

1992

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## Recommended Citation

Diane P. Wood, "Justice Blackmun and Individual Rights," 97 Dickinson Law Review 421 (1992).

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# THE JURISPRUDENCE OF JUSTICE HARRY A. BLACKMUN

## Justice Blackmun and Individual Rights

Diane P. Wood\*

Of the many contributions Justice Blackmun has made to American jurisprudence, surely his record in the area of individual rights stands out for its importance. Throughout his career on the Supreme Court, he has displayed concern for a wide variety of individual and civil rights. He has rendered decisions on matters ranging from the most personal interests in autonomy and freedom from interference from government in life's private realms, to the increasingly complex problems posed by discrimination based upon race, sex, national origin, alienage, illegitimacy, sexual orientation, and other characteristics. As his views have become well known to the public, both through the opinions he has authored and those he has joined, he has become known as one of the leading "liberal" justices of the Burger and Rehnquist Courts — a fact which I believe has caused him some amusement, given the initial publicity that greeted his appointment to the Court. Nevertheless, if "liberal" here connotes an abiding concern for the individual, a desire both to keep government in its place and to ensure that governmental actions facilitate individual development, and a vision of the equality of human beings before the law, Justice Blackmun richly deserves the

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label.

One could not in the space of one short article canvass everything Justice Blackmun has done in the field of individual rights. Here, I have chosen to focus on the non-criminal areas relating to individual autonomy and the right to be free from discrimination (derived both from statutes and from the Constitution). The picture that emerges is one of a hierarchy of rights, ranging from the most highly protected against governmental restriction to those that are more subject to democratic controls. It is at times a complex picture, for Justice Blackmun insists on seeing the world in all its factual disarray, and he resists the temptation to employ the simplifying assumptions of abstract theory that might make his judging job easier. He prefers the more difficult approach that is firmly grounded in the facts of each case, knowing that in the long run this will produce the most just results, as well as the soundest development of the law.

### I. The Right To Be Let Alone

It is not just the notoriety of the Supreme Court's 1973 decision in *Roe v. Wade* that causes me to place the "right to be let alone" at the top of Justice Blackmun's hierarchy.<sup>1</sup> In fact, Justice Blackmun's consistent position on the abortion issue over the twenty years that *Roe* has been law, as well as his decisions on other so-called privacy issues, suggests that the most sacred area of individual rights to him is the one relating to the individual's personal autonomy — the right, as he put it in his dissenting opinion in *Bowers v. Hardwick*,<sup>2</sup> "to be let alone" (citing Justice Brandeis' famous dissent in *Olmstead v. United States*<sup>3</sup>). In a sense, this is a pre-constitutional right that does not and cannot depend on formal constitutional recognition (which would imply that it could be removed in the same manner). Individuals are free from some intimate forms of governmental intrusion simply by virtue of their humanity.

The Justice freely acknowledged in *Roe v. Wade* that "[t]he Constitution does not explicitly mention any right of privacy."<sup>4</sup> However, he noted also that in a line of decisions going back to the late nineteenth century, the Court had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>5</sup> This does not mean that the

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1. 410 U.S. 113 (1973), *decided with Doe v. Bolton*, 410 U.S. 179 (1973).

2. 478 U.S. 186, 199 (1986).

3. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

4. 410 U.S. at 152.

5. *Id.*

Constitution created the privacy right, in the same way that it created the House of Representatives or the Sixth Amendment requirement of juries in criminal trials. Instead, the opinion offers two possible avenues of constitutional recognition, as it states the key holding of the Court:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is*, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>6</sup>

Put another way, Justice Blackmun articulated in *Roe*, and the many cases that followed, the important insight that a core set of individual rights exists that neither the states nor the federal government may trample, no matter how much due process they may use.<sup>7</sup>

The explosive public debate that followed *Roe* conveniently disregarded several important points about the decision. First, by ignoring *Roe's* focus on the woman's right to choose whether or not to complete her pregnancy, abortion opponents gave little or no thought to the many positive steps they might take that would help both pregnant woman and potential life alike: steps including better access to contraception (which obviously avoids the dilemma in the first place, and helps to ensure that children when born are cherished), social acceptance of unmarried pregnant women (thus reducing the stigma of an unwanted pregnancy), and widespread and inexpensive day care for young children (so that motherhood would not mean the economic end of a woman's life). Second, *Roe* was immediately accused of requiring "abortion on demand," in plain contradiction to the opinion's careful attention to the increasing interest the state has in the developing fetus throughout a pregnancy, and the complex balancing between the mother's interests and those of the fetus that *Roe* discusses.

