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Linda Greenhouse

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Marvin Anderson Lecture

Harry Blackmun, Independence and Path Dependence

UNIVERSITY OF CALIFORNIA—HASTINGS COLLEGE OF THE LAW
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LINDA GREENHOUSE

On January 24, 1973, Justice Harry Blackmun flew with one of his law clerks to Cedar Rapids, Iowa, the law clerk's hometown, to speak at a chamber of commerce dinner.¹ To his great surprise, he was met by dozens of anti-abortion picketers. The Supreme Court had issued *Roe v. Wade* two days earlier.² "Picketed!—police protection," Blackmun noted on the list he made of significant events in each Supreme Court term, a chronology he maintained for his twenty-four years and for several years into retirement.³

From our perspective, knowing the impact *Roe* was to have on American political culture, Blackmun's surprise may seem naïve. But from his perspective, of course, it made little sense that he should come to personify an opinion that, while it bore his name, spoke for a seven-to-two Court. He had received an assignment, and he had discharged it to the best of his ability. He was no crusader for abortion rights and, in fact, found the idea of abortion personally distasteful. But as counsel to the Mayo Clinic, he had spent formative professional years in the company of doctors, whom he respected greatly. Prominent Mayo graduates and staff members were among the growing numbers in the medical profession who were advocating the reform of existing abortion laws. Blackmun was persuaded that if a physician decided that terminating a

1. The episode is recounted in JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* 5 (Basic Books 1998).

2. *Roe v. Wade*, 410 U.S. 113 (1973).

3. Harry Blackmun, notes (Harry A. Blackmun Collection, Library of Congress Manuscript Division [hereinafter HAB Collection], Container 1548, folder 4).

pregnancy was indicated, that physician should not have to risk criminal prosecution and prison for acting in the patient's best interest.

Those who have not read *Roe v. Wade* recently might well be startled by its doctor-centric language and by the extent to which it vindicates the rights of women only by proxy, through their doctors:

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision. And basic responsibility for it must rest with the physician.⁴

The sixty-four-year-old man who wrote those words can be excused for not anticipating that they would cause people to take to the streets or that they would make him, for the rest of his own long life, the target of epithets such as "baby-killer" and of regular death threats. Of the issues on the Court's docket, Blackmun was more emotionally invested in the death penalty, with which the Court was also wrestling in the mid-1970s. Capital punishment rather than abortion appeared to many to be the moral issue of the day, and Blackmun was engaged in a career-long struggle to reconcile his personal opposition to the death penalty with his view that judicial duty required him to refrain from interpreting the Constitution to conform to his personal beliefs. Neither his nor any of the other opinions in *Roe* give evidence of anywhere near that degree of moral struggle, as Professor Powe recently pointed out: "*Roe* was a most unique divisive case insofar as no one at the time saw it as divisive—recall the blandness of the Rehnquist and White dissents."⁵

So we can understand Blackmun's shock at his reception in Cedar Rapids, and at the vituperation that came his way in the ensuing weeks and months. All of us know now what Harry Blackmun did not know then: that *Roe v. Wade* would have a profound effect on American political culture. My focus in this lecture is on the other side of that coin: the impact of the decision upon its author. My thesis today, and the thesis of my book, *Becoming Justice Blackmun*,⁶ is that it was the experience not of writing *Roe* but of living with its aftermath, of defending it, and of eventually coming to identify with it in an intensely personal way that changed Harry Blackmun profoundly and made him the Justice he became. In embracing his legacy and in defending his legacy, he created his legacy.

My book is aimed at a lay audience, and my editor would have shot

4. *Roe*, 410 U.S. at 165–66.

5. L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 723 (2003).

6. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (Henry Holt/Times Books 2005).

me if I had tried to slip in such an academic term as “path dependence” to describe this phenomenon. So it is with some pleasurable anticipation that I will try it out here, because I think it does fit, and further, that considering Harry Blackmun’s career in that light can deepen our understanding not only of a singular American life, but of how the mysterious intersection of the personal and the political can shape history.

