmun traced the exclusion of women from juries back to English common law, which justified the practice by "'the doctrine of *propter defectum sexus*, literally, the "defect of sex."'" *Id.* (quotations omitted). The Justice further explained that early American opponents of female inclusion on juries disguised their objections in the valiant desire to shelter delicate and innocent females from the evil courtroom. *Id.* (citing Bailey v. State, 219 S.W.2d 424, 428 (Ark. 1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing, and degrading to a lady.")) (other citations omitted).

It was not until the mid-twentieth century, informed the Justice, that the Supreme Court first challenged the fairness of excluding women from juries. *Id.* at 1424 (citing Ballard v. United States, 329 U.S. 187, 189-90 (1946)). Justice Blackmun explained that inclusion opponents challenged that women would contribute nothing to a trial and, thus, their exclusion did not render an all-male jury unfair for a defendant. *Id.* Despite charges of women's worthlessness, the Justice noted that the *Ballard* court required inclusion of women on federal juries in those jurisdictions where women were permitted to participate in state proceedings. *Id.* Justice Blackmun highlighted *Ballard*'s reasoning, noting in particular the Court's emphasis that female jurors act no more as a class than their male counterparts. *Id.* (quoting *Ballard*, 329 U.S. at 193-94 (footnotes omitted)). The Justice further underscored the Court's observation that neither women nor men are disposable, and that the presence of both genders on a jury is essential to creation of a distinct character. *Id.* (quoting *Ballard*, 329 U.S. at 193-94 (footnotes omitted)).

Despite the Court's recognition of women's worth in the civic arena, Justice Blackmun noted the Court's refusal to grant women an unqualified right to equal jury

The Justice noted that the Supreme Court has reviewed gender-based classifications with heightened scrutiny since 1971 to ensure that the government's purportedly benign distinctions were not products of archaic stereotypes.[160]

Next, Justice Blackmun rejected Alabama's contention that sex discrimination in jury selection should be permitted because gender bias has not been as pervasive as race discrimination.[161] The Justice recognized that women and blacks have not suffered from identical social biases, but suggested that the common factor of victimization overcomes the disparities.[162] Furthermore, the Justice challenged the Court to recognize that our country's trail of gender discrimination commands the heightened scrutiny afforded sex-based classifications.[163] Accordingly, the Justice reminded that for gender classifications to survive constitutional muster, they must have an exceedingly persuasive justification which furthers a legitimate government objective.[164]

Applying this standard to the instant case, Justice Blackmun considered whether peremptory challenges rooted in sex stereotypes significantly further an individual's interest in selecting an impartial jury.[165] The Justice first addressed Alabama's contention that its use of the peremptory challenge to eliminate male jurors was justified by the notion that men are likely to sympathize with one another in a paternity suit, while women are prone to feel for the mother.[166] Justice Blackmun vehemently denounced this the-

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access at the state level. *Id.* In particular, the Justice cited the Court's reasoning that despite the expanding freedoms of women, statutory exemption of women from compulsory jury service was reasonable because women occupied a unique place at the core of the family. *Id.* (citation omitted). Justice Blackmun noted, however, that fourteen years later the Court recanted its earlier reasoning and used the Sixth Amendment to strike a similar statutory exemption. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975)). Blackmun pointed to the Court's analysis that exclusion of certain factions of society from juries undermines the Constitution by denying diversity and sharing of civic duty. *Id.* (quoting *Taylor*, 419 U.S. at 530-31) (other citation omitted).

160 *Id.* at 1424-25 (citations omitted).

161 *Id.* at 1425 (citation omitted).

162 *Id.* (quoting Note, *supra* note 144, at 1921).

163 *Id.* (quoting Frontiero v. Richardson, 411 U.S. 677, 685 (1973)).

164 *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Personnel Adm'r. v. Feeney, 442 U.S. 256, 273 (1979)).