In this rhetorical atmosphere, it was predictable that the limits of the right recognized in *Roe* would be tested. They were. In 1975, the Court considered the validity of a Virginia statute that made it a misdemeanor "by the sale or circulation of any publication, to en-

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6. 410 U.S. at 153 (emphasis added).

7. Those who have argued against this idea often dismiss hypothetical rules, such as state-ordered marriage, state-compelled sterilization, state restrictions on the race or religion of acceptable marriage partners, or adoptive children, that would arguably violate it as "things that just wouldn't happen here." Unfortunately, both history and contemporary precedent around the world indicate that this assumption about human behavior is too optimistic.

courage or prompt the procuring of an abortion.”<sup>8</sup> Justice Blackmun, writing for the same seven-person majority that had decided *Roe*, held that the Virginia courts had erred in assuming that commercial speech was entitled to no First Amendment protection. The majority further held that it would violate the appellant’s First Amendment rights to apply the statute to his advertisement for abortion services in New York.<sup>9</sup>

At the other extreme, the Supreme Court in the 1975 decision of *Connecticut v. Menillo* overturned a Connecticut ruling that held a state statute invalid which criminalized an attempted abortion. The lower court had applied the law to a person who was not a physician and who had never had any medical training.<sup>10</sup> *Roe*, the Court pointed out *per curiam*, had not gone so far; indeed, its rationale supported the continued enforceability of criminal abortion statutes against nonphysicians, insofar as it balanced the risks during the first trimester of an abortion done by a physician against the risks of normal childbirth.

It was not long, however, before many state legislatures began a kind of war of attrition against *Roe v. Wade*. Typical of the statutes passed was the one considered in *Planned Parenthood of Central Missouri v. Danforth*,<sup>11</sup> which required (1) the woman to certify in writing her consent to the procedure, (2) consent of the spouse, (3) parental consent for pregnant minors, (4) prohibition of the use of a certain technique of abortion after the first 12 weeks of pregnancy, (5) recordkeeping requirements, and (6) standards of care for the aborted fetus. Again writing for the Court, Justice Blackmun upheld the written consent and recordkeeping requirements, and struck down the more onerous spousal consent, parental consent, and care and technique requirements.

These kinds of issues regularly returned to the Court, in a line of cases including *Colautti v. Franklin*,<sup>12</sup> *Bellotti v. Baird*,<sup>13</sup> *Thornburgh v. American College of Obstetricians and Gynecologists*,<sup>14</sup>

8. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

9. *Id.* at 825, 829. *Bigelow* also gave new life to the protection of commercial speech in general under the First Amendment — a subject beyond the scope of this article.

10. *Connecticut v. Menillo*, 423 U.S. 9 (1975).

11. 428 U.S. 52 (1976).

12. 439 U.S. 379 (1979) (standard of care for physician when fetus “may be viable”).

13. Two phases: first, 428 U.S. 132 (1975) (parental consent); second, 443 U.S. 622 (1979) (parental consent with alternative of judicial approval following parental notification).

14. 476 U.S. 747 (1986) (informing woman about medical assistance and father’s responsibility for child support; required information from physician about detrimental physical and psychological risks; reporting requirements; degree of care for postviability abortions; required second physician).

*Webster v. Reproductive Health Services*,<sup>15</sup> *Hodgson v. Minnesota*,<sup>16</sup> *Ohio v. Akron Center for Reproductive Health*,<sup>17</sup> and, finally, the 1991 decision in *Planned Parenthood of Southeastern Pa. v. Casey*.<sup>18</sup> It is enough here to say that, beginning with *Webster*, the rights secured by *Roe* and reaffirmed for many years had become increasingly circumscribed. In many ways, the most significant restrictions were economic in nature. The Court in 1977 had drastically cut back on the right to choose for indigent women, when it upheld a variety of funding and public facility restrictions in *Beal v. Doe*,<sup>19</sup> *Maher v. Roe*,<sup>20</sup> and *Poelker v. Doe*,<sup>21</sup> all over Justice Blackmun's dissents. It reinforced these rulings in *Harris v. McRae*,<sup>22</sup> which upheld the so-called Hyde Amendment basically prohibiting all federal funding of abortions. Between the funding cases, which had converted *Roe* into a commitment to allow *non-indigent* women to make decisions about their pregnancies, and the restrictions approved in *Webster*, the original 1973 concept had become severely attenuated.

