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SYMPOSIUM

Justice Blackmun and Judicial Biography: A Conversation with Linda Greenhouse

CONSTITUTIONAL INTERPRETATION AND THE “WORLD OUT THERE”: AN INTRODUCTION TO THE SYMPOSIUM*

Heidi Kitrosser[†]

This issue and the symposium on which it is based were inspired by Linda Greenhouse’s wonderful and much-praised book,¹ *Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey*.² Greenhouse, the *New York Times*’ Pulitzer Prize-winning Supreme Court reporter,³ was one of two journalists⁴ granted early access to a treasure trove of personal and official papers left to the Library of Congress by the late Justice Harry Blackmun.⁵ Her book is based on Blackmun’s papers.⁶

* This title is based on the title of Harold Hongju Koh’s 1994 tribute to Justice Blackmun: *Justice Blackmun and the “World Out There,”* which itself borrowed a phrase from a dissenting opinion by Justice Blackmun. For full citation information see *infra* note 9.

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¹ For reviews of the book, see, for example, David J. Garrow, *The Accidental Jurist*, THE NEW REPUBLIC, June 27, 2005, at 36; Laura Kalman, “*Becoming Justice Blackmun*”: *Deconstructing Harry*, N.Y. TIMES, May 8, 2005, § 7, at 9; Bob Minzesheimer, “*Becoming Justice Blackmun*” Follows an Ideological Journey, USA TODAY, May 9, 2005, at 4D; Jeffrey Rosen, *A Pivotal Justice Less Than Supremely Confident*, N.Y. TIMES, May 6, 2005, at E43.

² LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* (2005).

³ See Kalman, *supra* note 1.

⁴ The other journalist was Nina Totenberg of National Public Radio. See Garrow, *supra* note 1, at 37.

⁵ *Id.*; see also Harold Hongju Koh, *Unveiling Justice Blackmun*, 72 BROOK. L. REV. 9, 11-16 (2006).

⁶ Garrow, *supra* note 1, at 37.

Justice Blackmun was both widely revered and widely criticized for emphasizing the real world ramifications of Court decisions and for acknowledging his own struggles in resolving some cases.⁷ It is fitting that a Justice so known for tying constitutional decision-making to its human geneses and consequences would leave to the public so extensive a record of the Justices' decision-making processes and of his own experiences during his years on the Court.⁸

Becoming Justice Blackmun—the literary fruit of Linda Greenhouse's access to this archive—very much reflects the connection that Justice Blackmun perceived between constitutional decision-making and the “world out there.”⁹ Greenhouse elegantly weaves biographic stories with details of the Justices' deliberations on cases and with doctrinal background on the areas of case law cited. For example, in discussing *Roe v. Wade*¹⁰—the case for which Justice Blackmun, its author, is most famous—Greenhouse explains the doctrinal line of which *Roe* became a part and subsequent developments in the case law,¹¹ the significance of Justice Blackmun's past role as a lawyer for the medical profession,¹² and the personal and jurisprudential impact of public reactions to *Roe* on Justice Blackmun.¹³

Becoming Justice Blackmun, the Blackmun papers, and Justice Blackmun's life itself raise three important lines of inquiry. First, they raise descriptive questions about the relationship between jurisprudence and judicial biography. That is, how do judges' experiences impact their jurisprudence? Second, they raise normative questions as to how much the public *should* know about the human story behind judicial decision-making. As historian Laura Kalman notes, “Some justices destroy their papers. They believe the less the public knows about the Supreme Court, the more easily the illusion is

⁷ See, e.g., GREENHOUSE, *supra* note 2, at 114, 207-11, 222-24, 231-32; Garrow, *supra* note 1, at 41; Kalman, *supra* note 1; Rosen, *supra* note 1.

⁸ For discussion of the unprecedented breadth and depth of the Blackmun papers, see, for example, Kalman, *supra* note 1; Koh, *supra* note 5, at 11-16.

⁹ See Harold Hongju Koh, *Justice Blackmun and the “World Out There,”* 104 YALE L.J. 23, 25 (1994) (“Blackmun came to see ‘another world “out there,” that the Court ‘either chooses to ignore or fears to recognize.’” (quoting *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting))).

¹⁰ 410 U.S. 113 (1973).

¹¹ GREENHOUSE, *supra* note 2, at 73-80, 86-88, 98-101, 110-12, 133-34, 138-45, 149-52, 182-206.

¹² *Id.* at 74, 82-83, 90-92, 99.