“Path dependence” is a concept not originally from law but from the physical and biological sciences and through them to economics, from which it has migrated into legal scholarship to help explain why different societies have evolved different forms of corporate governance.⁷ Reduced to its core, it is a way of saying that eventual outcomes depend on initial conditions, that “history matters” and that incremental, even accidental choices or events can have outsized consequences. One paradigmatic example of path dependence is the QWERTY typewriter keyboard, an arrangement patented by its inventor and sold in 1873 to the Remington typewriter company.⁸ The virtue of the QWERTY arrangement was that it avoided the common problem of jammed typewriter keys by separating the most widely used letters across the keyboard. By forcing typists to go slower, it had the effect of enabling them to type faster, and after the QWERTY keyboard won a famous speed-typing competition in Cincinnati in 1888, it became the industry standard. It had such a head start that no other typewriter or keyboard arrangement, no matter how ergonomically superior, has been able to dislodge it. The phrase “path dependence” itself evokes a hypothetical wagon road through the woods, a crooked road around which shops, lodging, and eventually villages and towns grow up so that even later, in the age of the automobile, when there is both the incentive and the technology to replace the old crooked road with a straight highway, it is too late—society has arranged itself along the bends in the road, and bent the road must stay.

How does path dependence account for Harry Blackmun’s career? It is my thesis that three areas of his jurisprudence are directly attributable to the fact of his having received the assignment to write for the majority in *Roe v. Wade*: commercial speech, the rights of poor people, and women’s rights. In these three areas, his ever-tighter embrace of *Roe* brought him to positions he would not otherwise have taken, and the same personality traits that led him to self-identify so passionately with the decision that bore his name meant that he clung just as tightly to the

7. See, e.g., Craig LaChance, *Nature v. Nurture: Evolution, Path Dependence and Corporate Governance*, 18 ARIZ. J. INT’L & COMP. LAW 279 (2001); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (1996).

8. LaChance, *supra* note 7, at 291.

positions he embraced in *Roe's* shadow.

First, to *Roe* itself. Although the world attached *Roe* to Harry Blackmun almost immediately, he struggled for some time against that perception. He had spoken for the Court, he would insist, and indeed, the year-long construction of the majority opinions in *Roe v. Wade* and the companion case *Doe v. Bolton*,⁹ both of which went through two arguments, was a highly collaborative process. The concept of fetal viability, instead of the first trimester, as the point at which the state's interest in protecting potential fetal life becomes "compelling," for example, was a contribution of Justice Lewis Powell that Blackmun incorporated with the strong support of Justices Thurgood Marshall and William Brennan.¹⁰

There was a sense in which Blackmun continued to see himself as almost an accidental bystander at a cataclysm. *Roe* was something that "*happened to me* early in my years here," he noted to himself fifteen years later.¹¹ But as the attacks mounted—and they came not only from religiously and ideologically committed foes of abortion rights but broadly from within the legal academy—Blackmun's own identification with the decision grew ever stronger. It is important to remember that just as he was attacked, he was also lionized by abortion-rights and women's-rights groups for whom this most modest of men became a hero.

While *Roe* was still pending, a First Amendment case reached the Court from Virginia. A newspaper editor in Charlottesville, Jeffrey C. Bigelow, had published an advertisement for an abortion referral service in New York, where a new state law had made abortion legal. Bigelow had been convicted and fined \$500 for violating a Virginia law that made it a crime to "encourage or prompt the procuring of abortion" by means of a lecture, an advertisement, "or in any other manner."¹² The Virginia Supreme Court, rejecting his First Amendment challenge, had ruled that a "commercial advertisement" such as his "may be constitutionally prohibited by the state."¹³ Under the Supreme Court's precedents, that argument was quite likely correct. Commercial speech ranked near the bottom of the hierarchy of First Amendment protection. In any event,

9. 410 U.S. 179 (1973).