165 *Id.* at 1426. Justice Blackmun also briefly entertained Alabama's contention that a state's interest in determining the paternity of a child justifies gender-based peremptory strikes. *Id.* at 1426 n.8. The Justice summarily discarded this theory, rebuking Alabama for its failure to recognize that the sole interest behind the peremptory challenge is in obtaining an impartial jury. *Id.*

166 *Id.* at 1426 (citation omitted). Justice Blackmun challenged Alabama's reliance

ory, warning that sex-based peremptory strikes cannot be justified by the very same biases the law forbids.[167] The Justice accused Alabama of resurrecting the reprehensible notions that once rationalized women's exclusion from juries and voting booths.[168] Justice Blackmun reiterated that the Equal Protection Clause demands that the government probe deeper than superficial stereotypes when making decisions that are apt to memorialize prejudice.[169]

Moreover, Justice Blackmun warned that assuming that jurors have certain attitudes based on their sex is tantamount to legally branding them inferior.[170] For women in particular, the Justice posited, the assumption of attitudes exhumes a whole history of

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on one study to establish that the two genders have notably different attitudes that warrant gender-bias in peremptory challenges. *Id.* at 1426 n.9 (citation omitted). The Justice pointed to another source which indicated that there are no cognizable differences in the reactions of the sexes to trials. *Id.* (citation omitted). Moreover, Justice Blackmun charged that even before women were awarded a constitutional right to jury participation, academics cautioned against using gender as a proxy for bias. *Id.* (citation omitted).

167 *Id.* at 1426 (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)).

168 *Id.* at 1426 & n.10. Justice Blackmun noted that such invidious discrimination surfaced even in trial manuals. *Id.* at 1426 n.10 (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 210 (1989) (quotation omitted) ("'I don't like women jurors . . . . It is possible that their "women's intuition" can help you if you can't win your case with the facts.'")). Moreover, the Justice chided Alabama's failure to substantiate its assertion that sex alone is determinative of a juror's attitude. *Id.* at 1426-27. Invoking precedent, the Justice instructed that even if some ounce of truth could be detected in the stereotypes, that fact alone could not justify sex-biased jury selection. *Id.* at 1427 n.11.

169 *Id.* (citations omitted). Addressing the effects of jury selection bias, Justice Blackmun first emphasized that all parties to the action face the risk that the same discrimination that infected the selection process will likewise contaminate the entire litigation. *Id.* at 1427 (citing Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991)). Second, the Justice proffered that society suffers a loss of faith in the judicial process due to the state-endorsed prejudice in the courtroom. *Id.* The Justice cautioned that the government's use of sex stereotypes in jury selection perpetuates biases that have long infected various aspects of public life. *Id.* (quotation omitted). Third, the Justice posited that intentional gender discrimination incites doubt regarding a jury's objectivity and respect for the law, most palpably in cases in which gender-sensitive issues are paramount. *Id.*

After enumerating the harms wrought by prejudicial jury selection, Justice Blackmun addressed Alabama's contention that men are not protected against gender bias. *Id.* at 1427-28 (citations omitted). The Justice rejected as contrary to precedent Alabama's theory that men have no right to protection against bias because they have not historically been its victims. *Id.* (citation omitted). Noting that jurors have a right to unbiased selection methods, the Justice reminded that this right applies to men and women alike. *Id.* (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982)).

170 *Id.* (citation omitted).

exclusion from the civic arena.[171] Furthermore, the Justice declared, gender exclusion invites the repugnant belief that certain people, because of their sex alone, are unfit in the eyes of the government to decide important issues.[172]

Lastly, Justice Blackmun avowed that the equal chance to share in the administration of justice is implicit in our democratic society.[173] This opportunity, the Justice emphasized, advances the equal protection guarantee of participatory rights for all races, all nationalities, and both genders.[174] Conversely, the Justice warned that deprivation of these participatory rights on the basis of gender, like race, imperils equal protection principles as well as the

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171 *Id.* Justice Blackmun challenged the oft sounded claim that all peremptory strikes are rooted in some bias. *Id.* at 1428 n.14. The Justice explained that where peremptory strikes are grounded in characteristic classifications other than sex or race, they do not perpetuate the same notions about the group's abilities or tendencies that have historically excluded them from various social functions. *Id.* (citation omitted).