A large part of the reason for this was political. *Roe v. Wade* had become an issue of central importance to the Republican Party in the presidential elections of 1980, 1984, and 1988. Many believed that the justices appointed to the Court during those years were waiting for the first opportunity to overrule *Roe* once and for all. Thus, when Justices O'Connor, Kennedy, and Souter supported a more modest version of *Roe* in their joint opinion in *Casey*, Justice Blackmun both appreciated the significance of their commitment to "individual liberty and the force of *stare decisis*."<sup>23</sup> Yet, with another presidential election underway, it was plain for all to see that a change of one more vote could mean the end not only of *Roe* but of the entire vision of individual autonomy upon which it rested. In language uncharacteristically frank for Supreme Court opinions, Justice Blackmun wrote:

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15. 109 S.Ct. 3040 (1989) (legislative "findings" on beginning of human life; required viability tests for 20 week fetus; prohibition on use of public facilities; prohibition on use of public funds).

16. 110 S.Ct. 2926 (1990) (48-hour waiting period; two parent consent requirement with judicial bypass).

17. 110 S. Ct. 2972 (1990) (parental notice, judicial bypass).

18. 112 S. Ct. 2791 (1992) (informed consent; 24-hour waiting period; parental consent; reporting and recordkeeping constitutional; spousal consent unconstitutional).

19. 432 U.S. 438 (1977).

20. 432 U.S. 464 (1977).

21. 432 U.S. 519 (1977).

22. 448 U.S. 297 (1980).

23. 112 S.Ct. at 2844.

I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds [that of the Court majority and that of Chief Justice Rehnquist and Justice Thomas] will be made.<sup>24</sup>

No one will know how many voters heard these words, or were influenced by them, in the 1992 election. Nonetheless, it seems clear that the majority of Americans are committed to a constitutional structure in which their fundamental privacy rights and personal autonomy are assured. As time goes on, it has become increasingly clear that these rights require protection in areas beyond the difficult and controversial one of abortion. Here, too, Justice Blackmun has made his mark.

In an area closely related to that of abortion, the Court considered the constitutionality of a New York statute making it a crime to sell or distribute *any* contraceptives to minors under the age of sixteen, and for anyone other than a licensed pharmacist to distribute contraceptives to persons sixteen and older, in *Carey v. Population Services International*.<sup>25</sup> Justice Blackmun joined Justice Brennan's opinion for the Court holding that regulations imposing a burden on a decision as fundamental as whether to bear or beget a child could be justified only by compelling state interests, and had to be narrowly drawn to express only those interests. With typical realism, Justice Blackmun was also part of the four-Justice plurality which found that the prohibition on distribution to minors under sixteen could not be justified as a regulation furthering the state's policy against "promiscuous sexual intercourse among the young," at least in the absence of any evidence that banning contraceptives might have the desired effect.

More recently, the Justice wrote eloquently of the right to be let alone in *Bowers v. Hardwick*,<sup>26</sup> in which the validity of the Georgia sodomy statute was at issue. A majority of five upheld the law, commenting that the Constitution nowhere mentions a "right to engage in homosexual sodomy." In dissent, Justice Blackmun recharacterized the issue: could the law regulate the private, intimate sexual practices of both homosexual and heterosexual consenting adults alike (as it purported to do on its face), or does such a law violate

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24. 112 S. Ct. at 2854-55.

25. 431 U.S. 678 (1977).

26. 478 U.S. 186 (1986).

the personal privacy rights of the individuals concerned? As Justice Blackmun correctly understood, *Bowers* should have been an easy case. Almost any case can be trivialized in the same way the majority handled *Bowers*: does the Constitution protect the right to purchase 3.2% beer?<sup>27</sup> does it protect the right to attend the University of California at Davis Medical School?<sup>28</sup> does it include the right to know the price of prescription drugs?<sup>29</sup> The fact that no such clauses appear in the Constitution did not prevent the Court in those cases from recognizing various types of constitutional protections that resulted in the specific consequences noted. In the same way, Justice Blackmun understood that more was at stake in *Bowers* than the particular private conduct in question, and that by protecting the intimate conduct of some, we protect the individual autonomy of all.