10. Letter from Lewis Powell to Harry Blackmun (Nov. 29, 1972) (HAB Collection, Container 151, folder 4); Letter from Harry Blackmun to Lewis Powell (Dec. 4, 1972) (HAB Collection, Container 151, folder 3); Memorandum from Harry Blackmun to the Conference (Dec. 11, 1972) (HAB Collection, Container 151, folder 4); Letter from Thurgood Marshall to Harry Blackmun (Dec. 12, 1972) (HAB Collection, Container 151, folder 4); Letter from William Brennan to Harry Blackmun (Dec. 13, 1972) (HAB Collection, Container 151, folder 8).

11. Harry Blackmun, notes written in response to letter from David R. Gergen (Apr. 5, 1988) (HAB Collection, Container 1440, folder 2) (emphasis added).

12. See *Bigelow v. Virginia*, 421 U.S. 809, 812-13 (1975).

13. See *id.* at 814.

the Court held the *Bigelow* case for *Roe* and then sent it back to the Virginia Supreme Court for reconsideration in light of the fact that the right to abortion was now the law of the land.¹⁴ The Virginia court reaffirmed *Bigelow's* conviction, and he filed a new Supreme Court appeal.¹⁵

Reviewing the briefs in advance of the argument in December 1974, Blackmun was immediately sympathetic to *Bigelow's* case. The First Amendment "should prevent states from prohibiting advertisements of products or conduct that is clearly legal at the place advertised," he wrote in notes to himself.¹⁶ A majority voted to reverse, and Chief Justice Burger assigned the opinion to Blackmun. The result was *Bigelow v. Virginia*,¹⁷ the Supreme Court's first declaration of First Amendment protection for advertising. There is little doubt that Blackmun's interest in the case was animated by the subject matter of the advertisement. There is no evidence that he was thinking about how the issue might next appear. But he had started down a path, and there was no turning back, either for him or the Court.

Within a year, a new commercial speech case reached the Court, once again from Virginia, in the form of a challenge to a state law that prohibited pharmacists from advertising the price of prescription drugs. "I have no great difficulty in concluding that the principles enunciated in *Bigelow* are applicable here and that this statute must fall," Blackmun wrote in notes to himself,¹⁸ preparing for the November 1975 argument in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.¹⁹ Once again, he got the assignment. Lewis Powell was concerned that the opinion might open the way to constitutionally protected advertising of fees by doctors and lawyers. To accommodate that concern, Blackmun allowed Powell to add a footnote underscoring the difference between the dispensing by pharmacists of standardized products and the rendering of professional services by doctors and lawyers.²⁰ But it was only a matter of months before *Bates v. State Bar of Arizona*²¹ placed the question of lawyer advertising on the Court's docket. "Let it develop," Blackmun wrote to himself as he prepared for the argument in January 1977.²² Burger was in dissent by this time, and Blackmun received the assignment from Brennan. The path was clear.

14. *Bigelow v. Virginia*, 413 U.S. 909 (1973), *remanded to 200 S.E.2d 680* (Va. 1973), *rev'd*, 421 U.S. 809 (1975).

15. *Id.*

16. Harry Blackmun, notes (HAB Collection, Container 199, folders 8–9).

17. 421 U.S. at 818.

18. Harry Blackmun, notes (HAB Collection, Container 218, folders 1–3).

19. 425 U.S. 748 (1976).

20. *Id.* at 773 n.25.

21. 433 U.S. 350 (1977).

22. Harry Blackmun, notes (HAB Collection, Container 252, folders 1–3).

He just had to keep walking.