¹³ *Id.* at 134-39, 206.

preserved that our system is based on rule of law, rather than men and women.”¹⁴

Third, they raise normative questions about the impact that judges’ understandings of the “world out there”¹⁵ should have on jurisprudence, particularly on constitutional jurisprudence. Some argue that social and cultural change should have no bearing on constitutional interpretation.¹⁶ Justice Scalia, for example, famously argues that judges should adhere to the “original meaning” of the Constitution’s text, by which he means each provision’s original expected application.¹⁷ For instance, in discussing the Eighth Amendment’s prohibition against cruel and unusual punishment, Justice Scalia argues that the death penalty cannot legitimately be deemed “cruel and unusual,” regardless of that term’s evolving social meaning or of changing knowledge about the penalty’s application. This is because the Constitution explicitly assumes the existence of the death penalty in provisions such as the protection against deprivation of life without due process of law.¹⁸ Others counter, however, that the content of the Constitution’s sweeping clauses are designed to evolve with social and cultural change.¹⁹ For example, Ronald Dworkin argues:

[K]ey constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules [T]he application of these abstract principles to particular cases . . . [thus] must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.²⁰

With respect to the death penalty and the Eighth Amendment, Dworkin argues:

The framers of the Eighth Amendment laid down a principle forbidding whatever punishments are cruel and unusual. They did

¹⁴ Kalman, *supra* note 1.

¹⁵ See *supra* note 9.

¹⁶ See Jill Hasday, *Conscription, Combat, and Constitutional Change Outside the Courts* (draft article, on file with author) (citing prevalence of this view).

¹⁷ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37-41, 45-46 (1997); see also Ronald Dworkin, *Comment, in id.* at 115, 119 (referring to “‘expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have”).

¹⁸ SCALIA, *supra* note 17, at 46.

¹⁹ See, e.g., Dworkin, *supra* note 17, at 119-27.

²⁰ *Id.* at 122.

not themselves expect or intend that [the] principle would abolish the death penalty, so they provided that death could be inflicted only after due process. But it does not follow that the abstract principle they stated does not, contrary to their own expectation, forbid capital punishment.²¹

Each article in this issue tackles one or more of these important questions. That is, each paper grapples with one or more of the following: the descriptive relationship between jurisprudence and judicial biography, the extent to which the public should be privy to this relationship, and the relationship between constitutional decision-making and the “world out there.”²²

Dean Harold Koh’s article straddles all three questions. Dean Koh considers how to strike “the right balance between disclosure and nondisclosure” of Supreme Court deliberations,²³ and situates the history of the Blackmun papers and their release within this analysis.²⁴ Drawing upon the papers and upon Linda Greenhouse’s book, he goes on to discuss aspects of Justice Blackmun’s life history, including Justice Blackmun’s evolving view of the relationship between government and individuals and parallel changes in his constitutional jurisprudence.²⁵

Professors Earl Maltz, Nan Hunter and Dena Davis each focus on the descriptive relationship between jurisprudence and judicial biography. Professor Maltz explains that “[e]ach [Justice’s interpretive] position reflects a unique set of influences and experiences. Judicial biographies provide detailed accounts of these influences and experiences, thereby deepening our knowledge of the forces that ultimately shape Supreme Court jurisprudence.”²⁶ Professor Maltz discusses the interplay of biography and jurisprudence through the example of Justice Peter V. Daniel.²⁷

Professor Hunter reminds us of the importance of both recognizing the personal histories that color Justices’ jurisprudence, and not overstating the influence of particular biographical factors. Professor Hunter focuses on Justice

²¹ *Id.* at 120-21.

²² *See supra* note 9.

²³ Koh, *supra* note 5, at 10.

²⁴ *Id.* at 10-12, 19-23.

²⁵ *Id.* at 24-34.

²⁶ Earl M. Maltz, *Biography is Destiny: The Case of Justice Peter V. Daniel*, 72 BROOK. L. REV. 199, 199 (2006).

²⁷ *Id.* at 200-09.

Blackmun's background as a lawyer for the Mayo Clinic and as an admirer of the medical profession.²⁸ She argues:

[T]he longstanding "Mayo made him do it" explanation of *Roe* is wrong and should be jettisoned. . . . Blackmun's experiences as counsel for Mayo left him more pragmatic than starry-eyed about medical authority. . . . His papers indicate that he was concerned about what he feared might be careless treatment of physicians' interests, but he was not blind to medical parochialism nor engaged in a mission to expand the authority of doctors.²⁹

Professor Hunter elaborates on the respects in which Justice Blackmun's background did and did not impact his views in *Roe v. Wade* and other abortion cases.³⁰

Professor Davis discusses Justice Blackmun's involvement with his church and its relationship to his jurisprudence.³¹ Focusing on two sermons that Justice Blackmun delivered to his church, Professor Davis identifies multiple themes of compassion.³² Similarly, says Professor Davis, much of Justice Blackmun's constitutional jurisprudence was grounded in compassion as a guiding principle.³³ Professor Davis cites Justice Blackmun's acknowledgment of the uncertainty of much constitutional interpretation, coupled with his observation that "we will grope, we will struggle, and our compassion may be our only guide and comfort."³⁴

The articles by Professors Jason Mazzone, Chai Feldblum and Andrew Koppelman move the discussion from the interaction between judicial biography and jurisprudence to the interpretation of particular constitutional provisions. This raises the "relationship between constitutional decision-making and the 'world out there.'"³⁵

Professor Mazzone considers Justice Blackmun's view of juries.³⁶ Professor Mazzone concludes that Justice Blackmun

²⁸ Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 BROOK. L. REV. 147 (2006).