172 *Id.* at 1428. Justice Blackmun acknowledged that the Court has historically ratified discrimination in peremptory strikes. *Id.* at 1429 n.15. The Justice refused, however, to accept past error as a justification for perpetuating invidious bias. *Id.*

Next, Justice Blackmun urged that the proscription of gender bias does not portend the end of peremptory challenges. *Id.* at 1429. Nor, the Justice declared, do gender-neutral strikes conflict with the government's goal of securing a fair trial. *Id.* Justice Blackmun assured that litigants may still eliminate unacceptable jurors so long as gender is not used as a metaphor for prejudice. *Id.* Accordingly, the Justice declared that peremptory strikes based on traits that disproportionately characterize one gender may be upheld absent proof of discriminatory motive. *Id.* at 1429 & n.16 (citation omitted).

Justice Blackmun next addressed the claim that a rule forbidding gender-based challenges is unworkable. *Id.* at 1429. This argument, the Justice rebutted, is undercut by the successful implementation of sex-neutral strikes in many jurisdictions. *Id.* (citation omitted). The Justice further instructed that the party charging sex discrimination must make a prima facie case of intentional bias before any explanation by the striking party is required. *Id.* at 1429-30 (citing Batson v. Kentucky, 476 U.S. 79, 97 (1986)). Even then, the Justice clarified, the explanation need not satisfy "for cause" standards, but must be without gender bias or pretext. *Id.* at 1430 (citation omitted). Moreover, the Justice observed that race and gender are overlapping concepts. *Id.* Accordingly, Justice Blackmun charged that failure to protect jurors against either form of discrimination may undermine *Batson*. *Id.* The correlation between race and gender, the Justice posited, makes gender an easy pretext and shield for racial bias. *Id.*

173 *Id.* The Justice recognized that our long tradition of trial by jury is founded on the concept of an impartial jury taken from all levels of society. *Id.* at 1430 n.19 (quoting Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946)). The Justice acknowledged that this system does not demand the presence on all juries of persons from all groups and classes. *Id.* (quoting *Thiel*, 328 U.S. at 220). Nonetheless, the Justice insisted that of the potential jurors, otherwise eligible individuals must not be intentionally excluded based on their economic, religious, or racial classifications. *Id.* (quoting *Thiel*, 328 U.S. at 220).

174 *Id.* at 1430 (citing Powers v. Ohio, 499 U.S. 400, 407 (1991)).

integrity of the courts.[175] Accordingly, Justice Blackmun concluded that the Equal Protection Clause forbids gender discrimination in the exercise of peremptory challenges.[176] To hold otherwise, the Justice posited, would reduce the Equal Protection Clause to mere rhetoric.[177]

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175 *Id.*

176 *Id.*

177 *Id.* (quoting Batson v. Kentucky, 476 U.S. 79, 97-98 (1986)).

In a cautionary concurrence, Justice O'Connor approved of the Court's ban on sex-based peremptory strikes, but warned that its victory over gender bias does not come without cost. *Id.* at 1430, 1431 (O'Connor, J., concurring). The Justice first acknowledged that the majority's holding was a logical extension of *Batson* with possibly even greater ramifications. *Id.* at 1431 (O'Connor, J., concurring). Specifically, Justice O'Connor posited that by requiring stricter adherence to constitutional tenets in jury selection, the majority has invited litigants to bring to the forefront what was once in the periphery. *Id.*

Continuing in this vein, Justice O'Connor cautioned that the Court's holding sounds the death toll for peremptory strikes. *Id.* Justice O'Connor recalled the long history of the peremptory challenge as well as its importance in securing a fair trial. *Id.* (quotation & citations omitted). The Justice lamented that as the Court pulls tighter on the constitutional reins, attorneys will be forced to verbalize intuitive hunches which the peremptory strike once precluded. *Id.* Justice O'Connor opined that the majority's ban converts the peremptory challenge into a challenge for cause. *Id.* Moreover, the Justice submitted that the newly-imposed restraint on jury selection increases the risk that prejudiced individuals will secure seats on juries because lawyers will fail or fear to articulate a gender-neutral basis for a strike. *Id.* Justice O'Connor hesitated to think of the peremptory's dimming existence. *Id.*

Next, Justice O'Connor proffered that even when gender concepts affect the exercise of a peremptory strike, the value of the process to litigants does not wane. *Id.* at 1431-32 (O'Connor, J., concurring). The Justice asserted that gender considerations undoubtedly play a role in a trial. *Id.* at 1432 (O'Connor, J., concurring). Specifically, the Justice postulated that one need not be a sexist to recognize that in some instances an individual's sex influences his or her perception of a case. *Id.* Justice O'Connor urged that people cannot be expected, as jurors, to disregard what they know as males or females. *Id.*