Another issue the Court was dealing with simultaneously with abortion was poverty. Blackmun wrote the opinion for the Court in *United States v. Kras*,²³ a bankruptcy case that challenged the constitutionality of requiring a \$50 fee as a condition for filing for bankruptcy, regardless of the bankruptcy petitioner's ability to pay. Blackmun was skeptical of Robert Kras's claim that he was too poor to pay the \$50. Kras had turned down the chance to pay the fee in installments, \$1.28 a week for nine months, Blackmun noted in the memo he wrote to himself before the argument in the fall of 1972.²⁴ Douglas, Brennan, Stewart, and Marshall—all strong allies of Blackmun's in *Roe*—were in dissent, and the dissenting opinions were stinging. To Blackmun's observation in his majority opinion that Kras could have paid the fee for a weekly installment of "less than the price of a movie and little more than the cost of a pack or two of cigarettes," Marshall countered that "the desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity." Blackmun was particularly gratified to hear from the government lawyer who had argued the case, more than a year later, that Kras had paid the \$50 in full barely a month after the decision.²⁵

But not long after the *Kras* decision, poverty presented itself to the Supreme Court in a new context: abortion. The question in a trio of cases decided in the 1976 term was whether the states had a statutory or constitutional obligation to pay for abortions for women who could not afford them. The constitutional question was presented in a case from Connecticut, *Maher v. Roe*.²⁶ To Blackmun, the answer was obvious. Connecticut was trying to "do indirectly what *Roe* says it cannot do directly," Blackmun wrote in his pre-argument notes—namely, prevent women from obtaining abortions. He characterized as "drastic and disingenuous" the state's suggestion that any obstacle to abortion was *de minimis* because poor women would be able to find the necessary money.²⁷

For the first time in a steady flow of abortion cases since *Roe*, Blackmun was on the losing side. He was not surprised by Burger's defection, but Stewart and Powell also abandoned him. William O. Douglas had retired the year before. His replacement, John Paul Stevens, who was later to become one of the Court's very strongest advocates for abortion rights, drew the line at public funding and joined

23. 409 U.S. 434, 435 (1973).

24. Harry Blackmun, memo (HAB Collection, Container 156, folders 4-5).

25. Letter from Edward R. Korman to Harry Blackmun (June 17, 1974) (HAB Collection, Container 156, folder 5).

26. 432 U.S. 464, 466 (1977).

27. Harry Blackmun, notes (HAB Collection, Container 246, folder 1).

the six-to-three majority that upheld the three challenged laws. “For the individual woman concerned, indigent and financially helpless, as the Court’s opinions in the three cases concede her to be, the result is punitive and tragic,” Blackmun wrote in his dissenting opinion.²⁸ He added:

There is another world ‘out there,’ the existence of which the court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.²⁹

Obviously, the change of tone from the *Kras* opinion is striking: suspicion replaced by empathy for the poor and even outrage at the unfairness of their treatment by a hypocritical and duplicitous state. Blackmun’s outrage was due in part to his view of the merits, and in part to his sense that the Court was changing, that support for *Roe*—as he understood *Roe*—was weakening, and that those he had counted as allies had betrayed him. The abortion funding cases did indeed open Harry Blackmun’s eyes to the other world “out there,” a perspective he was to adopt across a range of cases for the remaining seventeen years of his Supreme Court career, most famously in his “poor Joshua!” dissent in *DeShaney v. Winnebago County Department of Social Services*.³⁰ In that dissent, he adopted a strikingly personal and non-judicial tone to give voice to a little boy left brain-damaged by his violent father into whose custody the state-employed social workers, ignoring abundant warning signs, had placed him. Joshua’s injury, while tragic, was not constitutionally cognizable, the majority held.

In addition to serving as a bridge to the world “out there,” the abortion funding cases also marked the beginning of a repositioning in Harry Blackmun’s mind of the abortion issue itself. The funding cases, after all, were not about doctors; they were about women—pregnant, alone, poor, and in need. Blackmun and the Court came late to women’s rights. For years, the abortion cases and the sex discrimination cases, which advocates including Ruth Bader Ginsburg were rationing and shepherding toward the Court in a carefully considered litigation campaign, ran on separate parallel tracks, as if they could not possibly have anything doctrinally to do with one another. And indeed, until the abortion cases came to be seen as cases about women, there was no reason for these two tracks to converge.

