COMMENTS

Protecting Employees’ Fetuses From Workplace Hazards: Johnson Controls Narrows the Options

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In International Union v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991), the Supreme Court held that an employer’s fetal protection policy, which excluded women from certain positions, was illegal gender discrimination, violating Title VII of the Civil Rights Act of 1964. This Comment explores the various frameworks which courts have used, since passage of the Civil Rights Act of 1964, to analyze gender-based discriminatory employment policies. Mr. Weil argues that although the Supreme Court properly decided Johnson Controls, leaving to the employee the decision of how best to protect her offspring, the opinion did not go as far as could be desired: more narrowly tailored fetal protection policies may still be possible under this ruling. The author suggests, in conclusion, less discriminatory alternatives to standard fetal protection policies, recognizing that society, rather than employers, must ultimately make the decisions which involve weighing protection of the unborn against the guarantee of equal opportunity for women in the workplace.

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INTRODUCTION

A fetal protection policy ("FPP") is a company rule concerning hiring or job assignment that excludes certain categories of workers from certain jobs because the hazards associated with those jobs may pose risks to workers’ offspring. FPPs, a source of growing controversy over the past decade, are likely to remain controversial, in spite of a recent Supreme Court decision invalidating one employer’s protection policy, and actions by Congress narrowing the scope of permissible discrimination. One reason for the controversial nature of FPPs is their situation at the nexus of three complicated, sometimes difficult areas of jurisprudence. The first of these is the relatively new field of biomedical legal analysis, which evolves continually to keep pace with rapid developments in medical science. The second area is the volatile and polarized sphere of reproductive rights. Third, gender-discrimination law is an area of continuing struggles to overcome outmoded attitudes and antiquated practices that reflect lingering stereotypes about the proper roles of men and women in society. In March 1991, the Supreme Court handed down its decision in *International Union v. Johnson Controls, Inc.* 1 Johnson Controls had barred all fertile women from most of the highest-paying jobs in the company’s battery manufacturing operations, on the grounds that lead in the work environment posed an unacceptable risk of damaging any presently gestating or as yet unconceived fetus. 2 The Court held

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2. The *New York Times* termed the case "[o]ne of the most important sex discrimination cases in recent years." Linda Greenhouse, *Justices Hear Arguments on Fetal Protection Policy*, N.Y. TIMES, Oct. 11, 1990, at A10. A partial list of the parties filling amicus briefs in the *Johnson Controls* case before the Supreme Court illustrates the variety of people who feel their interests to be implicated in the case. This list includes: ACLU; American Nurses Association; American Society of Law and Medicine; the states of Arizona, Connecticut, Delaware, Florida, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, Ohio, Oklahoma, Puerto Rico, Texas, Vermont, The Virgin Islands, Washington; Association of the New York City Bar;
this policy to be illegal gender discrimination, and an unacceptable way for an employer to control liability or prevent harm to workers' unborn offspring.

Johnson Controls has clarified certain ambiguities in the law regarding the proper role of employers in protecting employees' fetuses. The case also appears to signal the present Court's commitment to scrutinize closely measures taken by private employers that tend to erode legislative and judicial guarantees of equality of opportunity for women in the workplace. However, it has not answered certain important questions underlying the debate over fetal protection policies. The outcome of this debate will have profound implications for employers, employees, and the unborn or unconceived babies whom fetal protection policies ostensibly aim to protect.

Johnson Controls came to the Supreme Court in the form of a sex discrimination case under Title VII, and much of this article analyzes fetal protection issues under that rubric. However, interests at stake in the fetal protection debate extend beyond those that Title VII is designed to protect. For this reason, the resolution of the Johnson Controls case takes only one, albeit an important, step in grappling with the important task of balancing the interests of workers and their unborn offspring, employers, and society at large.

In late 1991, after Johnson Controls was decided, Congress passed the Civil Rights Act of 1991. Like Johnson Controls, this bill affects the way in which workers alleging employment discrimination may prove their cases. By overturning an earlier Supreme Court decision, Wards Cove Packing Co. v. Atonio, the 1991 Act has increased the burden on employers who would discriminate against workers for the sake of their unborn children.

This article analyzes the new restrictions on fetal protection policies imposed under Title VII, as interpreted in Johnson Controls and as subsequently amended by the 1991 Civil Rights Act, and the prospects for future attempts to protect employees' offspring. Part I of this article discusses the interests at stake in the debate over workplace fetal protection policies, and Part II examines the legal history and societal context of these policies. Part III explores the limits on the Court's current FPP jurisprudence under Title VII, and argues that the Court should have

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Central New York Council on Occupational Safety and Health; Environmental Defense Fund; Massachusetts Executive Office of Labor; NAACP Legal Defense and Education Fund; National Black Women's Health Project; Natural Resources Defense Council; NOW Legal Defense and Education Fund; U.S. Equal Opportunity Employment Commission.

6. See infra note 74 and accompanying text.
gone further than it did in Johnson Controls. The Court’s analysis has left loopholes through which fetal protection policies may still squeeze.

A proper construction of Title VII should completely deny employers recourse to a defense of fetal protection against charges of gender discrimination. However, this may be a matter for Congress, not the Court, to address. Part IV argues that even though such a construction of Title VII might leave some infants at risk, from a policy standpoint, it is proper and even desirable. This outcome preserves the operation of Title VII originally intended by Congress, as reiterated by the passage of the 1991 Act. In addition, it prevents the establishment of unintended and undesirable precedent that might leach into other areas of the law. Finally, by denying employers protection under Title VII to impose private fetal protection regimes, this construction leaves the decision-making in this area to the proper parties: either the individual employee and parent or, should it choose to act, Congress.

The article concludes that this society may yet have to choose between ensuring equal opportunity for women in the workplace and minimizing risks to unborn infants. However, such a choice is properly reserved for Congress or, at a minimum, should be explicitly addressed by the courts: the Supreme Court appropriately rejected the attempt of a private employer to impose its own decision about this issue on its employees. The article’s other major conclusion is that, though Johnson Controls is a hopeful first step, the job of defining limits in the fetal protection field remains substantially incomplete.

I

THE CONFLICTING INTERESTS IN THE FETAL PROTECTION POLICY DEBATE

Fetal protection policies implicate a unique collection of concerns and interests in the area of gender discrimination. Cases where exposure to lead is the feared risk (as was the case at Johnson Controls) bring these issues into stark relief. The evidence presented by employers in these cases suggests that elevated levels of lead in the bloodstream pose a reproductive danger that is transmitted only through exposed women, not through exposed men.\(^7\) Analysis indicates that lead exposure poses more of a developmental than a strictly reproductive hazard,\(^8\) and that levels considered sufficient to damage the developing fetus are insufficient to harm the reproductive organs or gametes of either men or women.\(^9\) In addition, Johnson Controls maintained that, because of the time required

\(^7\) See, e.g., Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548-49 (11th Cir. 1984); Johnson Controls, 886 F.2d at 889-90.
\(^8\) Johnson Controls, 886 F.2d at 880-81.
\(^9\) Hayes, 726 F.2d at 1550.
to clear lead out of the bloodstream; removing a woman from lead exposure as soon as she became pregnant would not avert the risk of damage.\footnote{International Union v. Johnson Controls, Inc., 886 F.2d 871, 892-93 (7th Cir. 1989), rev'd, 111 S. Ct. 1196 (1991).} Thus, according to this analysis, not only pregnant women, but all women capable of becoming pregnant risk transmitting the harm of lead exposure to future fetuses. Because of these claims, the Johnson Controls FPP presents a good model for examining the various interests implicated by such policies in general.

Battery manufacturer Johnson Controls, Inc. adopted its fetal protection policy in 1982 “to prevent unborn children \textit{and their mothers} from suffering the adverse effects of lead exposure.”\footnote{Id. at 874 (emphasis added). The court does not comment on this note of paternalism, which enters the policy from its very outset. It is, after all, impermissible to discriminate in employment with the aim of “protecting” a woman (whether pregnant or not) from a danger that threatens men and women equally. \textit{See infra} note 147 and accompanying text. The court states that the Johnson Controls policy was maintained to “protect \ldots pregnant women and their unborn children from dangerous blood lead levels.” 886 F.2d at 876 (emphasis added).} The policy applied to all women of childbearing \textit{capacity}: “[a]ll women except those whose inability to bear children is medically documented.”\footnote{Id. at 876 n.8.} Women lacking evidence of sterility were barred from jobs in lead-laden work environments,\footnote{Id. at 876. The policy excluded women from every area where any employee had been discovered to have a blood lead level greater than 30 g/dl during the preceding year, or from which a sample of air had been taken in the past year containing concentrations greater than 30 g/m$^3$. \textit{Id.}} as well as from any position from which they could be promoted into such an environment.\footnote{Id. Initially, the policy allowed women already in positions in lead-laden areas to remain in their jobs if they chose, as long as their blood lead levels remained below the 30 g/dl target. \textit{Id.} This “grandfather clause” provided that women already in higher-paying positions who failed to maintain acceptable blood levels would be transferred to other jobs in Johnson Controls’ operation at the same pay and benefit level. \textit{Id.} This case-by-case approach was not considered for women generally. \textit{Id.}}

At first blush, the clash of interests in the FPP context seems much like that found in any sex discrimination case brought under Title VII. The women plaintiffs\footnote{The plaintiff class, defined as “all past, present and future production and maintenance employees \ldots affected by [Johnson Controls'] Fetal Protection Policy,” included men. One of the named plaintiffs, for instance, was Donald Penney, who had asked for and been denied permission to take a leave of absence in order to lower his blood lead level sufficiently to permit him to safely father a child. \textit{International Union v. Johnson Controls, Inc.}, 111 S. Ct. 1196, 1200 (1991). This article does not address the interest of men in equal treatment under FPPs.} in \textit{Johnson Controls} argued that they were being
discriminated against through denial of specific economic opportunities and the right to make choices about their own employment, purely on the basis of gender. The employer, for its part, advanced its interest in freedom of choice and in the ability to operate its business as it saw fit.

But the issue of protecting the fetus from toxic hazards in the workplace involves interests beyond those found in the standard Title VII discrimination case. First, FPPs—by treating nearly all women as potential childbearers—pose a threat to women's interest in control over their own bodies and reproduction. Second, through FPPs, employers arguably seek to vindicate their interests in not being forced to participate in harming a young child (or to incur financial liability for that harm). Third, while society retains an interest in safeguarding its standard Title VII interests (preventing discrimination and enhancing equal opportunity), the FPP context also impinges on societal interests not otherwise prominent in a Title VII action. These are an interest in the health and capacity of future generations, and an interest in avoiding the burden of "government financed programs to train or maintain a handicapped child . . . and to provide the child with the training necessary to overcome the mental and physical harm attributable to lead exposure."