Justice Blackmun demonstrated his concern for personal rights in a family setting in *Moore v. City of East Cleveland*,<sup>30</sup> which involved an astonishing city ordinance that made it a crime for a homeowner to have living with her a son, a grandson, and a second grandson who was the cousin rather than the brother of the first. He joined the plurality opinion written by Justice Powell, which reiterated the principles underlying this area:

This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment . . . . A host of cases . . . have consistently acknowledged a "private realm of family life which the state cannot enter."<sup>31</sup>

Whether it is the abortion issue of the 1970's and 1980's, the issue concerning the definition of "family" of the 1960's and 1970's, or the many difficult questions that lie on the horizon, posed by new technologies of in vitro fertilization, surrogacy, prolongation of life through technical means,<sup>32</sup> or others unimagined now, the principle of individual privacy, dignity, and autonomy for which Justice

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27. See *Craig v. Boren*, 429 U.S. 190 (1976).

28. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

29. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

30. 431 U.S. 494 (1977).

31. *Id.* at 499.

32. See, e.g., *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841 (1990) (dealing with the right of legal guardians to order termination of medical treatment for individual in persistent vegetative state), and opinion by Brennan, J., joined by Justice Blackmun, *id.* at 2863, arguing for the right of the individual and the guardian to decide this difficult issue.



Blackmun has stood will stand at the top of the list of civil rights protected against governmental interference absent the most compelling justifications.

## II. Race

Almost equally high on the hierarchy of civil rights that Justice Blackmun has protected stands the right to be free from race discrimination, both in the conventional cases of actions that disadvantage persons because of their race, and in the more difficult circumstances of affirmative efforts designed to erase the enduring effects of the legacy of discrimination. From his earliest days on the Court, he has displayed an unswerving commitment to the principle and the promise of genuine equality for all.

October Term 1970 was the Justice's first full term on the Court, and it had more than its share of landmark civil rights cases. Among others, the Court handed down its decisions in *Griggs v. Duke Power Company*,<sup>33</sup> which banned employment tests that had a racially discriminatory effect, if they were not sufficiently job-related; *Griffin v. Breckenridge*,<sup>34</sup> which breathed new life into 42 U.S.C. § 1985(3) by finding that it reached private conspiracies to violate the civil rights of a defined class;<sup>35</sup> and *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>36</sup> which broke new ground on the remedies available for the desegregation of school districts. In each of these, Justice Blackmun joined the majority's opinions vindicating the rights of the black plaintiffs.

It was not long before he authored some opinions for the Court himself. In 1973, he wrote for the Court in *Tillman v. Wheaton-Haven Recreation Association*,<sup>37</sup> holding that a private club's racially discriminatory membership policy violated 42 U.S.C. § 1982. The next year, he wrote for the Court in *Gilmore v. City of Montgomery, Alabama*,<sup>38</sup> striking down a city policy with respect to allegedly private swimming pools that had the effect of creating segregated enclaves and depriving blacks of access to parks and

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33. 401 U.S. 424 (1971).

34. 403 U.S. 88 (1971).

35. Recently, a majority of the Court read *Griffin* narrowly, as it decided that § 1985(3) did not afford protection to women seeking abortions from the organized violent behavior of those seeking to prevent their access to clinics. *Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753 (1993). Justice Blackmun joined the dissenting opinions of both Justice Stevens, *id.* at 779, and Justice O'Connor, *id.* at 799.

36. 402 U.S. 1 (1971).

37. 410 U.S. 431 (1973).

38. 417 U.S. 556 (1974).

recreational facilities. In many subsequent cases, he either wrote or joined opinions ensuring the vigorous and effective enforcement of the constitutional and statutory prohibitions relating to race discrimination.<sup>39</sup>

In many ways, however, the case that crystallized Justice Blackmun's position on the problem of race discrimination (and incidentally removed all doubt in the mind of the press about his liberal credentials) was *Regents of the University of California v. Bakke*,<sup>40</sup> — the first genuine "affirmative action" case. *Bakke* involved the constitutionality of a special admissions program adopted by the Medical School of the University of California at Davis, which was designed to assure the admission of a specified number of minority students. The Court splintered badly in its decision, with two different groups of five agreeing to the two main holdings: (1) that Bakke had to be admitted to the Medical School, but that (2) it was wrong to prohibit the school from taking race into account in its admissions process. Justice Blackmun, with Justices White, Marshall, and Brennan, agreed with the second point and would have reversed the first point and held that the school was within its rights to deny admission to Bakke. The Justice joined Justice Brennan's opinion for those four, but it is his own briefer separate opinion that commands our attention here.