It was an awkward time, during which the Court lurched forward and back, struggling to understand a world in which age-old practices

28. *Beal v. Doe*, 432 U.S. 438, 462 (1976) (Blackmun, J., dissenting).

29. *Id.* at 463.

30. 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

were suddenly being challenged as unconstitutionally discriminatory. The fact that many of the cases Ruth Bader Ginsburg brought to the Court had male plaintiffs, challenging paternalistic laws that favored women in various government benefits, did not make the Court's job any easier, because to the nine men of the Supreme Court, the premises behind these laws—that women tended to need protection and financial support more than men did—made a good deal of sense and seemed, at the least, well-intentioned even if not carefully tailored.

What to do, for example, about something like maternity leave? Mandatory (and unpaid) maternity leaves were extremely common, especially in public school systems, where teachers were expected to leave the classroom before their pregnancy would become visible to students. Those of us old enough to have been in public school in those days remember when young, pretty, and popular teachers would simply disappear, failing to come back from Christmas vacation, for example, and likely never to return. A pair of cases challenging these policies arrived early in the 1973 term. Most of the Justices thought the policies were unfair, but three years before *Craig v. Boren*³¹ made sex discrimination subject to heightened judicial scrutiny, they lacked the constitutional vocabulary to express what, exactly, the problem was. Certainly, this was the position Harry Blackmun was in. In his pre-argument memo for one of the cases, *Cleveland Board of Education v. LaFleur*,³² we can see him struggling to get a handle on the issue:

It is easy to say initially that any regulation which relates to pregnancy is automatically and per se sex discriminatory. I am not at all certain that this is necessarily so. Actually, what the regulation does is to draw distinctions between classes of women, that is, those who are pregnant and those who are not pregnant, rather than between male and female. It is somewhat similar to an Army regulation requiring that enlisted men be shaved and not wear beards or mustaches. Such a regulation discriminates between one class of men and another class of men, and not as between men and women.³³

At the top of this typewritten memo, Blackmun added a handwritten note: "Not sex related."

He eventually joined Potter Stewart's majority opinion that invalidated the mandatory leave policies in *LaFleur* and a companion case. The Court decided the cases on the basis of due process rather than equal protection. The word "discrimination" did not appear in the opinion. A Court that had confidently announced the right to abortion only a year earlier was evidently tongue-tied in the presence of pregnant schoolteachers.

31. 429 U.S. 190, 197 (1976).

32. 414 U.S. 632 (1974).

33. Harry Blackmun, memo (HAB Collection, Container 175, folder 1).

Blackmun did not appreciate the campaign Ruth Ginsburg was conducting on behalf of the American Civil Liberties Union's Women's Rights Project, beginning with *Reed v. Reed*³⁴ in 1971, at the start of Blackmun's second term on the Court. This case challenged an Idaho probate law under which a man received an automatic preference for court appointment to administer an estate. The state court had upheld the preference, finding it justified by administrative convenience and neither "illogical nor arbitrary."³⁵ The Supreme Court unanimously disagreed, overturning the law on equal protection grounds in a rather cryptic six-page opinion by Warren Burger. Harry Blackmun went along, but he was not particularly happy. "The ACLU, on behalf of the appellant mother here, has filed a very lengthy brief filled with emotion and historical context about the inferior status of women," he wrote in notes to himself while preparing for the argument.³⁶ After the argument, when it was clear that the lower court would be reversed, he wrote: "Avoid an emotional opinion about women's rights. Write it narrowly."³⁷

I looked at the brief in the Court's library to try to see what there was about it that drew Blackmun's negative reaction. It was fairly long, at sixty-eight pages, but not drastically longer than many other merits briefs. It cited Gunnar Myrdal and a variety of social commentators and critics, seeking to get into the Court's record and into the Justices' consciousness the disadvantaged status of women in society. "A person born female continues to be branded inferior for this congenital and unalterable condition of birth," was one typical sentence—hardly a radical observation, even back in 1971.³⁸ What the brief in *Reed v. Reed* did ask for, however, was something the Court was unwilling to give, either then, or two years later in *Frontiero v. Richardson*,³⁹ or until this very day: to apply strict judicial scrutiny to claims of discrimination on the basis of sex.