The special complexity of fetal protection issues, however, stems from the presence of a fourth set of interests not usually found in the Title VII equation: those of the child (or potential child) of the female employee. The legal waters become so muddy in this area precisely because, by establishing a fetal protection policy, employers assert not only that fetuses have an interest in being born healthy, but also that they, as employers, may properly champion this interest.

The extent of the interests of the unborn, or the not yet conceived, is unsettled in the law. It may be easy to speak of their right to life or to a certain quality of life, or merely to achieve their own individual potential, but the sources, extent and weight of such interests are murky and highly controversial, especially when they come into conflict with the rights or interests of the mother. In recent years, reconciling apparently divergent interests of mother and unborn child has been a source of complex and challenging litigation. Cases have investigated whether mothers may be compelled to undergo invasive surgical procedures for the benefit of their

16. Id.
17. Id. at 1197-98.
18. Johnson Controls, 886 F.2d at 897-98 n.39 (citing, as examples, cases upholding motorcycle helmet laws).
19. Employers are not actually asserting the interests of employees' fetuses. In most cases, the interests are somewhat more attenuated than this. In fact, the employers are seeking to protect the "interests" of the potential (not actual) fetuses of some (not all) of their female employees from possible harm of an as yet uncertain character and extent. See infra notes 171-84 and accompanying text.
gestating fetus, whether a mother may be forced to ingest (or forgo) certain foods or drugs for the benefit of her unborn child, and whether a mother may be held criminally liable for things that she does or fails to do while pregnant. In addition, of course, the issue of abortion intimately implicates the relative rights of a mother and her developing embryo or fetus. In no modern case, however, has the potential mother been constrained in her actions or opportunities on the grounds that she might one day become pregnant—in no case, that is, outside the employment context, where the potential liability of another party, the employer, enters the picture. In 1990, Johnson Controls brought such a case before the Supreme Court.

The Seventh Circuit, sitting en banc, had affirmed the lower court’s grant of summary judgment in favor of Johnson Controls, upholding the validity of the company’s fetal protection policy under Title VII. In a unanimous decision, the Supreme Court reversed the Seventh Circuit. In the majority opinion and two concurring opinions, six Justices declared the Johnson Controls fetal protection policy to be an outright violation of Title VII. The remaining three Justices would have reversed

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20. See, e.g., In re A.C., 573 A.2d 1235 (D.C. Cir. 1990) (en banc) (vacating lower court order compelling terminally ill mother to undergo a Caesarean section to prevent death of fetus and directing on remand, that question of what is to be done is decision for patient or incompetent patient’s guardian ad litem or counsel).

21. Jefferson v. Griffin-Spalding County Hosp. Auth., 274 S.E.2d 457 (1982) (denying motion to stay a court-ordered transfusion and Cesarean section). The In re A.C. court also noted that “over the five years preceding [a recent national survey] there were thirty-six attempts to override maternal refusals to proposed medical treatment,” including thirteen cases where orders requiring Cesarean sections were issued. 573 A.2d at 1243 (citing Kolder, Gallagher & Parsons, Court-Ordered Obstetrical Interventions, 316 NEW ENG. J. MED. 1192, 1192-93 (1987)). In People v. Pointer, 199 Cal. Rptr. 357, 362-366 (Cal. Ct. App. 1984), the court reviewed a condition of probation prohibiting a woman convicted of child endangerment from conceiving a child while on probation. The woman’s child endangerment conviction stemmed from following a strict macrobiotic diet which had affected the development of her children and jeopardized the life of the child she was nursing. Id. at 359-60. The court ruled that the prohibition of conception was overly broad, but that the less restrictive means of monitoring the woman’s pregnancy status and imposing pre- and postnatal requirements were appropriate. Id. at 365-66.

22. As to criminal prosecution of women for their treatment of their own bodies while pregnant, see generally Dawn Johnsen, From Driving to Drugs: Governmental Regulation of Pregnant Women’s Lives after Webster, 138 U. PA. L. REV. 179 (1989).

23. Courts occasionally consider the interests of parties other than the mother or the child. Primarily, courts have considered the interests of the father, other immediate family members, and society as a whole. See, e.g., Cruzan v. Department of Health Serv., 497 U.S. 261 (1990).


26. Johnson Controls, 886 F.2d at 901.

27. 111 S. Ct. at 1210.

28. Id. at 1209-10 (holding that “Title VII . . . forbids sex-specific fetal-protection policies”); Id. at 1216 (Scalia, J., concurring in the judgment) (“[T]reating women differently ‘on the basis of pregnancy’ constitutes discrimination ‘on the basis of sex.’”).
on the ground that the grant of summary judgment was not warranted on the facts before the court.\textsuperscript{29}

To understand the significance of \textit{Johnson Controls}, it is necessary to place the case into the broader context of standard Title VII doctrine. The Seventh Circuit's \textit{Johnson Controls} opinion is a useful starting point for this inquiry. That court purported to analyze Johnson Controls' FPP in such a way as to give "meaningful and thoughtful consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child."\textsuperscript{30} The way in which these various interests interact under Title VII, including the extent to which they are cognizable at all, is the focus of the next part of this article.

\textbf{II}

\textbf{THE LEGAL HISTORY OF FETAL PROTECTION: FROM \textit{MULLER} TO \textit{JOHNSON CONTROLS}}

Burdening women to safeguard their ability to bear healthy children has a venerable history. In 1908, in upholding an Oregon statute restricting the workday of women employed in "mechanical establishments" to ten hours per day, the Supreme Court, stated:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . [A]s healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.\textsuperscript{31}

The issue of formal corporate fetal protection policies, however, arose more recently in the legal system. In \textit{Oil, Chemical \& Atomic Workers v. American Cyanamid Co.},\textsuperscript{32} a much-publicized 1980 challenge to American Cyanamid's fetal protection policy brought under the Occupational Health and Safety Act of 1970 (OSHA),\textsuperscript{33} the Court of Appeals for the District of Columbia (hereinafter D.C. Circuit) declined to strike down the company's policy.

The policy presented certain American Cyanamid female employees with a grim choice: submit to voluntary sterilization, with the company covering the cost, or be fired.\textsuperscript{34} In response to this policy, the Secretary of Labor (stretching the language of the general duty clause of OSHA\textsuperscript{35})

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1210 (White, J., concurring in part) ("The Court erroneously holds . . . that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy.").
\item \textit{Johnson Controls}, 886 F.2d at 893 (emphasis in original).
\item \textit{Muller v. Oregon}, 208 U.S. 412, 421 (1908).
\item \textit{American Cyanamid}, 741 F.2d 444 (D.C. Cir. 1984).
\item \textit{29 U.S.C. §§ 651-678 (1988) [hereinafter OSHA or OSH Act].}
\item \textit{American Cyanamid}, 741 F.2d at 446.
\item The general duty clause reads, in part:
\item "(a) Each employer -
\item (1) shall furnish to each of his employees employment and a place of employment which are free
\end{enumerate}
\end{footnotesize}
cited American Cyanamid, charging that its policy created an unacceptable hazard of employment. However, the Occupational Safety and Health Review Commission held that the Secretary's citation failed to allege a violation cognizable under the Act and refused to invalidate the policy. Observing that the fetal protection policy was "neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities," the Commission concluded that the policy was not within the conception of what Congress sought to regulate under OSHA. In the Commission's words: "The definition of hazard proposed by the Secretary [which encompassed requiring a woman to be sterilized in order to keep her job] is not, under any fair reading of the legislative history, substantially comparable to the concept of hazard entertained by Congress in passing [OSHA]."

A panel of the D.C. Circuit, in an opinion authored by Judge Robert Bork, upheld the policy. Significantly, the court, given the opportunity to review a policy implicating the entire complex of fetal protection issues, expressly withheld judgment on whether Cyanamid should be considered "innocent" because it had offered women the opportunity to choose between remaining fertile and having a job, or "guilty" because it "offered an option of sterilization that the women might ultimately regret choosing." According to the court, such a characterization was a matter for legislative judgment. "Congress has enacted a statute," the court concluded, "and our only task is the mundane one of interpreting its language and applying its policy." Agreeing with the Review Commission, the court held that the plaintiffs' claim was not cognizable under OSHA because forcing a woman to choose between sterilization and employment from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1) (1988).

37. Id., at 1600-01.
38. Id. at 1600.
39. Id. This narrow construction of "work or work-related activities" from the OSH Act relates to the very broad construction the Seventh Circuit later gave to Title VII's analogous statutory language, "normal operation of [a] particular business." See infra notes 181-84 and accompanying text.
40. American Cyanamid Co., 9 O.S.H. Cas. (BNA) at 1600-01.
41. American Cyanamid, 741 F.2d at 445. The panel included Judge (now Justice) Scalia.
42. Id.
43. Id. at 450. As authority for this proposition, the court cited Corning Glass Workers v. Brennan, 417 U.S. 188 (1974), an Equal Pay Act case that addressed the meaning of the phrase "working conditions" and held such a term should be given content by reference to "the language of industrial relations" in which context the notions conceived of in the bill had been understood. 741 F.2d at 450 (citing 417 U.S. at 202). In contrast to the Seventh Circuit, the Supreme Court, particularly in Justice Scalia's concurrence, narrowed the scope of interpretation given to congressional language. Johnson Controls, 111 S. Ct. at 1216. Thus, although the outcomes differed in their effect on women, American Cyanamid and Justice Scalia's Johnson Controls concurrence share a certain methodological consistency.
protection was not the type of workplace "hazard" Congress had intended OSHA to regulate.\textsuperscript{44}

It should be emphasized that this opinion does not stand for the proposition that fetal protection policies that discriminate against fertile women for the sake of their potential offspring are lawful. Rather, it simply holds that OSHA does not prohibit such policies.\textsuperscript{45} The court specifically avoided the question of the policy's legality \textit{outside of the OSHA context}.\textsuperscript{46} The tensions explicitly sidestepped over a decade ago in \textit{American Cyanamid} remain unreconciled today, and were very much in evidence in the \textit{Johnson Controls} case. While the Johnson Controls policy lacked \textit{American Cyanamid}'s more ghoulish aspect (the aid and encouragement that company policy gave female employees to undergo sterilization), the basic clash of interests remained, arising this time in the context of a Title VII sex discrimination suit rather than an occupational safety challenge.