Citing the tiny percentage of minority doctors in the country, he wrote, "[i]f ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race conscious."<sup>41</sup> This followed from the original purpose of the Fourteenth Amendment and its goal of complete equality. He frankly recognized the tensions affirmative action creates, but he wrote:

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful.

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39. See, e.g., *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) (permitting action claiming racial discrimination in housing policies); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (permitting individual discrimination claim); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (permitting Title VII action after private arbitration); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (concurring in the judgment that back pay should normally accompany a finding of unlawful discrimination, but stating that the employer's good faith ought to be a "very relevant factor" in fashioning an affirmative remedial order); *Rizzo v. Goode*, 423 U.S. 362 (1976) (dissenting from Court decision striking down a lower court order designed to remedy police mistreatment of minority citizens); *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 prohibited private, commercial, nonsectarian schools from denying admission to prospective students solely on the basis that they were black); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (upholding housing discrimination complaint relating to the practice of racial steering).

40. 438 U.S. 265 (1978).

41. *Id.* at 403.

To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot — we dare not — let the Equal Protection Clause perpetuate racial supremacy.<sup>42</sup>

Justice Blackmun took a similar approach to the question raised in *United Steelworkers v. Weber*,<sup>43</sup> whether Title VII prohibits all private, voluntary, race-conscious affirmative action plans. Voting with the majority to uphold the plan, and thus to reject Weber's Title VII attack on it, he wrote separately of his misgivings and of the "practical and equitable" considerations supporting the Court's result. Given the broad remedial purpose of Title VII, it should not be construed to foreclose private affirmative efforts to redress the effects of segregation. In addition, noting as always the particular facts, the Justice cited the moderate, temporary nature of the program, and the ability of Congress to correct any mistakes in statutory interpretation.<sup>44</sup>

Justice Blackmun has consistently supported the same kinds of measured, voluntary affirmative action programs in other contexts, sometimes with majorities, sometimes in dissent. The cases include *Fullilove v. Klutznick*,<sup>45</sup> *Firefighters Local Union No. 1784 v. Stotts*,<sup>46</sup> *Wygant v. Jackson Board of Education*,<sup>47</sup> *Local 28 v. EEOC*,<sup>48</sup> *Local 93 v. City of Cleveland*,<sup>49</sup> and *United States v. Paradise*.<sup>50</sup> The general point that emerges from the record is clear:

42. *Id.* at 407.

43. 443 U.S. 193 (1979).

44. *Id.* at 216.

45. 448 U.S. 448, 517 (1980) (joining opinion of Marshall, J., concurring in the judgment that upheld the constitutionality of the 10% minority set-aside provision of the Public Works Employment Act of 1977).

46. 467 U.S. 561, 593 (1984) (dissenting from a Court opinion that struck down an injunction to effectuate the terms of an earlier consent decree designed to redress racial discrimination).

47. 476 U.S. 267, 295 (1986) (joining Justice Marshall's dissent from Court holding that a school board's policy of extending preferential protection against layoffs to minority teachers violated the 14th Amendment).

48. 478 U.S. 421 (1986) (joining Justice Brennan's opinion for the majority in holding that the district court properly used statistical evidence in evaluating a union's membership policies, and that certain measures were properly taken to supervise the court's orders, and joining Justice Brennan's opinion for the plurality in holding that Title VII does not prohibit a court from ordering affirmative, race-conscious relief as a remedy for past discrimination).

49. 478 U.S. 501 (1986) (joining Justice Brennan's opinion for the Court holding that Title VII did not preclude the entry of a consent decree that might benefit individuals who were not actual victims of the employer's discriminatory practices, and that voluntary actions to eradicate race discrimination might include reasonable race-conscious measures).

50. 480 U.S. 149 (1987) (joining Justice Brennan's plurality opinion concluding that even under a strict scrutiny analysis, the one-black-for-one-white promotion requirement imposed by the District Court for the Alabama Department of Public Safety was permissible).

through good times and bad, in the majority, the plurality, and in dissent, Justice Blackmun has done his utmost to enforce the constitutional and statutory commands against race discrimination, and for a truly equal society.