Justice O'Connor next denounced the Court's ban on gender-based strikes as a limitation on a party's freedom to act on his or her own intuition. *Id.* The Justice drew a distinction between stating that "gender makes no difference as a matter of law . . . [and] . . . gender makes no difference as a matter of fact." *Id.* Further, the Justice commended the Court's extension of *Batson* to gender but warned of the costs of the decision. *Id.* Specifically, Justice O'Connor imparted that the gender extension adds an additional burden to trials, foreshadows imminent doom for the peremptory challenge, and eliminates attorney intuition in jury selection. *Id.*

Based on these concerns, Justice O'Connor emphasized that the Court's holding must apply only to state actors. *Id.* The Justice cautioned against an overbroad application of the new doctrine to private litigants, especially criminal defendants. *Id.* at 1432-33 (O'Connor, J., concurring) (citations omitted). The Justice acknowledged that the instant case involved no injustice to private litigants, Justice O'Connor inquired uncertainly about future actions. *Id.* at 1433 (O'Connor, J., concurring).

Justice Kennedy, in a brief concurrence, voiced wholesale accord with the majority. *Id.* (Kennedy, J., concurring). The Justice examined the history of Fourteenth Amendment case law leading to the Court's conclusion. *Id.* Beginning with the Amendment's origin in remedying the ills of slavery, Justice Kennedy traced the devel-

opment and interpretation of the Equal Protection Clause to present day. *Id.* The Justice remarked that it was not until 1971 that classifications based on gender received heightened scrutiny. *Id.* Today, noted the Justice, gender classifications are presumably invalid. *Id.* (citation omitted).

In the light of this history, Justice Kennedy found the Court's application of the Equal Protection Clause to sex-based challenges unquestionably appropriate. *Id.* (citations omitted). The Justice stressed that the language of the Clause clearly reflects a concern for the rights of individuals, not groups. *Id.* at 1434 (Kennedy, J., concurring). At the center of the Clause's guarantees, the Justice reminded, lies the imperative that states treat people as individuals and not as indistinct members of a race or sex. *Id.* (quotation omitted). Accordingly, Justice Kennedy submitted that when sex-based peremptory strikes are used, the affected individual suffers an affront to personal dignity and rights. *Id.* (citation omitted). Justice Kennedy proffered that the ultimate proof of the Fourteenth Amendment's neutrality is found in the Court's application of its principles to bias against men. *Id.*

Next, stressing the importance of individual rights, Justice Kennedy speculated about the intended effect of the Court's decision. *Id.* First, the Justice stressed that a properly selected juror must not yield to individual prejudices. *Id.* Second, the Justice stressed that each juror is his or her own representative, not that of a class. *Id.* Justice Kennedy urged that nothing would so undermine the sanctity of the judicial system as the belief that individuals of various classes sound their biases in the jury room. *Id.* (citation omitted). The Justice reminded that the jury is a cross-section of society and as such is a tool for eliminating prejudice, not fostering it. *Id.* (citations omitted). What the Constitution promises, the Justice imparted, is an impartial jury, not twelve members of a specific sex or race. *Id.* (citations omitted).

Chief Justice Rehnquist filed a sober dissent. *Id.* (Rehnquist, C.J., dissenting). The Chief Justice first rebuked the majority for its extension of *Batson* to gender-based peremptory strikes. *Id.* at 1434-35 (Rehnquist, C.J., dissenting). Acknowledging that *Batson* was rightly decided, the Chief Justice charged that *Batson* was inapplicable to sex discrimination in jury selection due to the dissimilarities between race and gender prejudice. *Id.* Chief Justice Rehnquist further explained that equal protection precedent recognized the race-gender disparity in its assignment of different degrees of protection to both. *Id.* at 1435 (Rehnquist, C.J., dissenting) (citation omitted). Moreover, the Chief Justice observed that while gender and racial equality both remain unachieved, realization of the latter presents the more formidable challenge. *Id.* (citation omitted).