\textbf{A. Standard Title VII Framework for Sex Discrimination Analysis}

Fetal protection policy cases under Title VII depart somewhat from the standard framework of Title VII sex discrimination cases. Nevertheless, because they continue to use important elements of that framework, it is necessary to understand the standard framework in order to make full sense of the departure. This article does not undertake to explicate fully this complicated area of law, already so carefully addressed by others;\textsuperscript{47} a brief overview of Title VII jurisprudence suffices to illuminate the discussion that follows.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national ori-

\begin{itemize}
\item \textsuperscript{44} 741 F.2d at 450.
\item \textsuperscript{45} \textit{Id.} at 447. This narrowness of scope notwithstanding, the circuit court's decision in \textit{American Cyanamid} is worth considering in the context of current challenges to fetal protection policies under Title VII for what it reveals about the assumptions underlying fetal protection policies and the general tension between fetal rights and women's rights.
\item \textsuperscript{46} The court noted, in fact, that "[i]t has been suggested that what occurred here may be an 'unfair labor practice' under the National Labor Relations Act or forbidden sex discrimination under Title VII of the Civil Rights Act of 1964." 741 F.2d at 450 n.1. A separate suit was brought under Title VII at the same time as \textit{American Cyanamid}, which the company settled. \textit{Id.} Additionally, the Commission, upholding the administrative law judge's decision in favor of American Cyanamid, did so specifically on the grounds that the OSH Administration was preempted from exercising jurisdiction in the matter by (among other things) the likelihood that the issue fell within Title VII "as amended by the Pregnancy Discrimination Act, . . . as possible sex-based discrimination." \textit{American Cyanamid Co.}, 9 O.S.H. Cas (BNA) at 1597-98.
\end{itemize}
The intent of Congress in enacting Title VII, the Supreme Court has said, was to remove the "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." This declaration of principle at least suggests its own negative: that in some situations, natural, reasoned or necessary barriers to employment, based on or correlated with otherwise "impermissible" classifications, may be allowed. The difficulty in Title VII cases, once discrimination has been demonstrated, is to convince the court that the discrimination is justified.

The course of Title VII litigation has developed two closely related defenses that an employer may raise to the charge of improper discrimination. One applies to policies that discriminate explicitly ("facial discrimination" or "disparate treatment" cases), while the other applies where the discernable effect of a policy is to discriminate against a protected class of people though the policy is not, by its explicit terms, discriminatory (so-called "disparate impact" cases).

1. **Facial Discrimination Cases and the Bona Fide Occupational Qualification Test**

An employment policy that states, either explicitly or covertly, that "women need not apply" is facially discriminatory. Not all facial discrimination is forbidden under Title VII. For example, cases have permitted restricting obstetrical nursing positions to women in solicitude for the patients' privacy interests. The difficulty comes, however, in trying...
to identify legitimately sex-specific jobs, without reference to the very stereotypes and prejudices that Title VII was designed to uproot. 53

To identify such positions, courts ask whether gender is a "bona fide occupational qualification," (BFOQ), for the job to be performed. 54 This term, and the defense, developed by the courts, that it affords an employer for explicit discrimination, comes straight from Title VII. Section 2000e-2 of the statute allows an employer to discriminate on the basis of one of the protected categories if the discrimination is based on "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." 55

An employer who would exclude members of one sex from a certain position must demonstrate that "the essence of the business operation would be undermined by not hiring members of one sex exclusively." 56 This "essence" test was first embraced by the Supreme Court in Dothard v. Rawlinson, 57 which upheld an Alabama hiring regulation within the state prison system that "explicitly discriminate[d] against women on the basis of their sex." 58 The Court found that a BFOQ justified the practice of excluding women from positions that brought them into contact with prisoners at an all-male penitentiary. 59 In a prison largely populated with sex offenders, the Court reasoned, the female guard's "very woman-

grounds, 671 F.2d (8th Cir. 1982) (female BFOQ for obstetrical and gynecological nurses in recognition of patients' privacy interests).

On the other hand, the right of producers to hire men to play male roles and women to play female roles is often cited as a classic bona fide occupational qualification. Yet even certain nearly-universally accepted categories of "men's" or "women's" work, such as male actors playing male roles, are breaking down. In earlier times, women's roles in Shakespearean dramas were played by men, as are female roles today in Japanese Kabuki theater. A woman has recently played a familiar male Shakespearean lead, Falstaff, at Washington D.C.'s Folger Theater. Mervyn Rothstein, An Artful Falstaff Who Transcends Sex, N.Y.TIMES, June 7, 1990, at C17.

53. The position we now call "flight attendant," for example, was long considered the exclusive domain of women (not so much by women themselves, perhaps, as by the male airline executives who employed them). This practice finally fell before Title VII challenges in a series of cases that helped shape the doctrine as it relates to sex discrimination. See Johnson Controls, 111 S. Ct. at 1205 for citations and discussion.

54. Johnson Controls, 886 F.2d at 893-94.


58. 433 U.S. at 332. In Dothard, a female applicant was denied employment in an Alabama correctional facility because she did not meet the physical requirements established by state statute for all law enforcement officers. It should hence be noted that Dothard was not a true facial discrimination case. The Dothard Court's footnote following the language quoted here noted that, "[b]y its terms," the challenged Alabama regulation applied to both exclusively male and exclusively female jobs. But the district court found that the regulation was the administrative means by which the Corrections Board carried out its policy of not hiring women for contact positions in all-male penitentiaries, positions which accounted for 75% of the available correctional counselor jobs in the prison system. Id. at 332-33 n.16.

59. Id at 334.
hood” would undermine her ability to provide prison security, maintenance of which “is the essence of a correctional counselor’s responsibility.”

Though *Dothard* upheld an instance of discrimination based on a BFOQ, the Court took the opportunity to narrow the applicability of the defense, describing it as “an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” The hiring policy for Alabama prisons passed muster only because of the uniquely hostile atmosphere of the Alabama penitentiary system. “In the usual case,” the Court observed, “the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.” In the words of Justice Marshall’s dissent: “The Court properly rejects two proffered justifications for denying women jobs as prison guards. It is simply irrelevant here that a guard’s occupation is dangerous and that some women might be unable to protect themselves adequately.”

In *Dothard*, the Court also endorsed an alternate formulation of the BFOQ test, stating that an employer can rely on a BFOQ exception when it can demonstrate “reasonable cause” or “a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.”

Since *Dothard*, courts confronted with facially discriminatory policies have consistently applied the narrow BFOQ test articulated in *Dothard*. The burden of proving that the essence of the business would be undermined, or that all or substantially all members of the class would...

60. *Id.* at 336. The Court explained that in a prison that housed sex offenders “[t]he likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel.” *Id.*

61. *Id.* at 336-37.

62. *Id.* at 334. The Court points out that, in the case of a state employer, this level of scrutiny would be, “at the very least,” as strict as that required under the Equal Protection Clause analysis. *Id.* at 334 n.20. While the Equal Protection Clause of the Constitution does not, of course, constrain private employers, the analogy provides a useful standard against which to measure the duty required of such private actors.

63. *Id.* at 334. Indeed, the Court termed the conditions of overcrowding and dormitory-style warehousing of inmates in the Alabama prisons “constitutionally intolerable.” *Id.* The observation that it was something about the job, rather than something about the female job applicants, that ought to be changed offers an interesting foreshadowing of one important critique of the Johnson Controls fetal protection policy.

64. *Id.* at 335.

65. *Id.* at 341 (Marshall, J., dissenting in part).

66. *Id.* at 333 (quoting *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969)).

67. See, e.g., *Western Air Lines v. Criswell*, 472 U.S. 400, 412-17 (1985); *Weeks*, 408 F.2d at 232. Courts have employed this test both in the rare cases where the challenged hiring policy explicitly stated that “women [or men] need not apply” as well as in cases like *Dothard*, where the court...
be ineffective, falls on the employer.\textsuperscript{68} In addition, following Dothard, the BFOQ inquiry has also evolved to include a requirement that the employer demonstrate that no less discriminatory avenue is open by which to meet the same bona fide business ends.\textsuperscript{69} Only after these elements have been proved may the BFOQ be relied on to justify intentional (not to be confused with invidious) discrimination.


The other, generally less onerous and more frequently invoked defense to a charge of Title VII violation was judicially created. The "business necessity" defense was first articulated by the Supreme Court in Griggs v. Duke Power Co.\textsuperscript{70} "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."\textsuperscript{71} Subsequently, the Court considerably altered this defense, in Ward's Cove Packing Co. v. Atonio,\textsuperscript{72} by holding that the burden of persuasion in a case of disparate impact discrimination ultimately remained with the plaintiff at all times.\textsuperscript{73} Finally, in passing the Civil Rights Act of 1991, Congress expressly repudiated major aspects of the Supreme Court's reasoning in Ward's Cove and returned much of the law of this area to its pre-Ward's Cove state.\textsuperscript{74}

An employer may be able to resort to the business necessity defense when a plaintiff charges that a rule or requirement of employment that is neutral on its face, applying to men and women equally, in operation produces disproportionate exclusion of one sex. The Griggs Court stepped beyond the express provisions of Title VII at that time when confronted with a facially neutral employment policy that was "fair in form, but discriminatory in operation"\textsuperscript{75} (in this case to the disadvantage of black employees). The Court held that, whether discrimination was intended or merely incidental to an employment practice, "[t]he touch-
stone [for judging the legality of such a practice] is business necessity."

Recall that, with respect to the BFOQ, analysis focuses on the favored group and the employer's subjective intent. To rebut the presumption of subjective discriminatory intent that attaches to a facially discriminatory policy, the employer must demonstrate that all or substantially all members of the group have a characteristic which allows them, but not the disfavored group, to perform the essence of the work. The business necessity defense, on the other hand, looks at the discriminatory hiring practice. The question here is whether the hiring practice is or is not related to job performance. A policy that has a disparate impact on a protected group will be excused if the employer can establish a business necessity for it. In articulating this test, the Supreme Court has said that "the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."

In areas of Title VII law outside of the sex discrimination context, the two defenses outlined here are not, strictly speaking, mutually exclusive. In sex discrimination cases, however, "clear disparate impact discrimination will be tested by business necessity and clear disparate treatment discrimination will be tested by a BFOQ defense."