Although he was the father of three daughters, one of whom later became a lawyer, Harry Blackmun was not an easy sell. In November 1980, in anticipation that a woman might join the Court someday, Potter Stewart proposed dropping the traditional "Mr. Justice" in favor of a sex-neutral title. The justices collectively agreed to make the change, over Blackmun's objection. "It seems to me that of late we tend to panic and to get terribly excited about some rather inconsequential things," he wrote in a letter addressed to Chief Justice Burger and circulated to the

34. 404 U.S. 71 (1971).

35. *Reed v. Reed*, 465 P.2d 635, 638 (Idaho 1970).

36. Harry Blackmun, notes (HAB Collection, Container 135, folder 10).

37. *Id.*

38. Brief for Appellant at 25, *Reed*, 404 U.S. 71, (No. 70-4), 1971 WL 133596.

39. 411 U.S. 677, 688 (1973).

other Justices.⁴⁰ “I regard this as one of them . . . we seem to be eliminating, step by step, all aspects of diverseness, and we give impetus to the trend toward a colorless society.”⁴¹ The next year, of course, saw the arrival of Justice Sandra Day O’Connor.

Yet despite his instincts, and very much to his credit, Harry Blackmun kept an open mind. He kept listening. In 1975, for example, Ruth Ginsburg argued *Weinberger v. Wiesenfeld*,⁴² a challenge to a federal social security provision that granted certain benefits to widows that it withheld from widowers. Blackmun’s law clerk urged him to vote to uphold the differential. “No doubt, the statute’s provision rests on a stereotype—a stereotype that has greatly diminished validity,” the law clerk, Richard Blumenthal—now the attorney general of Connecticut—wrote to the Justice, adding that “[w]omen are more likely to be needy, even in this increasingly liberated age.”⁴³ Blackmun was inclined to agree, as his own notes indicate. “So long as the objective of the differential is to alleviate need, I suspect that we shall have to hold that the differential is not unconstitutional,” he wrote before the argument.⁴⁴ But he took notes on the bench as Ginsburg made her case that the provision violated equal protection. “It is a good clean case, factually,” he wrote to himself. “The differential does seem rather useless.”⁴⁵ Blackmun joined Brennan’s majority opinion that found the provision unconstitutional.

But still he struggled to understand the essence of the claim of unconstitutional discrimination on the basis of sex. The claim kept appearing in contexts where Blackmun simply did not see a problem that needed to be addressed with such a powerful instrument as a constitutional holding. For example, in a 1982 case, *Mississippi University of Women v. Hogan*,⁴⁶ he resisted the arguments of his law clerk and the force of Sandra Day O’Connor’s majority opinion, remaining resolutely in dissent from the Court’s holding that the state’s exclusion of men from a public nursing program—the only one of several such programs in the Mississippi system that was not open to both sexes—violated the Equal Protection guarantee. His dissenting opinion warned against the imposition of “needless conformity,” adding: “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

40. Letter from Harry Blackmun to Warren Burger (HAB collection, Container 1548, folder 4).

41. *Id.*

42. 420 U.S. 636, 637–38 (1975).

43. Letter from Richard Blumenthal, law clerk to Harry Blackmun, to Harry Blackmun (HAB Collection, Container 203, folder 6).

44. Harry Blackmun, notes (HAB Collection, Container 203, folder 6).

45. *Id.*

46. 458 U.S. 718, 733 (1982) (Blackmun, J., dissenting).

some people by forbidding the State to offer them a choice while not depriving others of an alternative choice.”