### III. Sex Discrimination

Although there can be no doubt about the Justice's commitment to the principle of legal equality between the sexes, given among other things his positions in the abortion cases, this is an area where he has acknowledged a greater role for governmental response to actual differences. Perhaps he has been ahead of his time: it is interesting to note that feminist scholarship has moved in a similar direction.<sup>51</sup> In the late 1960's and early to mid-1970's, its emphasis was on formal equality, but as time has gone on, feminist theory has moved beyond this to a more complex undertaking to identify the special needs of women without at the same time returning to the protective or repressive stereotypes of earlier eras.<sup>52</sup>

Shortly after Justice Blackmun joined the Court, then-Chief Justice Burger wrote for a unanimous Court in *Reed v. Reed*,<sup>53</sup> striking down an Idaho statute that mandated a preference for males as potential estate administrators. Rather than subjecting that state law to the lenient "rational basis" standard normally used to assess economic legislation, *Reed* demanded a "fair and substantial relationship" between the statutory goal and the means used to achieve it (here, of course, the gender-based classification). It found the preference for males to be wanting.

In 1975, the same kind of issue returned to the Court in *Stanton v. Stanton*,<sup>54</sup> which involved a Utah law specifying eighteen as the age of majority for females, and 21 for males. This time Justice Blackmun wrote for the Court. Notably, he found it unnecessary to decide whether a classification based on sex is inherently suspect: precisely the position he had taken in *Frontiero v. Richardson*,<sup>55</sup> in

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under the Equal Protection Clause).

51. For an excellent collection of articles that document these changes, see Symposium, *Feminism in the Law: Theory, Practice and Criticism*, 1989 Univ. of Chicago Legal Forum, and the opening article, Ruth Bader Ginsburg and Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, *id.* at 9.

52. See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. COURT REV. 201.

53. 404 U.S. 71 (1971).

54. 421 U.S. 7 (1975). See also *Stanton v. Stanton*, 429 U.S. 501 (1977) (reiterating the holding of *Stanton I*).

55. 411 U.S. 677 (1973).

which he refused to join an opinion by Justice Brennan so classifying gender, and instead joined Justice Powell's opinion concurring in the judgment. Instead, in *Stanton*, the Justice found *Reed* to be controlling. Acknowledging that Utah might have relied on facts such as the earlier biological maturity of girls, he nonetheless condemned the classification for its irrational reliance on old stereotypes, and for its failure to recognize that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas."<sup>56</sup> Thus, avoiding the strait-jacket of the "suspect classification," Justice Blackmun nonetheless imposed a high standard of justification on legislative distinctions based on sex.

The Court's opinion in *Craig v. Boren*<sup>57</sup> carried on with the *Reed/Stanton* analysis, as it invalidated an Oklahoma law prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen. Again demonstrating caution, the Justice joined the opinion except insofar as it held that the operation of the Twenty-first Amendment did not alter the operation of the equal protection clause; he did agree, however, that the Twenty-first Amendment did not save the Oklahoma statute in question.<sup>58</sup> In the same Term, he voted with the majority in *Dothard v. Rawlinson* to uphold an Alabama regulation establishing gender criteria for prison guards in "contact" positions in maximum-security prisons, on the ground that sex was a bona fide occupational qualification (BFOQ) under Title VII for these positions.<sup>59</sup>

The Justice's unwillingness to disregard objective differences between men and women is easily observable in his positions in the various insurance cases the Court has heard, including *General Electric v. Gilbert*,<sup>60</sup> *City of Los Angeles, Department of Water and Power v. Manhart*,<sup>61</sup> and *Arizona Governing Committee v. Norris*.<sup>62</sup> In *Gilbert*, he joined the Court's opinion holding that the exclusion of disability due to pregnancy from a benefits plan did not violate Title VII in itself, while carefully leaving open the possibility of an

56. 421 U.S. at 14-15.

57. 429 U.S. 190 (1976).

58. *Id.* at 204-210 (Part II.D), 214 (opinion of Blackmun, J., concurring in part). The opinion of the Court also disapproved the earlier decision in *Goesaert v. Cleary*, 335 U.S. 464 (1948), both on equal protection and Twenty-first Amendment grounds. Justice Blackmun's reservation may also have covered this statement.

59. 433 U.S. 321 (1977).

60. 429 U.S. 125 (1976).

61. 435 U.S. 702 (1978).