3. The Short-Lived Impact of Wards Cove

Initially, the BFOQ and the business necessity defenses closely resembled each other. The Supreme Court's decision in Wards Cove, however, drew a stark and significant line between the two. Wards Cove announced the rule, which many found a shocking reversal of eighteen years of precedent, that the "ultimate burden of proving that discrimi-
nation has been caused by a specific employment practice remains with the plaintiff at all times.\textsuperscript{85} Confronting a prima facie case of disparate impact, the Court held that, while the employer had the burden of producing evidence of a business justification for the allegedly discriminatory policy, the burden of persuasion remained with the plaintiff.\textsuperscript{86}

In placing the burden of persuasion squarely on the plaintiff in this way, the Court professed to be following standard Title VII doctrine.\textsuperscript{87} Indeed, expeditions through legal precedent turn up language that supports the Court's contention.\textsuperscript{88} Nevertheless, many, including the Johnson Controls parties,\textsuperscript{89} were caught off guard by what in fact was a significant change, upsetting long-standing assumptions about burdens of proof in disparate impact cases.\textsuperscript{90}

The distinction that Wards Cove sought to draw between business necessity and the BFOQ was of particular importance in the context of fetal protection policy. In cases up to and including the Seventh Circuit's Johnson Controls decision, fetal protection policies had been analyzed in a unique manner: though often facially discriminatory, they were nevertheless analyzed under a disparate impact/business necessity framework.\textsuperscript{91} Thus, because the chief pre-Johnson Controls fetal protection policy cases discussed in this comment\textsuperscript{92} predated Wards Cove, much of

\begin{itemize}
\item 86. \textit{Wards Cove}, 490 U.S. at 659. Plaintiffs in \textit{Wards Cove} had attempted to demonstrate the existence of discrimination by showing that a cannery's hiring processes resulted in a statistical disparity between the racial distribution of people in "cannery jobs" on the cannery line and the distribution in various so-called "skilled" (higher-paying) positions. \textit{Id.} at 647. Because the array of specific hiring practices complained of in no way explicitly singled out persons of certain racial groups, the Court determined that the business necessity test should be applied rather than the BFOQ test. \textit{Id.} at 658. The Court went on to allocate the burdens of proof as it deemed appropriate in analyzing a challenge to practices that were entirely neutral on their face. \textit{Id.} at 659-60.
\item 87. \textit{Id.}
\item 88. \textit{Id.} at 670 n.14 (Stevens, J., dissenting).
\item 89. Johnson Controls was first argued on September 15, 1988. The record on which the arguments were submitted, for and against summary judgment, had of course been developed earlier. Wards Cove was decided on June 15, 1989, just ten days before the en banc rehearing of Johnson Controls. By that date, it was too late for the Johnson Controls plaintiffs to create a record adequate to sustain the burden of persuasion they now found themselves facing.
\item 90. During the debate over the Civil Rights Act of 1991, the refrain was often heard that Wards Cove had overruled or overturned Griggs. Senator Specter of Pennsylvania, for example, observed that: "In the Griggs case in 1971 . . . the Court established what the standards would be where there was disparate impact. It was not easy, but America got along with that rule for 18 years . . . until Wards Cove, when the rule was turned on its head. The burden of proof was placed upon the employees. The standards of Griggs were changed. And that is what we are trying to correct here." 136 CONG. REC. S9828 (daily ed. July 17, 1990) (statement of Sen. Specter). This position was widely shared: "I want a bill that accomplishes what I think most of us want to accomplish, namely, the overruling of Wards Cove, taking the law back to where we were under the Griggs decision and subsequent cases." \textit{Id.} at S9836 (statement of Sen. Danforth).
\item 91. This approach is the opposite of that in Dothard, where a semantically neutral policy was deemed to exert disparate treatment. Dothard v. Rawlinson, 433 U.S. 321, 327 (1977).
\item 92. \textit{See infra} notes 102-139 and accompanying text.
\end{itemize}
their jurisprudence had been cast into doubt even before the Seventh Circuit decided Johnson Controls.93 (Since then, of course, the 1991 Civil Rights Act has returned the allocation of the disparate impact/business necessity burden to its pre-Wards Cove state).


One final piece of sex discrimination law bears discussion before turning specifically to the fetal protection policy cases. In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA").94 The PDA was a legislative response to the Supreme Court’s decision in General Electric v. Gilbert,95 which upheld a corporate policy of refusing payments to women for disabilities arising out of pregnancy.96 The legislative history of the PDA makes it clear that Congress enacted this amendment to Title VII in order to bring the status of pregnancy and the ability to bear children within the protection of the antidiscrimination statute.97

Structurally, the PDA augmented the definitional section of Title VII, expanding the category of protected persons by clarifying that the term "because of sex" includes "because of or on the basis of pregnancy, childbirth, or related medical conditions."98 This amendment expanded the scope of the prima facie case for sex discrimination that the law would scrutinize; it did not directly affect the substance of the Title VII defenses discussed above.99

Nowhere in the legislative history of the PDA did Congress consider the situation presented in fetal protection policy cases.100 Consequently, in applying the PDA to fetal protection policies, we may only extrapolate from similar issues that Congress did consider in acting on this legislation. For example, by intending that employers follow gender-blind policies even when those policies would be more expensive to administer for female employees than for males,101 Congress decided that the em-

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93. One analyst noted that the Wards Cove burden shift not only skewed the result in Johnson Controls, but would probably have reversed the outcome in prior fetal protection policy cases as well. Judge Easterbrook pointed out that, under the majority's approach to the burden of proof, Hayes would probably have been decided against, rather than in favor of, the plaintiff. Johnson Controls, 886 F.2d at 915 (Easterbrook, J., dissenting).
94. See PDA supra note 48.
95. 429 U.S. 125 (1976).
96. Id. at 127-28.
99. Johnson Controls, 886 F.2d at 904.
100. See H.R. REP. No.948.
101. H.R. REP. No. 948 at 4-6. For example, in the greater actuarial cost of women who live longer than do men, or in the higher cost of insurance to provide for pregnancy-related expenses, or in the cost to the company of pregnancy leave.
ployer’s interest in economy of operation does not outweigh the employee’s interest in equal treatment.\textsuperscript{102} It is not clear, however, that Congress intended to go so far as to balance the interests of women against those of the fetuses they carry. The PDA’s legislative history does not unequivocally justify the conclusion that the woman’s concerns should always prevail over fetal interests. But it remains clear in light of the PDA that the woman’s interest bears considerable weight.

This article turns now to a review of how the courts have applied Title VII principles to challenges against fetal protection policies, and analyzes the clarifications made by the Supreme Court in its \textit{Johnson Controls} decision.

\subsection*{B. Fetal Protection Policies Under Title VII: Earlier “Deemed Disparate Impact” Analysis}

\textit{Johnson Controls} was not the first challenge to a fetal protection policy under Title VII. At least four cases were brought before the Seventh Circuit’s decision, charging that employment policies ostensibly prompted by concern for the safety of employees’ fetuses violated Title VII.\textsuperscript{103} The two main cases cited extensively in the Seventh Circuit’s opinion were \textit{Wright v. Olin Corp.}\textsuperscript{104} and \textit{Hayes v. Shelby Memorial Hospital.}\textsuperscript{105}

In \textit{Wright}, the EEOC and a class of female employees challenged the “fetal vulnerability” policy of the Olin Corporation.\textsuperscript{106} The Fourth Circuit affirmed the district court’s basic determination that FPPs were not per se violations of Title VII, but faulted the district court for failing to apply “disparate impact/business necessity theory,” which it “conclude[d] . . . is best suited for a principled application of Title VII doctrine to the fetal vulnerability program.”\textsuperscript{107} The court then remanded

\textsuperscript{102} See \textit{Johnson Controls}, 111 S. Ct. at 1211-12 (White, J., concurring).

\textsuperscript{103} In two cases, hospitals sought to exclude from radiation-exposed areas women who were already pregnant. \textit{Hayes v. Shelby Memorial Hosp.}, 726 F.2d 1542 (11th Cir. 1984); \textit{Zuniga v. Kleberg County Hosp.}, 692 F.2d 986 (5th Cir. 1984). In one case, women not yet pregnant were excluded from areas containing harmful chemicals. \textit{Wright v. Olin Corp.}, 697 F.2d 1172 (4th Cir. 1982). In \textit{Doerr v. B. F. Goodrich Co.}, 484 F. Supp. 320 (N.D. Ohio 1979), plaintiff’s employer had recently adopted a policy barring women of child-bearing capacity from certain jobs which involved exposure to the chemical vinyl chloride. The court denied plaintiff’s motion for a preliminary injunction reinstating her in such a restricted position and dismissed the complaint without prejudice. \textit{Id.} at 325-26. \textit{Hayes} and \textit{Wright} thus formed the bulk of fetal protection policy case precedent. In \textit{Zuniga}, violation of Title VII was alleged, but the court did not reach the defenses in depth because it held that the fetal protection policy was a mere pretext for invidious discrimination. \textit{Zuniga}, 692 F.2d at 992.

\textsuperscript{104} 697 F.2d 1172 (4th Cir. 1982).

\textsuperscript{105} 726 F.2d 1543 (11th Cir. 1984).

\textsuperscript{106} \textit{Wright} 697 F.2d at 1192.

\textsuperscript{107} \textit{Id.} at 1185. See also \textit{id.} at 1186 (“possible applicability [of this theory] was not considered by the district court”).
the case for further factual determination of whether Olin's policy was "justified by sound medical evidence and instituted and maintained with no intent to discriminate on the basis of sex."\(^{109}\)

In *Hayes*, a hospital fired an X-ray technician when she informed her superior that she was pregnant, approximately two months after her hiring to work in the hospital's radiology department.\(^{110}\) The hospital had no formal fetal protection policy, but fired Ms. Hayes based on the opinion of the staff radiation safety director that exposure to radiation would harm Hayes' developing fetus.\(^{111}\)

Hayes sued and recovered damages of approximately $8,000 on a claim that the hospital had violated her rights under Title VII.\(^{112}\) The district court rejected both the "business necessity" and "bona fide occupational qualifications" defenses raised by the hospital.\(^{113}\) On review, the court of appeals stated that it agreed with the outcome in *Wright*\(^{114}\) and accepted the business necessity and BFOQ frameworks.\(^{115}\) The court approved the lower court's application of these rules to the facts of the case, holding both that the hospital had failed to rebut the presumption that the firing reflected a facially discriminatory policy and that management had failed to consider less discriminatory alternatives to achieve the hospital's professed end, protection of Hayes' fetus.\(^{116}\)

In addressing the fetal protection policy, first *Wright* and then *Hayes* diverged in an important way from the traditional Title VII framework.\(^{117}\) Common sense suggests that policies that affect only women

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108. Under Olin's policy, women between age 5 and 63 years of age were assumed fertile unless found by one of Olin's own doctors to be infertile. *Wright*, 697 F.2d at 1182. Even women incapable of bearing children could be excluded from restricted jobs unless the company's doctor found that they would not sustain "adverse physiological effects" from the restricted work environment. Id. While men in Olin's plants were warned about the hazards of lead exposure, as required by OSHA regulations, no restrictions were placed on male employees. *Id.*

Olin's policy separated its manufacturing processes into three categories of jobs. "Unrestricted jobs" were open to all women. *Id.* "Controlled jobs," which brought the employees into minimal contact with chemicals known or suspected to cause miscarriages (abortifacients) or birth defects (teratogens), were open to pregnant women only after individual case-by-case evaluations and after the employee had signed a form acknowledging her awareness of the risk involved. *Id.* The third category, "restricted jobs," were closed to all fertile women. *Id.* This category included jobs that Olin's management deemed to pose an unacceptable risk of exposure to the hazardous chemicals. *Id.*

109. *Id.* at 1176.