At the same time, however, there was another force at work on Harry Blackmun. The abortion debate was changing—ironically, in part because of Sandra Day O’Connor’s arrival and her willingness to express deep skepticism about the foundations of *Roe v. Wade* in the 1983 *Akron* case, the first case to address abortion since she joined the Court.⁴⁷ Barely a decade old, *Roe* was on the defensive, and so was Blackmun. His sense of what *Roe* had sought to accomplish began to change. The change had begun with his dissenting opinion in the abortion funding cases, in the shift in his focus from all-knowing doctors to desperate and needy women, and now the change accelerated. He held onto a five-to-four majority in the 1986 *Thornburgh* case, concluding with a strongly worded description of the meaning of the right to choose abortion: “Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy”⁴⁸ By the time of Blackmun’s dissent in the 1989 *Webster* case,⁴⁹ his linguistic, intellectual, and emotional focus was entirely on women. It was for them that he was holding back the tide, for them that he had become a most improbable icon.

And so in the last years of his career, the sex discrimination cases and the abortion cases, after running on parallel tracks for so long, began to converge. In *Planned Parenthood v. Casey*,⁵⁰ the 1992 decision that—with Sandra Day O’Connor’s crucial assistance—preserved the right to abortion, equal protection entered Blackmun’s abortion discourse for the first time. He explicitly embraced a unified jurisprudence of women’s rights that saw reproductive freedom as an essential aspect of women’s equality:

A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality. State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women’s bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a

47. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

48. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

49. *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

50. 505 U.S. 833 (1992).

conception of women's role that has triggered the protection of the Equal Protection Clause.⁵¹

And then Blackmun did something remarkable. He cited O'Connor's opinion for the Court in *Mississippi University for Women v. Hogan*, from which he had dissented ten years earlier. The convergence was complete.

Ruth Bader Ginsburg joined the Court the next year. She and Blackmun were to spend only one term together, because the 1993 term would be his last. One of his final opinions, which he assigned to himself during his brief tenure as Senior Associate Justice, was *J.E.B. v. Alabama*,⁵² a case on discriminatory jury selection, which extended to sex the rule of *Batson v. Kentucky*⁵³—that peremptory challenges could not be used to remove prospective jurors on the basis of race. “We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality,” Blackmun wrote for the majority.⁵⁴ In deference to Ginsburg, he included a footnote that treated as still open the question of whether sex discrimination should be subject to strict scrutiny; because sex-based jury challenges failed even intermediate scrutiny, it was not necessary in this case to revisit the issue on which Ginsburg had failed to persuade the Court so long ago.⁵⁵ While joining the majority in *J.E.B.*, Ruth Ginsburg said nothing. She had no need to. Harry Blackmun had, improbably, said it all for her.

Before concluding this account of Harry Blackmun's journey, I should mention one other element. For the first sixteen years of his tenure on the Court, he shared the bench with his boyhood friend Warren Burger. When he came to the Court in the second year of Burger's chiefship, Blackmun was deeply fond and admiring of his lifelong acquaintance, for whom he had served as a public cheerleader and—as his collected papers make clear—private emotional bulwark. Blackmun was also acutely sensitive to being described dismissively as Burger's “Minnesota twin,” and the story of his career on the Court is in some substantial measure the story of his path from Warren Burger's side to independence.

That path, too, began with *Roe v. Wade*. Burger made the assignment but—in contrast to other members of the *Roe* majority, who at least offered Blackmun empathy and emotional support—never evinced a willingness to share the burden. In fact, he began sniping at *Roe* almost immediately, and within a few years had abandoned it.

51. *Id.* at 928.

52. 511 U.S. 127 (1994).

53. 476 U.S. 79 (1986).

54. *J.E.B.*, 511 U.S. at 129.

55. *Id.* at 137 n.6.

Neither man recognized it at the time, of course, but Burger's betrayal—which is how Blackmun saw it—freed Blackmun to go his own way, free from private ties and the public shadow of twinship. Path dependence was also a road to independence, to *Becoming Justice Blackmun*.