62. 463 U.S. 1073 (1983).

effects-based theory.<sup>63</sup> *Gilbert* was later legislatively overruled by the Pregnancy Discrimination Act of 1978.<sup>64</sup> In *Manhart*, however, he joined a Court judgment finding a requirement of greater pension contributions for women to be in violation of Title VII. With typical scrupulousness, he pointed out the tension between the *Manhart* holding and the *General Electric* holding in his separate opinion. He concluded that he could accept a restriction on the scope of the earlier decision, given that the only issue was one of statutory construction. Later, in *Norris*, it was Justice Blackmun's turn to read precedents narrowly, as he would have confined *Manhart* to its facts and would have upheld differences in retirement *benefits* according to sex-based actuarial tables.<sup>65</sup>

In a group of cases including *Orr v. Orr*,<sup>66</sup> *Michael M. v. Superior Court*,<sup>67</sup> and *Mississippi University for Women v. Hogan*,<sup>68</sup> Justice Blackmun has supported legislation or positions designed to assist women. In *Orr*, which held that alimony obligations could not vary according to sex, he reiterated his support in a concurring opinion for the holding of *Kahn v. Shevin*,<sup>69</sup> in which the Court had upheld more generous payments for widows than for widowers. In *Michael M*, he concurred in the judgment of the majority that the California statutory rape law should be upheld over an equal protection challenge, while offering the following pointed comment:

It is gratifying that the plurality recognizes that “[a]t the risk of stating the obvious, teenage pregnancies . . . have increased dramatically over the last two decades” and “have significant social, medical and economic consequences for both the mother and her child, and the State.” There have been times when I have wondered whether the Court was capable of this perception, particularly when it has struggled with the different but not

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63. See *supra* note 61. The key holding of the Court, which was that a distinction based upon pregnancy was not a “sex-based” distinction, caused an outburst of laughter in the courtroom the day that the *Gilbert* decision was announced, suggesting perhaps that this was an area where a dose of common sense would have helped the judicial process.

64. 42 U.S.C. § 2000e(k). The PDA specifies that sex discrimination includes discrimination on the basis of pregnancy. In 1987, Justice Blackmun joined the opinions by Justice Marshall for the Court in part and for a plurality in part, holding that the Pregnancy Discrimination Act did not pre-empt state legislation extending special benefits to pregnant workers (namely, the right to a pregnancy leave with reinstatement to the same or a comparable job afterwards). *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

65. 463 U.S. at 1095 (joining opinion of Powell, J., dissenting in part and concurring in part).

66. 440 U.S. 268 (1979).

67. 450 U.S. 464 (1981).

68. 458 U.S. 718 (1982).

69. 416 U.S. 351 (1974).

unrelated problems that attend abortion issues.<sup>70</sup>

The absolute prohibition of sexual intercourse with underage women was a constitutionally acceptable way for the state to address these issues.

In *Hogan*, the Justice displayed a similar willingness to allow state regulation, when he dissented from the Court's condemnation of a state-supported single sex (all-*female*) school of nursing, writing:

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose — indeed destroy — values that mean much to some people by forbidding the State to offer them a choice while not depriving others of an alternative choice.<sup>71</sup>

The Equal Protection Clause does not, he continued, require “needless conformity.”

Nonetheless, thanks again to his careful attention to both facts and legal doctrine, and to his underlying respect for individual autonomy, Justice Blackmun had no trouble understanding and thus invalidating the so-called fetal vulnerability policy of the Johnson Controls Company. In *International Union, UAW v. Johnson Controls*,<sup>72</sup> he authored the Court's opinion rejecting a company policy to exclude all fertile female employees from certain jobs due to the risk to fetal development of exposure to dangerous substances (there, principally lead). Neither the business necessity justification nor the BFOQ exception to Title VII could save this kind of sex-based employment criterion. With full disclosure of the risks, women could judge for themselves whether or not to accept such jobs.

#### IV. Other Areas

So many other cases have also raised questions about individual rights that it is difficult to draw the line for this article. The Justice has decided cases involving the rights of aliens, whom he has protected with the same vigor as he has other racial and ethnic groups;<sup>73</sup>

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70. 450 U.S. at 481-82.

71. 458 U.S. at 734.

72. 111 S. Ct. 1196 (1991).

73. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (Blackmun, J., concurring in the judgment); *Examining Board of Engineers, Architects and Surveyors v. de Otero*, 426 U.S. 572 (1976); *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Blackmun, J., concurring). See also *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (Jews may state a claim under 42 U.S.C. § 1982); *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (person of Arabian ancestry

the rights of illegitimate children and their parents, where he has recognized a variety of possible legitimate state interests;<sup>74</sup> the rights of the disabled, where he has generally deferred to statutory levels of protection;<sup>75</sup> and age discrimination, where he again has relied heavily on statutory guidance.<sup>76</sup> In all these, as in the three areas examined here in detail, several general themes emerge.