110. *Hayes*, 726 F.2d at 1546.

111. *Id.* at 1546.

112. *Id.*

113. *Id.* at 1546.

114. *Id.* at 1546 n.2.

115. *Id.* at 1548 ("Although we tend to agree that this is a facial discrimination case, to ensure complete fairness to the Hospital, we will also analyze this case under the disparate impact/business necessity theory.").

116. *Id.* at 1554.

117. See, e.g. Timko, supra note 14 at 174.
because only women can become pregnant are facially discriminatory. However, even after enactment of the PDA the lower courts were often reticent to state that fetal protection policies constituted facial discrimination and follow through by analyzing them under the BFOQ standard. While acknowledging that fetal protection policies that addressed in utero harm necessarily applied exclusively to people with functioning uteruses—that is, to women—the courts chose to analyze these cases under what this article will refer to as the "deemed disparate impact" theory. This analytic approach treated fetal protection policies as if they were facially neutral, applying the business necessity defense.

The courts appear to have been pushed in this direction by a tension between doctrine and policy. On the one hand, courts must fashion a coherent Title VII doctrine. On the other hand, they appear to have been groping for a way to implement a policy of protecting the health of the unborn (and reducing the liability exposure of the employers).

BFOQ analysis focuses on the employee, asking how her presence in the position would undermine the essence of the job. It also thrusts upon the employer the obligation of proving that no less discriminatory alternative exists. Such a showing would be very difficult to make for a fetal protection policy, perhaps even impossible, depending on the way "essence" of the business is defined. The court, for instance, held that "[p]otential for fetal harm . . . is irrelevant to the BFOQ issue." Courts, however, have seemed unsatisfied with this outcome. Responding to the unique interests implicated in the fetal protection context, courts have struggled to uphold policies that appeared to be discriminatory under Title VII, sometimes to the detriment of sound legal

118. The fact that only women can be fertile and that by far the vast majority of women workers are either actually fertile, or presumptively so under the various policies examined so far, makes the characteristic on which the discrimination is based at least as intrinsically related to femaleness as any other substituted characteristic the courts have examined. See, e.g., the description of Dothard, supra notes 57-65 and accompanying text, which found size and weight qualifications to be a surrogate for a simple requirement that applicants be male. It is possible to imagine cases where the characteristic is understood to substitute for a protected categorical characterization, for example excluding from the position of TV anchor people whose skin absorbs light at a certain frequency. Citing Griggs, the Wright court observed that "it has long been applied as well to policies whose 'facial neutrality' was only superficial in view of the palpable correlation between the gender of employees and its manifest consequences. See Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (no seniority accumulated during maternity leave.)." Wright, 697 F.2d at 1186.


120. Hayes, for example, held that the BFOQ defense required "the employer to show a direct relationship between the policy and the actual ability of a pregnant or fertile female to perform her job." Hayes, 726 F.2d at 1549. The court noted that such a case, while conceivable, "should be rare." Id. at 1549 n.9.

121. 29 C.F.R. § 1625.6(b) (1992).

122. Hayes, 726 F.2d at 1549.

123. Id. (quoting the lower court's decision, Hayes v. Shelby Memorial Hosp., 546 F. Supp. 259, 264 (N.D. Ala. 1982)).
reasoning.124

The Wright court, for example, started its analysis by noting that the fetal protection policy challenge "does not fit with absolute precision into any of the developed theories."125 In this context the court termed the distinction between the business necessity and BFOQ defenses subject to "logical dispute," but then stated that any such dispute would be a mere semantic quibble having "no relevance to the underlying substantive principle. . . ."126 The court objected to insisting on the distinction on the ground that policies expressed in neutral terms can be every bit as discriminatory as those that single out one protected class for overt discrimination.127 Oddly, however, it employed this insight as a justification for applying the less stringent business necessity test usually reserved for policies that are found to be facially neutral as opposed to merely pretextual.128

The court offered a circular and entirely conclusory explanation for this choice, stating that the BFOQ defense was inappropriate because, "if properly applied, it would prevent the employer from asserting a justification defense which under developed Title VII doctrine it is entitled to present."129 The Wright court was of the opinion that while the "loose equation" matching overt discrimination with the BFOQ defense was "properly descriptive of the paradigmatic litigation pattern," it did not reflect a constraint inherent in Title VII doctrine.130 In other words, the Fourth Circuit took the position that employers could choose between the broader business necessity defense and the narrower BFOQ defense, asserting whichever they found more advantageous. The court simply concluded without further discussion that, as between the BFOQ and the business necessity test, "the latter is best suited for a principled application of Title VII doctrine to the fetal vulnerability program."131 Rather than applying BFOQ doctrine as it had developed in gender discrimination cases generally, and reaching the logical conclusion that Title VII may not always allow employers to protect workers' unborn children, the Wright court modified the law to achieve its desired policy outcome.

124. The courts have found two ways in which to uphold this discrimination under Title VII. The first was to create this "deemed disparate impact" analysis, in order to apply the more accommodating business necessity defense. See infra notes 118-39. The other was to loosen up the strictures of the BFOQ, as the Sixth Circuit did in Grant v. General Motor Corp., 908 F.2d 1303 (6th Cir. 1990). The Johnson Controls appeals court opinion took both of these tacks.
125. Wright, 697 F.2d at 1184.
126. Id. at 1186. This may well be the case in the context of the Wright opinion, since it failed to differentiate the consequences of a finding of "facial discrimination" from those from a finding of mere "disparate impact." Id.
127. Id. at 1184.
128. Id. at 1183-84.
129. Id. at 1185 n.21.
130. Id.
131. Id. at 1185.
The *Hayes* court similarly applied "deemed disparate impact" analysis, though its rationale for doing so is even less clear. It stated that, "[a]lthough we tend to agree that this is a facial discrimination case, to ensure complete fairness to the Hospital, we will also analyze this case under the disparate impact/business necessity theory." The *Hayes* court then proceeded to further confuse matters by borrowing the elements of the *Wright* business necessity analysis and using them in a BFOQ analysis as well.133

In contrast to *Wright*, the *Hayes* court began with a "presumption" that a policy that applies by its terms only to women is facially discriminatory.134 Rather than applying the BFOQ analysis at that point, however, the court held that the employer may rebut this presumption by showing "(1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace, and (2) that the hazard applies to fertile or pregnant women, but not to men."135 These are the elements of the *Wright* business necessity defense.

The court continued, saying, that "[i]f the employer fails to overcome the burden of proving that its policy is not facially discriminatory, then its only defense is BFOQ."136 If the employer successfully rebutted the initial presumption, however, in the court's view the policy "effectively and equally protects the offspring of all employees"137 and should be analyzed under the business necessity defense. As in *Wright*, the reasoning of *Hayes* reduced to a circular argument. The court's framework essentially provided that, if a policy could pass the business necessity test, that test should be applied instead of the more stringent BFOQ analysis.

The *Wright* and *Hayes* approach, testing a fetal protection policy under a business necessity rather than a BFOQ standard, was analyzed and approved by the federal Equal Employment Opportunity Commission ("EEOC" or "Commission") in its policy statement on reproductive hazards.138 The policy statement commented that, although the BFOQ was normally the only defense available in cases of overt discrimination, the Commission concurred with *Hayes* and *Wright* that Title VII doc-

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132. *Hayes*, 726 F.2d at 1548 (emphasis added).
133. *Id.* at 1548 n.8.
134. *Id.* at 1548.
135. *Id.* at 1548 n.8 (citing *Wright*, 697 F.2d at 1190-91 and noting that the *Wright* court called this the business necessity test, whereas this court was allowing such a showing to rebut the charge of facial discrimination).
136. *Hayes*, 726 F.2d at 1549.
137. *Id.* at 1548.
trine should be "flexibly applied" in this "narrow class of cases."  

In separate ways, therefore, the Wright and Hayes courts succeeded in carving out a special set of tests for use in applying the requirements of Title VII to the fetal protection context. In both cases, the result was to allow application of the looser business necessity test on the theory that a "no fertile women" policy could be transformed from a facially discriminatory policy to a facially neutral one by the uniqueness of women's childbearing ability.

The majority of a divided Seventh Circuit invoked the Wright/Hayes line of precedent to uphold Johnson Controls' fetal protection policy against the Union's challenge. After reviewing and approving Wright, Hayes, and the EEOC Reproductive Hazards Policy, the court concluded that the business necessity defense could be raised to a Title VII challenge against a fetal protection policy because this defense properly balanced "the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." On this basis, the circuit court held that the district court had properly granted summary judgment because there was a complete failure of proof regarding one or more of the essential elements for which the Union (as the party opposing the motion) carried the burden of proof.

The Seventh Circuit's opinion painted a sympathetic picture of Johnson Controls' attempts to clean up its work environments and its exhortations to its female employees to refrain voluntarily from becoming pregnant while working in lead-laden areas. The court also set out the evidence it deemed to compel the conclusion that the risk of harm to female employees' offspring was significant and arose only through expo-

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139. Id. at 405-6614-15.
140. Johnson Controls, 886 F.2d at 885-86.
141. Fetal Hazards, supra note 138.
142. Johnson Controls, 886 F.2d at 886.
143. Id. at 888-93. The business necessity defense, as elaborated by this court, would exonerate a defendant if three conditions were met: the risk of harm was substantial and the harm was transmitted only through the female and there was no less onerous alternative. Id. at 886-87. The fact that the plaintiff bore the burden of proof meant that, to avoid summary judgment, he or she must meet the standard of evidence (i.e., preserve a "genuine issue for trial") on at least one of these elements. Id. at 888. The court pointed out that, with regard to the first and second elements of this business necessity test, Johnson Controls did not need to demonstrate a "general consensus . . . within the qualified scientific community. . . . It suffices to show that within that community there is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one." Id. at 888-89 (citing Wright, 697 F.2d at 1191). Because the level of proof required to make out the first and second elements of the business necessity test was rather weak, the plaintiff could not prevail merely by showing that there was a triable question of fact whether, for example, exposure of men might also pose a hazard to the fetus. Johnson Controls, 886 F.2d at 889-90. The plaintiff seeking to sustain the burden against a summary judgment motion must show, instead, that there was a triable question of fact concerning whether so many scientists believed that men might also be an avenue of exposure that the prudent employer would also exclude men from the hazardous area. Id. at 889.
144. Id. at 875-76.
sure of potential mothers, not through exposure of men.\textsuperscript{145} According to the court, "[t]he overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk involving a danger of permanent harm."\textsuperscript{146} In its decision, the court recited Johnson Controls' characterization of the policy as designed to prevent harm to the fetus and the mother.\textsuperscript{147}

In this opinion, the Seventh Circuit emphasized that it was following "the lead of the Fourth Circuit, the Eleventh Circuit and the EEOC in determining that the policies can be justified by the 'business necessity' defense."\textsuperscript{148} In fact, however, this line of authority represents little actual legal precedent. Indeed, it boils down to one case: Wright. Only Wright actually reached the question of the "deemed disparate impact" analysis and utilized the framework as part of its holding.\textsuperscript{149} Hayes did not involve a broad, explicit fetal protection policy, but rather considered a "policy" conjured up to defend the firing of a lone pregnant employee.\textsuperscript{150} Thus, only one case prior to Johnson Controls, Wright, actually held that the business necessity defense could be used to analyze a fetal protection policy.