Next, Chief Justice Rehnquist distinguished *Batson* from the instant case. *Id.* The Chief Justice particularly emphasized that *Batson* reflects that racial concerns are the soul of the Fourteenth Amendment. *Id.* Thus, Chief Justice Rehnquist proffered that *Batson* is inapplicable to areas other than race. *Id.* (quotation omitted). Accordingly, the Chief Justice concluded that when gender, not race, is at issue in jury selection, equal protection principles weigh in favor of the peremptory challenge. *Id.* Applying this to the instant case, Chief Justice Rehnquist determined that Alabama had established that sex-based peremptory strikes significantly advance the state's interest in fair trials. *Id.* (citations omitted). Further, the Chief Justice declared that biological reality, not stereotyping, gives rise to sex-based peremptory strikes. *Id.* The Chief Justice thus reasoned that gender-based challenges do not breed the hate and malice that race-based strikes incite. *Id.*

Lastly, Chief Justice Rehnquist recognized the ramifications of the majority's decision envisioned by Justice O'Connor. *Id.* at 1435-36 (Rehnquist, C.J., dissenting). Finding the majority's extension of *Batson* constitutionally unwarranted and needlessly costly, the Chief Justice rejected the Court's decision. *Id.*

Justice Scalia, in a stinging dissent, accused the majority of a gross display of self-righteousness. *Id.* at 1436 (Scalia, J., dissenting). The Justice first denounced the

Court's opinion as wholly tangential to the actual dispute. *Id.* Justice Scalia lambasted the majority for indulging in a needless dissertation on the historical plight of women. *Id.*

Next, Justice Scalia chided the majority for its apparent inconsistency. *Id.* Specifically the Justice cited the Court's emphasis on the lack of statistical proof that sex is a predictor of juror behavior. *Id.* The Justice contrasted this with the Court's statistical determination nineteen years earlier that women bring distinct attitudes to the jury room. *Id.* (citing Taylor v. Louisiana, 419 U.S. 522, 532 n.12 (1975)). Although cognizant that times have changed and "unisex" is now vogue, the Justice attributed little value to the statistics cherished by the Court. *Id.* Justice Scalia believed trained litigators are a better guide to juror perceptions. *Id.* Nonetheless, the Justice recognized that attorney intuition is rendered irrelevant by the majority's assertion that there are no differences between the sexes. *Id.* Moreover, the Justice charged that even if it were solidly proven that sex could predict juror behavior, the majority would find some rationale for declaring it an unconstitutional proxy in jury selection. *Id.* (citing *id.* at 1427 n.11; *id.* at 1431-32 (O'Connor, J., concurring)).

Justice Scalia next condemned the majority's determination that all peremptory challenges based on class characteristics violate the Equal Protection Clause. *Id.* at 1437 (Scalia, J., dissenting). The Justice criticized this conclusion as unrealistic. *Id.* First, Justice Scalia questioned how any group could be denied equal protection when all groups at some point are the object of peremptory strikes. *Id.* (citations omitted). The Justice reminded that the peremptory challenge and the Equal Protection Clause have functioned rather harmoniously for more than a century. *Id.* Further, Justice Scalia found untenable the majority's claim of sex discrimination against men. *Id.* The Justice emphasized that for every male juror eliminated by Alabama, petitioner struck a female. *Id.* Justice Scalia thus found no discriminatory impact and no gender animus. *Id.* (citation omitted). Moreover, the Justice clarified that females are now stricken from juries based on a suspicion of their partiality to the non-striking party, not on a doubt as to their competence. *Id.* (citation omitted).

Next, Justice Scalia accused the Court of clouding its analysis with anti-sexist blithering that served only to wreak havoc. *Id.* at 1438 (Scalia, J., dissenting). The Justice opined that the majority's amorphous reasoning worked to place all peremptories in jeopardy. *Id.* Initially, Justice Scalia pointed to the majority's rejection of Alabama's claim that sex-based strikes advance the state's interest in an impartial jury. *Id.* The Justice charged that this move ultimately spells doom for the peremptory challenge because it implies that all strikes based on group traits will be labeled stereotypes. *Id.* Unable to imagine which stereotypes would be deemed impermissible in the future, Justice Scalia surrendered this determination to the Court's "peremptory/stereotyping jurisprudence." *Id.*

Second, Justice Scalia added loss of the peremptory's unique character to the list of harms wrought by the majority. *Id.* The Justice opined that restricting the peremptory strike's arbitrariness robs the practice of its essential freedom. *Id.* (quotation & citations omitted). Moreover, the Justice warned that the peremptory challenge is irreplaceable. *Id.*

A third cost of the majority's decision, the Justice opined, is the heavy burden that the entire justice system will be forced to carry in the search for "reasoned peremptories." *Id.* at 1439 (Scalia, J., dissenting). Specifically, the Justice proposed that extended voir dire and increased litigation will resulted in great attendant costs. *Id.* at 1438, 1439 (Scalia, J., dissenting).