*First*, when the core values of privacy and family arise, Justice Blackmun holds legislation up to the most exacting scrutiny.

*Second*, when the characteristic in question is "immutable," in the *Carolene Products* sense, Justice Blackmun demands a compelling state interest before it can be upheld against constitutional challenge.

*Third*, when common sense tells him that the distinction at issue may be genuine — for example, only women get pregnant; actuarial

may be protected under 42 U.S.C. § 1981).

74. See *Labine v. Vincent*, 401 U.S. 532 (1971) (Justice Blackmun with the majority opinion upholding a Louisiana law barring illegitimate children from sharing equally in an intestate father's estate with the legitimate children); *Stanley v. Illinois*, 405 U.S. 645, 659 (1972) (Justice Blackmun joining Chief Justice Burger's dissent to the Court opinion holding that a state statute denying an unwed father a hearing on his parental qualifications violated the Equal Protection Clause and the Due Process Clause); *Mathews v. Lucas*, 427 U.S. 495 (1976) (upholding provisions of the Social Security Act that condition the eligibility of certain illegitimate children for surviving child's insurance benefits upon special showing); *Lalli v. Lalli*, 439 U.S. 259, 276 (1978) (concurring in the judgment on the ground that *Labine* should be followed). On the other side, see *Parham v. Hughes*, 441 U.S. 347, 361 (1979) (objecting to a ruling upholding a Georgia statute under which the father of a deceased illegitimate child was required to pursue statutory legitimization proceedings as a condition of suing for wrongful death, but not a mother); *Califano v. Boles*, 443 U.S. 282, 297 (1979) (joining dissenting opinion in case upholding federal regulations denying mother's insurance benefits to the mother of an illegitimate child who never married the wage earner).

75. See, e.g., *Alexander v. Choate*, 469 U.S. 287 (1985) (rejecting claim under Rehabilitation Act of 1973 that a state Medicaid rule change would have an unlawful disproportionate impact on the disabled); *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986) (joining plurality opinion that held, *inter alia*, that a hospital's withholding of treatment from a handicapped infant when consent for treatment had not been given by the parents did not violate the Rehabilitation Act); *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (joining opinion finding that tuberculosis and similar contagious diseases could be a handicap within the meaning of the Rehabilitation Act); *Traynor v. Turnage*, 485 U.S. 535, 552 (1988) (opinion concurring in part, dissenting in part, and objecting to the majority's "irrebuttable presumption" about the willfulness of primary alcoholism, because the Rehabilitation Act was designed to eliminate such presumptions). Note, however, that in *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 455 (1985), Justice Blackmun joined Justice Marshall's opinion concurring in part and dissenting in part, which applied a higher level of scrutiny to a municipal zoning ordinance that disadvantaged the mentally retarded.

76. See *Vance v. Bradley*, 440 U.S. 93 (1979) (Congress did not violate Equal Protection Clause by requiring retirement at age 60 of Foreign Service officers); *Western Air Lines v. Criswell*, 472 U.S. 400 (1985) (statutory violation of the Age Discrimination in Employment Act to require flight engineers and pilots to retire at 60 without strong justification); *TWA v. Thurston*, 469 U.S. 111 (1985) (transfer policy based on age of pilot violated ADEA; no BFOQ shown). In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 (1979), Justice Blackmun specifically referred to the remedial nature of the Age Discrimination in Employment Act, and the need to construe it liberally.



studies consistently reveal differences between general male and female experience; minors often require special treatment — he is willing to listen carefully to the justification offered to support it. Even so, he will reject classifications based on generalized assumptions, simple convenience, or the like.

*Fourth*, throughout the area of individual rights, the Justice has paid close attention to the source of the right in question. Positions he is willing to take in statutory cases may not be identical to his constitutional interpretations. As the type of right asserted moves farther from the privacy and autonomy interests of the individual, and the right not to be disadvantaged because of immutable characteristics, he recognizes greater and greater freedom for the legislature to choose the required degree of protection.

## V. Conclusion

Coming from the State of Minnesota, with its traditions that combine a strong sense of individualism with an equally strong sense of social responsibility, Justice Blackmun has been one of the leading voices for individual rights on the Supreme Court for the last twenty-three years. He has respected democratic institutions without ever forgetting that the Court stands as the final guardian of human rights for each person in our society. It is a record of which we all can be proud — a record in which we all have shared, and will continue to share in the future.