One other task undertaken by the Seventh Circuit in its Johnson Controls opinion deserves notice here. The court devoted significant attention to the proposition that the Johnson Controls fetal protection policy could pass even the more narrow BFOQ test.\textsuperscript{151} In reviewing Johnson Controls, the Supreme Court firmly rejected the notion that fetal protection policies could be evaluated under the disparate impact analysis.\textsuperscript{152} The position of the Court on the question of BFOQ analysis, is not so clear, however.\textsuperscript{153}

\textsuperscript{145} Id. at 883.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 876. Discrimination to prevent harm to the mother is clearly impermissible if the company seeks to protect mothers from exposure to lead when such exposure would harm men in the same way as it would harm women. This looseness of language in the company's characterization and the fact that the court adopted the language as its own create cause for concern that neither was sensitive to Title VII's command that it is discriminatory to give women special "protection" not accorded men.
\textsuperscript{148} Id. at 883 (posing the question whether the court should follow this precedent), and id. at 886 ("We agree [with] the Fourth Circuit, the Eleventh Circuit and the EEOC in their conclusion that a business necessity defense may be utilized in a fetal protection policy case."). Johnson Controls' Respondent's Brief before the Supreme Court emphasized a similar position. The argument portion of that brief begins: "Every court of appeals considering the issue has concluded that, in narrow circumstances, medically validated fetal protection policies using gender classifications are lawful under Title VII. The EEOC, the federal agency charged with primary enforcement of Title VII, has consistently shared this view." Respondents' Brief at 15-16, Johnson Controls (No. 89-1215).
\textsuperscript{149} Wright, 697 F.2d at 1191-92.
\textsuperscript{150} Hayes, 726 F.2d at 1546.
\textsuperscript{151} Johnson Controls, 886 F.2d at 893.
\textsuperscript{152} Johnson Controls, 111 S. Ct. at 1207-08.
\textsuperscript{153} Id. at 1207.
To its credit, the Supreme Court’s Johnson Controls decision goes a considerable distance toward clarifying the confusion in the lower courts’ analyses of fetal protection problems under Title VII. Importantly, however, it does not completely shut the door on employer policies that discriminate against women for the sake of their future offspring. Nor does it fully address the underlying problem of fetal protection itself. The following part of this article will discuss the current status of the law under Johnson Controls.

III
CURRENT LEGAL CONTEXT: FETAL PROTECTION POLICIES UNDER TITLE VII AFTER JOHNSON CONTROLS

With its decision in Johnson Controls, the Supreme Court, to a substantial extent, clarified the status of FPPs, sharply restricting conditions under which employers may exclude women from the workplace in order to prevent harm to their fetuses.\textsuperscript{154} Though not all nine Justices joined in Justice Blackmun’s opinion for the Court, the Court was unanimous in reversing the Seventh Circuit’s decision.\textsuperscript{155} Still, questions remain regarding not only the status of fetal protection under Title VII specifically, but also the proper societal response to the possibility that fetuses may be harmed if their mothers work or have worked in unsafe environments. The Court failed to take the final, logical step in its reasoning: to declare that women, and not employers, are at all times empowered to decide questions of their own safety and that of their fetuses. Through this omission, the Court may have passed up the opportunity to significantly clarify and rationalize the framework of Title VII pregnancy discrimination analysis.

In Johnson Controls, the Court (Justice Blackmun, joined by Justices Marshall, Stevens, O’Connor, and Souter) appears to have held simply that “sex-specific fetal protection policies” are prohibited by Title VII.\textsuperscript{156} “Decisions about the welfare of future children,” wrote the Court, “must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents.”\textsuperscript{157} By focusing on the choice involved—“whether a woman’s reproductive role is more important to herself and her family than her economic role”\textsuperscript{158}—the Court identified the core decision in this debate and simplified the fetal protection issue.

The first step in the Court’s reasoning was to identify the proper

\textsuperscript{154} Id. at 1209-10.
\textsuperscript{155} Id. at 1210, 1217.
\textsuperscript{156} Johnson Controls, 111 S. Ct. at 1208-09.
\textsuperscript{157} Id. at 1207.
\textsuperscript{158} Id. at 1210.
Title VII framework under which to analyze Johnson Controls’ fetal protection policy. Because the policy “classifies on the basis of gender and childbearing capacity, rather than fertility alone,” the Court concluded it must be analyzed as a facially discriminatory policy. The Court thus rejected the “deemed disparate impact” approach of the Seventh Circuit and the previous FPP cases. The Court simply and properly rejected as “incorrect” the illogical conclusion of the Seventh Circuit that fetal protection cases did not involve facial discrimination “because the asserted reason of the sex-based exclusion . . . was ostensibly benign.”

Having determined that the BFOQ, and not business necessity, was the proper test to apply in determining whether the Johnson Controls FPP constituted justified discrimination, the Court reiterated the frequently repeated formulation that “[t]he BFOQ defense is written narrowly.” But the Court also went further, by asserting that the PDA imparts to the BFOQ test content specific to the question of whether women may be discriminated against on the basis of pregnancy. In the PDA, stated the Court, “Congress indicated that the employer may take into account only the woman’s ability to get her job done.”

The Court distinguished past pregnancy discrimination cases that discerned a BFOQ in discriminatory policies purportedly designed to ensure the safety of third persons. In these cases, the Court explained, the third parties potentially affected were “indispensable to the particular business at issue.” The Court rejected Johnson Controls’ contention that making batteries without harming fetuses was as much the essence of its business as carrying passengers without harming them is the essence of an airline’s business. The Court asserted that protection of “unconceived fetuses” fell outside the scope that the employer could legitimately claim as the essence of its business.

Following from its determination that fetal-protection itself may not be considered an essential part of the battery-making business, the Court

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159. Id. at 1203.
160. Id.
161. Id.
162. See supra notes 118-39.
163. Johnson Controls, 111 S. Ct. at 1203.
164. Id. at 1204.
165. Id. at 1206.
166. Id. at 1207 (citing Mary E. Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1255-56 (1986)).
167. Id. at 1205.
168. Id. (citing as examples: prisoners in Dothard; airline passengers in Title VII cases challenging restrictions on pregnant flight attendants and Age Discrimination in Employment Act challenge brought by flight engineer).
169. Id.
170. Id. at 1206.
easily declared that "Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."\textsuperscript{171} Nor was the Court willing to find a BFOQ\textsuperscript{172} in the extra cost that Johnson Controls might incur in hiring women: that is, the potential cost of tort liability for harm to employees' offspring.\textsuperscript{173} The Court determined that this too was an impermissible interest, which could not support a female infertility BFOQ: "We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them."\textsuperscript{174}

The linchpin of the Court's decision was its determination that "unconceived fetuses" fell outside the range of "third parties" whose protection might legitimate a discriminatory policy under a claim that the protection is at the essence of the employer's business.\textsuperscript{175} While the extent of the danger was not entirely clear on the basis of the record of this case, the Court must have realized that the presence of women employees in Johnson Controls' manufacturing process may indeed endanger the health of some fetuses. If risk to airline passengers is sufficient to allow the stewardess's employer to discriminate on the basis of pregnancy,\textsuperscript{176} how is risk to a fetus different?

The first, most obvious answer to this question is that the Court recognized the attenuated nature of the interest Johnson Controls claimed in fetal protection. Johnson Controls' policy did not actually focus on safeguarding fetuses; rather, it asserted the right to discriminate against all fertile women to protect the potential fetuses of some female employees from uncertain harm. In addition, however, the relationship of the stewardess to the passenger is distinguishable from the relationship of a female worker to her own fetus. The Court did not focus on this as an independent rationale, but it is crucial to understanding the reasoning of the case.

Rather than focus on this question of relationship, however, the Court explicitly based its decision on deference to the will of Congress.\textsuperscript{177} The Court reviewed the plain language of Title VII and the relevant legislative history to bolster its conclusion that Congress intended that there be no fetal protection BFOQ.\textsuperscript{178} It is especially important to recognize the tension in the Court's language and reasoning. On the one hand, it appears to broaden its holding into a virtual per se rule. (This is the

\begin{itemize}
  \item [171.] \textit{Id.} at 1207.
  \item [172.] At least in this case.
  \item [173.] \textit{Id.} at 1208.
  \item [174.] \textit{Id.} at 1209.
  \item [175.] \textit{Id.} at 1206.
  \item [176.] \textit{See, e.g.} Hariss v. Pan Am. World Airways, Inc., 649 F.2d 670, 675-76 (9th Cir. 1980).
  \item [177.] \textit{Johnson Controls.} 111 S. Ct. at 1206-07.
  \item [178.] \textit{Id.} at 1207.
\end{itemize}
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reading the concurrence expresses fears of when it complains that the majority's holding is that "the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy."

On the other hand, language within the same opinion tends to undercut such a reading. The analysis, however, is one-sided and unconvincing.

It is true that the plain language of Title VII and the PDA raises a question of whether fetal protection policies like that of Johnson Controls must be sanctioned under the BFOQ defense. To apply the BFOQ test, however, a court must determine the scope of the "particular business" with reference to which the degree of necessity of a discriminatory policy is then assessed. The answer to this inquiry does not flow nearly as inexorably as the Court suggests.

As the various opinions in the Johnson Controls litigation from the EEOC to the Supreme Court demonstrate, the scope given to the term "particular business" is likely to determine the outcome of the entire BFOQ inquiry. The Seventh Circuit, for example, defined Johnson Controls' business not merely as producing batteries but as "manufactur[ing] batteries in as safe a manner as possible." Other fetal protection cases have allowed similarly wide definitions.