Lastly, Justice Scalia submitted that the majority's irrational holding invites equally illogical propositions. *Id.* at 1439 (Scalia, J., dissenting). In particular, the Justice noted that pursuant to the majority's new standard for peremptories, a prosecutor in future proceedings will violate the Constitution whenever he selects a witness based on that person's likely appeal to the jury. *Id.*

Justice Blackmun's *J.E.B.* decision marks another great victory in the battle for women's emancipation.[178] While significant in terms of the peremptory challenge, *J.E.B.* is equally powerful in its impact on women's rights.[179] With regard to women's advancement, Justice Blackmun reaffirmed the individuality of women by condemning the ignorant misconception that all females perform, react, and think similarly.[180] By according women and men equal access to the civic arena, the Justice granted women an unfettered right to share in the fruits and freedoms of our democratic society.[181]

As Justice Blackmun so perceptively observed in *J.E.B.*, the reprehensible exclusion of women from various sectors of public life, specifically jury service, has been rationalized by a number of feeble explanations.[182] Those entities responsible for perpetuating the bias behind these excuses have sought to cast the blame for their actions on God, nature, and even women themselves.[183] Thanks to Justice Blackmun, this finger-pointing will cease to be effective.[184] No longer will the fear and hate that drive gender prejudice escape judicial scrutiny.[185] By forcing litigators to articulate legitimate reasons for excluding jurors, Justice Blackmun de-

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Concluding that the majority cared more about paying self-serving homage to sexual equality than upholding Fourteenth Amendment principles, Justice Scalia condemned the Court's blow to the long-standing practice of peremptory challenges. *Id.* Our constitutional jurisprudence, urged the Justice, neither mandates nor sanctions the desecration wrought by the Court. *Id.*

178 *See* George F. Will, *Jury by Trial*, WASH. POST, Apr. 28, 1994, at A27 (criticizing *J.E.B.*, but recognizing it as "a famous victory for women, the Constitution and justice").

179 *See* Joan Biskupic, *Supreme Court, 6-3 Prohibits Sex Bias in Jury Selection*, WASH. POST, Apr. 20, 1994, at A1 (noting that Blackmun's *J.E.B.* opinion was brimming with concern about prejudice against women but proposing that the decision may be a "legal lightning rod").

180 *See J.E.B.*, 114 S. Ct. at 1427 ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes . . . ."). *See generally* Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984) (exploring the role of constitutional law in defining women's place in contemporary society and proposing that women as a class perceive and approach issues differently from men).

181 *See* Note, *supra* note 144, at 1927 (citation omitted) (recognizing jury service as both a privilege and an obligation of citizenship and an individual's greatest opportunity to partake in the administration of justice).

182 *See supra* note 159 (noting the various excuses for excluding women from public life).

183 *See supra* note 58 (exploring the subservient role historically accorded women).

184 *See* Note, *supra* note 144, at 1926-27 (citations omitted) (enumerating the various justifications used to exclude women from juries, most notably the belief that women belonged at home while men monopolized public life).

185 *See id.* at 1921 (recognizing the similarities in the prejudice that has victimized both blacks and women).

manded compliance with the essence of equal protection—equality.[186]

Those individuals who continue to operate under the misconception of handicapping sex stereotypes have fabricated numerous assertions why gender-bias is permissible, even valuable.[187] Apparently, the proponents of these flawed notions have forgotten that equal protection is not a strict liability concept subject to a risk-utility analysis.[188] Whether the peremptory challenge will be rendered extinct or lose its unique character is wholly irrelevant. Absent a legitimate government interest, gender bias remains intolerable.[189] As Justice Blackmun declared, securing a fair trial is not a valid justification for state-sponsored sex bias.[190]

V. CONCLUSION

All too often in the enduring battle for respect and recognition, women have inculpated men for women's servile and constricted role in society.[191] While casting blame is an unfortunate antic in this struggle, women themselves are not free of fault, nor are men necessarily the opponent.[192] Social phenomena, of which both men and women are a part, have sculpted gender destinies.[193]

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186 *See* J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994) (holding that peremptory strikes based solely on the gender of a potential juror violate the Equal Protection Clause). *But see* Will, *supra* note 178, at A27 (criticizing *J.E.B.* as "flimsy . . . foolish . . . . [and] indignant about injustices to women").

187 *See* Note, *supra* note 144, at 1926-27 (citations omitted) (enumerating the various rationales for gender-biased exclusion).

188 *See* Peter A. Guadioso, Comment, Batson*'s Incomplete Legacy: Gender Discrimination and the Peremptory Challenge*, 3 SETON HALL CONST. L.J. 475, 517 (1993) (quotation & citation omitted) ("Assuming peremptory challenges are vital to the process of formulating impartial juries, the Court's 'middle tier' Equal Protection analysis mandates that 'classifications by gender must serve important government interest and must be substantially related to achievement of those objectives.'")

189 *See* Note, *supra* note 144, at 1933 (proffering that the sharp disagreement over the impact of sex on juror attitude demonstrates that gender-based peremptory challenges cannot survive equal protection review).

190 J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1429 (1994).

191 *See, e.g.*, Kathryn Boockvar, *Beyond Survival: The Procreative Rights of Women with HIV*, 14 B.C. THIRD WORLD L.J. 1, 1 (1994) ("Increasingly, women's autonomy over their bodies is being threatened as courts and legislatures play paternalistic roles.").

192 *See generally* Suzannah Bex Wilson, Note, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817 (1992). This article examines the origin and effects of sex discrimination and the social phenomena that fuel it, and suggests methods for eliminating it. *Id.* at 818. The author calls for full reform of gender discrimination in the public sphere, beginning with the legal profession. *Id.* at 840-42.

193 *See* Martha Minow, *Rights of One's Own*, 98 HARV. L. REV. 1084, 1084 (1985) (reviewing ELISABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON (1984)) (praising Griffith's biography, which depicts Stanton as a champion of

For whatever reason, many women have accepted the position that society has assigned to them.[194] Until all women confront the foe of gender prejudice, gender justice will remain out of reach.[195] The challenge comes in balancing respect for women's autonomy with an appreciation of the fundamental differences between the sexes. For those women who wage onward, they have found a friend in Justice Harry A. Blackmun.[196]

Justice Blackmun's retirement following a twenty-four year tenure on the Supreme Court marks a significant point in the evolution of women's emancipation.[197] From *Roe*'s articulation of a revolutionary Due Process principle through *J.E.B.*'s similar extension of Equal Protection theory, Justice Blackmun has contributed an invaluable quarter-century of liberating jurisprudence to women's developing autonomy.[198]

Justice Blackmun has been a valiant leader in women's collec-

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women's rights deeply affected by the "emptiness and confinement of the role that society assigned to women in the nineteenth century").

194 *See* Olsen, *supra* note 129, at 1498-99 (noting that despite women's successes in the fight for equality, vestiges of subordination to men linger).

195 *See* Deborah L. Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1733 (1991) (recognizing that despite the substantial progress toward gender equality, women's reproductive freedom is not secure and sexual violence and other forms of oppression still exist); *see also* Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573, 574 (1987). This article criticizes as "misplaced" the debate between those who claim women do not need special treatment to attain equality and those who purport that equality demands that the law recognize women's social significance. *Id.* The author argues that neither view can adequately redress women's social oppression because neither the legal system nor public opinion provides a stable foundation for eradicating gender injustice. *Id.* This article proposes that current patterns of legal reasoning impede equality and that only a restructuring of methodology offers hope for justice. *Id.* at 641-42.

196 *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 602-603 (1986) (explaining that heightened awareness of women's individuality and personal experience is part of the feminist approach to social reform). Justice Blackmun has been instrumental in championing the personal experiences of women and enlightening social consciousness on the path to gender equality. *See Sensitivity for Downtrodden*, *supra* note 9, at 15A (discussing the Justice's role in the emancipation of women).