The Court relied on the language of the PDA, which states that women who either are pregnant or may become pregnant must be treated like others "similar in their ability . . . to work." The plain language of the PDA bolsters the position that the BFOQ ought to be read narrowly so as to focus only on qualifications immediately pertinent to the production process and product. But, like the language of the BFOQ defense, this language too falls short of finally deciding the issue. The language added to Title VII by the PDA states: "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. . . ." Technically, the PDA merely added to the categories of individuals protected under Title VII, without changing the standard by

179. Id. at 1210 (White J., concurring).
180. See, e.g., Johnson Controls, 111 S. Ct. at 1209 ("We, of course, are not presented with, nor do we decide, a case in which costs [of allowing fertile women to work in a dangerous environment] would be so prohibitive as to threaten the survival of the employer's business.").
182. A definition can be devised to justify the exclusion of any group from a "particular business." For example, "maleness" would be a valid BFOQ if the court were to accept a definition of a particular business such as, for example, "the practice of law without the participation of women." While this example exaggerates the problem, it also illustrates the pivotal role played by the scope of this definition, which itself becomes (or compels) the conclusion.
183. Johnson Controls, 886 F.2d at 896.
184. See, e.g., Grant v. General Motors Corp., 908 F.2d 1303, 1311 (6th Cir. 1990) ("inordinate risk" to third parties, "including fetuses," in performing job justifies BFOQ).
185. Johnson Controls, 111 S. Ct. at 1206.
which the BFOQ is judged. In addition, as the Court noted, the language of the PDA appears to restrict the scope of what may be considered a BFOQ when it states that "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work. . . ." It strains the plain meaning of this language to suggest that a fertile woman is less able "to work" because she might one day become pregnant even if it is conceded that her child might be harmed because she works in a particular job. Yet the Seventh Circuit in effect determined that the job of battery-making required that batteries be made without harming fetuses, and Justice White's concurrence also raises the question whether the Supreme Court majority's opinion rests on irrefutable grounds. To reason from this "plain language" begs the question it seeks to answer: are two people "similar in their ability . . . to work" when the mere presence of only one of them in the battery assembly line may result in harm to a third party?

It is possible that the Court may have reasoned backwards from an intuitively attractive outcome to find a definition which "the language [of the statute] compels." After all, nothing in the language of Title VII compels either the broad conception of "particular business" applied to date by the fetal protection cases or the narrow one adopted by the Supreme Court in Johnson Controls.

Just as the plain language of the statute leaves open the proper definition of "business" and hence the scope of the BFOQ exception, the legislative history of Title VII and of the PDA falls short of providing the direct guidance the Court claims to find there on applying these statutes in a fetal protection policy case. The BFOQ provision, and the inclusion of sex as one of the protected categories, were last-minute innovations, added shortly before passage of the Civil Rights Act of 1964. As a result, the legislative history of these two provisions is "sparse." Cer-
tainly, the issue of fetal protection was never raised in 1964; nor was the interaction of Title VII and women's ability to bear children discussed at the time.195

If the legislative history of the PDA is more helpful, it is only by inference from the language used to discuss issues unrelated to the fetal protection question. The PDA established rules about employers' treatment of pregnant women.196 Congress arguably intended the PDA to address issues other than fetal protection, though fertility seems to have been a matter of concern to Congress for other reasons. This legislative history makes it clear, for instance, that the language of the amendment was intended to prohibit employers from taking account of certain secondary considerations, such as the greater cost of including women in a pension plan or the inconvenience of losing women from their workforce when they become pregnant.197

Comments can be drawn from the legislative history, however, that illustrate congressional motives and concerns underlying the PDA. For example, the House Report of the bill states that it makes "distinctions based on pregnancy per se violations of Title VII."198 The report further notes that, "[i]n using the broad phrase 'women affected by pregnancy, childbirth and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process."199 The report also states that "[u]ntil a woman passes the child-bearing age, she is viewed by employers as potentially pregnant. Therefore the elimination of discrimination based on pregnancy in these employment practices . . . will go a long way toward providing equal employment opportunities for women. . . ."200 Comments like these help direct the inquiry as to the proper handling of fetal protection under Title VII, in that they point to a concern for the rights of women. They indicate a strong intent to overcome what the Supreme Court later termed "myths and purely habitual assumptions" about a woman's role in society.201 It is not clear, however, that this commitment extends so far as to warrant a complete dismissal of those concerned with fetal safety.

This reticence to conclude that Congress has spoken clearly enough

Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII, 69 GEO. L.J. 641, 670 n.182 (1981) (termining the legislative history of these provisions "scanty").
195. See generally Williams, supra note 194 (discussing the congressional debates leading to passage of the legislation).
197. See supra notes 100-02. See also generally Williams, supra note 194.
198. H.R. REP. No. 948, supra note 97, at 3.
199. H.R. REP. No. 948 at 5.
200. H.R. REP. No. 948 at 6-7.
with respect to FPPs in Title VII and the PDA is justified by reference to other aspects of the legislative history of the PDA, most notably the debate over the status of abortion under the statute.\textsuperscript{202} Congress actively avoided the opportunity to address the “interests” of the fetus directly in the PDA debate in connection with the abortion question.\textsuperscript{203} As it relates to abortion, the PDA was structured to protect individual choice (both of the employee to have an abortion and of the employer not to have to fund it), but not to protect the fetus or balance its interests against those of the mother.\textsuperscript{204} But because a clear distinction can be made between depriving a fetus of the opportunity to live and bringing a person into the world substantially impaired, even the provisions of the PDA relating to abortion do not directly inform the fetal protection debate.

Nothing in the legislative history suggests that fetal protection was specifically contemplated when Congress struck its balance between the interests of employer and employee. It is hard, therefore, to see how this record can support an assertion that fetal protection is an overriding congressional concern.

How, then, did the Court reach its conclusion in Johnson Controls? That courts should reason backwards from a desired result in this sticky area of the law is not without precedent: that seems to be the history of the fertility BFOQ. Prior to the Supreme Court’s decision in Wards Cove,\textsuperscript{205} the possibility that an employer could successfully make out a BFOQ of female sterility was greeted with some skepticism.\textsuperscript{206} But because the courts (motivated partly by the belief that a fertility BFOQ case would be unwinnable) had created the “deemed disparate impact” analysis, it was seen as unnecessary to stretch the BFOQ in order to fit the fetal protection aim within it.\textsuperscript{207} After Wards Cove, courts and commentators who once appeared to believe the BFOQ required an impossibly strict showing on the part of the employer came to see it as necessary for the protection of the fetus (and therefore, apparently, no longer impossible). Thus, for example, the EEOC made an about-face on the subject, in

\begin{itemize}
\item \textsuperscript{202} H.R. Rep. No. 948 at 7.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. With a slight stretch, two principles could possibly be derived from the material on abortion in the PDA. One is that the employer cannot be required to participate in an activity that might harm the fetus. The other is that the employee has a right to control her reproduction with which the employer may not interfere as a condition of employment. While the first principle is not strong enough to support an employer’s right affirmatively to protect the fetus, the second is certainly a strong statement of a woman’s right to privacy and choice in such matters.
\item \textsuperscript{205} 490 U.S. 642 (1989). See supra notes 83-93 and accompanying text.
\item \textsuperscript{206} See, e.g. Hayes, 726 F.2d at 1548; Wright, 697 F.2d at 1185 n.21.
\item \textsuperscript{207} The Seventh Circuit’s Johnson Controls opinion found both the business necessity and BFOQ tests were met. 886 F.2d at 893. However, it was in a unique position because of the weakness of the record with which it was presented on appeal and its acceptance of the business necessity test as valid.
\end{itemize}
explicit response to the Seventh Circuit's application of the much-weakened business necessity test in *Johnson Controls*.

The BFOQ hurdle that courts recognized before *Wards Cove* still remained, however, when *Johnson Controls* came before the Seventh Circuit. This court's analysis was weakened by its reliance on the unsupported assertion of the employer's legitimate interest in protecting the employee's unborn child, and its BFOQ language helps to illuminate this flaw in the conceptualization of the fetal protection BFOQ. The court stated that the BFOQ must be "construed in a manner which gives thoughtful consideration to the interests of all those affected by a company's policy, in this case the employer, the employee and the unborn child." By figuring in the interest of the fetus, the court worked a significant expansion of the concept of "necessary to the . . . business" under Title VII to encompass this interest of the unborn, indeed the as-yet unconceived child.

The Seventh Circuit's analysis clearly illustrates the extent to which using the "deemed disparate impact" methodology in order to trigger a business necessity defense stacked the deck against the plaintiffs. The court recognized the importance of "flexibility" in adapting Title VII doctrine to fetal protection policies when it opted to treat what would otherwise be facial discrimination as a disparate impact case instead. Once that degree of flexibility was exercised, however, the court strictly observed the *Wards Cove* burden allocation without modification or sensitivity to the innovation that had initially brought the challenged policy under the "deemed disparate impact" rubric.

A favorable outcome for the employer seeking to make out a business necessity defense was nearly a foregone conclusion for any policy fashioned upon a modest basis of fact tending to show transmission of risk through the mother. The "deemed disparate impact" doctrine represented a determinative balance struck by the court, which favored the interests of the fetuses and potential fetuses over those of fertile wo-

208. Compare Fetal Hazards, supra note 138, with EEOC, *Policy Guidance on United Auto Workers v. Johnson Controls, Inc.*, 8 Fair Empl. Prac. Man. (BNA) 405:6797, 405:6803 (Jan. 24, 1990) [hereinafter EEOC policy]. This switch generally supports the inference that those charged with administering the antidiscrimination laws are motivated on the issue of fetal protection as much by seeing such policies justified as they are by fashioning a coherent policy to protect the nondiscrimination interests they are charged with upholding.


210. While the court purportedly disposed of the *Johnson Controls* plaintiffs' claims on the basis of the business necessity test, it proceeded to a BFOQ analysis, noting that "we are also convinced that Johnson Controls' fetal protection policy could be upheld under the bona fide occupational qualification defense." *Id.* at 893.

211. *Id.* at 897-99.

212. *Id* at 883.

213. *Id* at 883.

214. See EEOC Policy, supra note 208, at 405:6800.
men so that any "close calls" would be decided in favor of fetal protection. The Johnson Controls outcome in the Seventh Circuit was thus the predictable result of combining the "deemed disparate impact" theory with the loosening of the burden on the defendant wrought by Wards Cove.