197 *See* Ginsburg, *supra* note 89, at 692 (quotation omitted) (applauding Justice Blackmun's role in women's freedom from "role-typing"); *see also* Book Note, 82 MICH. L. REV. 713, 716 (1984) (reviewing BARBARA MILBAUER & BERT N. OBRENTS, THE LAW GIVETH . . . LEGAL ASPECTS OF THE ABORTION CONTROVERSY (1983)) (presenting the book's central thesis as a contemplation of the delicacy of individual freedoms in a legal and political system that is not representative of those people whose rights it guarantees).

198 *See* Karlan, *supra* note 4, at 536-39 (celebrating the Justice's advocacy of the rights of women and homosexuals).

tive march to independence.[199] An understanding of the full measure of the Justice's endowment to women's issues is a vision only hindsight can illuminate.[200] As the Justice takes his final bow and the confetti settles around the *J.E.B.* decision, women eagerly await

199 *Id.; see* Mary Deibel, *Philosophy of Court Unlikely to Change*, CLEVELAND PLAIN DEALER, Apr. 7, 1994, at 15A (quoting Blackmun regarding his tenure on the Court: "'I haven't changed. The court's changed under me'").

200 *Id.* Howard suggested that the philosophical disposition of the Supreme Court will likely remain the same with the retirement of Justice Blackmun and the appointment of a new justice. *Id. Contra* Joan Biskupic, *A Gentler Court Confirmation Process Emerges—Low-Key Hearings for Clinton Nominees Could Change Public Attitudes, Scholars Suggest*, WASH. POST, July 18, 1994, at A7 (suggesting that newly-appointed Justice Steven G. Breyer may sway the Court a bit toward the right).

the full realization of community participation.[201] At the same time, they question the fate of women's issues in the Court as a new justice fills Justice Blackmun's vacancy.[202]

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201 *See* Joan Biskupic, *A Different Sort of Court Awaits Blackmun Successor—Recent Terms Marked By Aversion to Change*, WASH. POST, Apr. 17, 1994, at A1 (recognizing that the fires of social change that raged around the 1970's Court have been long extinguished, and that as Blackmun steps down, the Court has been in a "holding pattern" brought about by conservative control in recent terms).

202 *See* Helen Dewar, *Breyer Wins Senate Confirmation to Top Court, 87 to 9*, WASH. POST, July 30, 1994, at A9 (noting that Steven G. Breyer, "moderate pragmatist" and former Chief Judge of the First Circuit Court of Appeals, won bipartisan approval). For further discussion of Breyer's nomination and confirmation, see Al Kamen, *In the Loop—Breyer Takes the Third*, WASH. POST , Oct. 3, 1994, at A17 (noting that Steven Breyer received the third and final swearing in on Friday, September 30, 1994); *see also* Biskupic, *supra* note 203, at A7 (informing that President Clinton wanted a non-controversial moderate for the Court); Joan Biskupic, *Nader Criticizes Breyer, Cutler Tie to Law Firm—ABA, Scholars Hail Supreme Court Nominee*, WASH. POST, July 16, 1994, at A3 (discussing Ralph Nader's denunciation of Justice Breyer because of the Justice's past tendency to favor large corporate entities over individuals and small businesses); Joan Biskupic, *Breyer Gives View of How He "Judges"—Justice Requires "Heart and a Head,"* WASH. POST, July 14, 1994, at A6 (noting Justice Breyer's philosophy that law is a question of balance between legal precepts and emotion, and stressing the Justice's endorsement of current abortion law and his belief that Fourteenth Amendment liberties extend beyond those specifically enumerated in the Constitution); *Judge Breyer on the Stand*, WASH. POST, July 17, 1994, at C6 (noting that at confirmation hearings, Justice Breyer declined to align himself with his predecessor but promised to interpret the law with an understanding of the ramifications of his decisions); Ruth Marcus, *Court Runners-Up Drew President's Warmest Praise—Clinton Settled on Breyer as Less Risky Choice*, WASH. POST, May 15, 1994, at A6 (stating that President Clinton selected Justice Breyer, in part, because the Justice had a track record that would not offend women's groups or democratic women in the Senate, but noting that Clinton rejected Justice Breyer in favor of Justice Ginsburg when replacing retired Justice White).