It was inappropriate of the court, however, to graft the elements of previous fetal protection cases into the context created by the Wards Cove "clarification" of Title VII policy. After Wards Cove, prudent policy and sound legal reasoning argue that disparate impact analysis should be unavailable in FPP cases. Indeed the EEOC, upon which the Seventh Circuit relied for support in its opinion and which Johnson Controls cited in its brief before the Supreme Court, concluded from its analysis of the issue of shifting the burden of proof that "Wards Cove should not apply to the analysis of the defendant's burden of proving business necessity in a fetal protection cases."

The "flexibility" of the courts in applying Title VII doctrine to fetal protection policies raises the question of the durability of the Supreme Court's Johnson Controls decision. The fact that only three Justices of the original five-Justice majority now remain on the Court raises the question of whether the Court might rethink its conclusions if presented with a more solidly documented case for fetal protection than Johnson Controls was able to marshal. This is why it is important to identify a more solid, less arbitrary basis for decisionmaking, to balance the interests involved directly. Absent greater express reliance on a "choice" rationale for the Johnson Controls holding, courts could try to take advantage of language in the opinion to find a BFOQ based on female infertility in the future.

For example, the majority opinion expressly reserved the question of whether, in cases where "costs [of not discriminating] would be so prohibitive as to threaten the survival of the employer's business," the outcome of the BFOQ inquiry might differ. Justice White's concurrence (in which Justices Rehnquist and Kennedy joined) argued that prior Supreme Court decisions construing the BFOQ "confirm[ed] that costs are relevant in determining whether a discriminatory policy is reasonably

215. See Johnson Controls, 886 F.2d at 901-02 (Cudahy, J., dissenting), 903-04 (Posner, J., dissenting), 909-11 (Easterbrook, J., dissenting) (all three dissenters advocating abandonment of the weakened business necessity test in favor of a stricter BFOQ test). See also EEOC Policy, supra note 208, at 405:6800 ("Given the Seventh Circuit's uncritical application of the Wards Cove adverse impact burdens to the factually distinct claim of facial discrimination, we now think BFOQ is the better approach.").

216. Johnson Controls, 886 F.2d at 885-87.

217. Respondents' Brief at 15-16, 21-22, Johnson Controls (No. 89-1215).

218. EEOC Policy, supra note 208, at 405:6800.

219. Johnson Controls, 111 S. Ct. at 1209.
necessary for the normal operation of a business.”220 In his separate concurrence, Justice Scalia, too, indicated that he would be receptive to arguments grounded in “cost alone.”221 His discussion of tort law as a source of expense to employers suggests that state tort law could be preempted if it sought to impose liability on an otherwise reasonable employer when injury results from his or her compliance with the dictates of Title VII.222 It nevertheless could remain open to an employer to argue that, for example, the cost of insuring women who expose themselves to fetus-threatening environments, or the costs of cleaning up such environments to accommodate women workers, make the discriminatory policy necessary for the normal operation of the business. (It seems plausible that a jury would hold employers to be negligent for not taking such clean-up steps.)

Another possible ground for assault which might come to command a majority on the Court, if presented in the proper posture, is suggested by the concurrence’s observation that “[t]he Court’s narrow interpretation of the BFOQ defense in this case . . . means that an employer cannot exclude even pregnant women from an environment highly toxic to their fetuses.”223 Whether or not this is an accurate portrayal of the majority’s position, this observation raises the possibility that a more narrowly tailored FPP would have a chance of passing BFOQ muster, at least for these three Justices. Certain language in the majority opinion suggests that some of the five, too, might be willing to entertain a narrower BFOQ.224

In Johnson Controls, the Court held that fetal protection policies that exclude women on the basis of their fertility should flunk the BFOQ test and should therefore be held per se violations of Title VII.225 One of the Court’s major complaints about the policy was that “it does not apply to the reproductive capacity of the company’s male employees in the same way as it applies to that of the females.”226 This criterion would appear to open the door for a fetal protection policy that ostensibly

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220. Id. at 1213 (White, J., concurring) (citing Dothard v. Rawlinson, 433 U.S. 321 (1977), and Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985)).
221. Johnson Controls, 111 S. Ct. at 1216 (Scalia, J., concurring) (“[T]he Court goes far afield, it seems to me, in suggesting that increased cost alone . . . cannot support a BFOQ defense . . . [N]othing in our prior cases suggests this . . . .”).
222. Id.
223. Id. at 1214 (White, J., concurring).
224. Id. at 1210. Indeed, the penultimate paragraph of the opinion suggests that the Court is willing to let women choose between work and childbearing, but seems also to imply that it will not be so eager to allow them to choose both: “It is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.” Id.
225. Id. at 1207. See also supra notes 178-80 and accompanying text.
226. Johnson Controls, 111 S. Ct. at 1203.
treated the sexes the same and yet, perhaps because of biological differences between men and women, could disproportionately impact women. For example, Johnson Controls might have insisted that no worker, regardless of sex, whose blood level went above the level that scientific tests had demonstrated to be potentially harmful to offspring would be allowed to continue working in a dangerously lead-laden environment. Before passage of the 1991 Act, such a policy would presumably have been analyzed under the business necessity framework, benefiting from the employer-favoring presumptions announced in *Wards Cove*. That avenue, fortunately, may now be foreclosed.

It remains to be seen whether the sweeping rejection of discrimination that *Johnson Controls* appeared to effect will stand the test of time. The conclusion the Court reached flows directly neither from expressions of Congress's intent in enacting Title VII and the PDA, nor from the Court's own gender discrimination doctrines. In rejecting the assumptions on which FPPs are based (that potential fetuses have cognizable interests separate from the mother's, that the employer may act to vindicate such interests, and that parents, and particularly mothers, cannot be trusted to do so) the Court necessarily had to make new law, not just construe already existing formulas. As this article has suggested, the Court could have extended the framework of fetal protection policy analysis further than it chose to do.227

Finding a way to protect fetuses—or to let employers try to do so—is likely to remain an issue before the courts. If our broader society does not find a way to address the problem, the courts may again look for a way to fit employers' fetal protection decisions within a framework of the law, the Title VII prohibitions announced in *Johnson Controls* notwithstanding.

More important than the Court's explicit deference to Congress in reaching its result was its implicit deference to the decision-making of women. In terms of gender discrimination law, FPPs should be seen as running counter to the spirit if not the letter of Title VII. However, this does not answer the question of whether or how fetuses ought to be protected.

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227. Before *Wards Cove*, some courts and commentators questioned whether fetal protection could ever meet the stringent BFOQ standards. See supra note 206 and accompanying text. At the time, however, the business necessity defense was thought to be available to protect the employer's policy. Now, even some of those most critical of the employer's impulse to protect the fetus at the expense of the mother's rights accept some form of fertility BFOQ. See, e.g., Williams, supra note 194, at 704 ("[W]here investigation reveals that fetuses are at risk only through the exposure of women . . ., where the interests of fetal health and equal employment opportunity conflict . . . [t]he employer should be allowed to implement a fetal protection policy . . . ."). But see *Johnson Controls*, 886 F.2d at 913 (Easterbrook, J., dissenting) ("Risk to fetuses falls outside of these rules [defining when sex may be a BFOQ].").
IV
CONCLUSION: FETAL PROTECTION BEYOND JOHNSON CONTROLS AND TITLE VII

For many observers, fetal protection policy cases call into play two competing intuitions. One is that women should be free to make important economic choices that affect them. The other is that fetuses should be protected from physical harm that can compromise their future well-being and possibly leave them a burden on society. Presented with the relatively "easy" case of Johnson Controls—where the policy was sweeping, the harm unproven, and the number of women actually having exposed themselves to the risk very small—the Supreme Court has resolved the tension in favor of women's choice. In so doing, it has entrusted fetal protection to mothers and taken it out of the hands of employers, or at least removed the easiest tool by which employers might have sought to avert the risk of harm and liability.

Given the fact that Johnson Controls arose in the context of Title VII, there can be little doubt that the Court chose the proper path. Not only does the opinion represent a correct reading of Title VII, but it properly leaves the issue open for Congress to address the wider societal question of fetal protection. In so choosing, however, the Court sidestepped important issues. What of other job situations, where women predominate, where no one has even suggested that women be excluded, but where risk to unborn children may be just as great? Researchers are beginning to suggest that a whole range of jobs, most notably involving work with cathode ray tubes or CRTs may be a source of injuries in developing fetuses.228 If this is the case, millions could be affected.

It should be admitted that employers' attempts to discriminate against women in the name of such protection are not utterly without legal basis or moral justification. We may soon have to confront the situation where women, in spite of known risks, choose to become pregnant and babies are thereby harmed. Real societal and fetal interests in health may thus be implicated. These cases may wait to be played out against the newly emerging background of tort law that holds parents liable for the harms they inflict upon their children.229

Given the current state of the law, however, employers will have to seek nondiscriminatory options if fetal protection remains a professed aim. For earnestly concerned employers (whether motivated by fear of

229. See, e.g. Elam v. Elam, 268 S.E.2d 109, 111-112 (S.C. 1980) (permitting a child to sue his parent in tort for injuries sustained from parent's negligent operation of automobile); Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1980) (holding that summary judgment had been granted improperly to a mother whose son sued her for negligently ingesting tetracycline during her pregnancy, resulting in discoloration of the son's teeth).
liability or of the damage that may be caused), there remains a range of possible responses. First, to be sure, they can close down operations entirely. Less drastically, they may wish to craft new facially neutral FPPs such as were discussed above. A more attractive option, when the economics of the situation are not prohibitive, is to clean up the workplace so that it is no longer dangerous to fertile or pregnant women. Finally, of course, the employer may decide that it can adopt no policy at all, other than to fully inform all female employees of the dangers that exist, and run the risk that damage may be done and liability incurred.

Indeed, if an employer takes all reasonable steps to clean up the workplace and provide complete information to women employees so that they can make their choices regarding whether to risk exposure to dangerous chemicals, this should cut off any finding of liability on the employer's part. This outcome is all the more likely now that, following Johnson Controls, federal antidiscrimination law specifically prohibits employers from excluding women from the workplace in order to safeguard their offspring.

230. Supra notes 225-26 and accompanying text.
231. The Seventh Circuit's opinion in Johnson Controls seemed to suggest that the company had done everything possible to address this issue and that further cleanup was either impossible or economically infeasible. 886 F.2d at 874-79.
232. The Johnson Controls Court spent a portion of its opinion discussing the risk of tort liability in cases where women are exposed to workplace hazards and fetuses are injured. The Court concluded that, "[i]f state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII." 111 S. Ct. at 1209. The Court pointed out that the company had not argued the issue in its brief; consequently, though the Court regarded fears of excessive liability as "unfounded," it would not deal with this question at this time. Id.