²⁹ *Id.* at 149-50.

³⁰ *Id.* at 162-66, 170-78, 192-93.

³¹ Dena S. Davis, *Moral Ambition: The Sermons of Harry A. Blackmun*, 72 BROOK. L. REV. 211 (2006).

³² *Id.* at 216-30.

³³ *Id.* at 229-34.

³⁴ *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (quoting ALAN STONE, LAW, PSYCHIATRY AND MORALITY 262 (1984)), quoted in Davis, *supra* note 31, at 234.

³⁵ See *supra* text accompanying note 22.

³⁶ Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35 (2006).

largely rejected conventional views of juries as “accurate fact finders, guardians of liberty, and a source of legitimacy.”³⁷ Instead, Justice Blackmun valued juries as democratic bodies in which citizens have the “opportunity . . . to participate in the workings of government.”³⁸ This view manifests itself in Justice Blackmun’s opinions upholding—and dissenting from refusals to uphold—challenges to juror exclusions based on race and gender.³⁹ From Justice Blackmun’s democracy-based perspective, it was crucial “to ensure at least that juries were open to all citizens.”⁴⁰ Justice Blackmun’s approach to juries reflects his view of constitutional interpretation as an effort to inform constitutional principles with insights from the real world, including evolving social and cultural norms. In this sense, Justice Blackmun’s approach to juries, as interpreted by Professor Mazzone, parallels Ronald Dworkin’s discussion of the Eighth Amendment. As with the Eighth Amendment and capital punishment, the framers of the Sixth and Fourteenth Amendments surely did not expect the right to a jury trial or the concept of equal protection to encompass the right of women to sit on juries. “But it does not follow that the abstract principle[s] they stated do[] not, contrary to their own expectation, forbid” gender-based exclusions.⁴¹

Professor Feldblum addresses the tension between the right to act in accordance with one’s core belief system, a concept that Professor Feldblum calls “belief liberty,”⁴² and the statutory equality rights of gays and lesbians. She considers how judges should handle belief liberty claims brought by those who wish not to comply with equal rights laws.⁴³ Professor Feldblum would balance the interests at stake on a case-by-case basis.⁴⁴ The bulk of her article explains the grounding of her balancing test, and the importance of grounding any case-by-case balancing, in a real world understanding of the magnitude of interests on both sides of the scale. With respect

³⁷ *Id.* at 47.

³⁸ *Id.*

³⁹ *Id.* at 48-55.

⁴⁰ *Id.* at 38.

⁴¹ See Dworkin, *supra* note 17, at 121.

⁴² Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61 (2006). Feldblum would protect belief liberty under the due process clauses. See *id.* at 63. She would include within the scope of protection those beliefs that “form a core aspect of the individual.” *Id.* at 83.

⁴³ *Id.* at 115-22.

⁴⁴ *Id.*

to belief liberty, for example, she argues that judges often “downplay the burden on religious people” forced to accommodate gays and lesbians.⁴⁵ Professor Feldblum, a former law clerk to Justice Blackmun who came out to him as a lesbian, also ties her analysis to her understanding of Justice Blackmun’s evolving views on gays and lesbians.⁴⁶

In response, Professor Koppelman’s article⁴⁷ critiques Professor Feldblum’s article on two main grounds. First, he would limit the constitutional protection of belief liberty to the First Amendment’s protection of religious free exercise. Professor Feldblum’s concept of belief liberty, he says, would “create a presumptive right to disobey any law you dislike intensely.”⁴⁸ Second, he argues that Professor Feldblum underestimates the burden on conservative Christians who wish to avoid equal protection laws when she conducts case-by-case balancing toward the end of her article.⁴⁹ He concludes that courts typically should allow religious exemptions from antidiscrimination statutes to stand (or should impose such exemptions themselves under the First Amendment),⁵⁰ while barring on equal protection grounds only those laws that “reflect[] a bare desire to harm an unpopular group.”⁵¹ Professor Koppelman’s approach takes evolving public standards into account in a very direct way. His approach would leave breathing room for community standards to evolve at their own pace, while maintaining some minimum equality-based protection for gays and lesbians. Koppelman concludes, in short, that courts “can’t hurry love”—or tolerance—through constitutional interpretation.⁵²

In *Becoming Justice Blackmun*, Linda Greenhouse writes that the waters of Justice Blackmun’s life “carried him to places he had never expected to go. And once having arrived at the destination, he stepped onto dry land and performed in ways that neither he nor others would have predicted.”⁵³ This

⁴⁵ *Id.* at 110.

⁴⁶ *See id.* at 65-69.

⁴⁷ Andrew Koppelman, *You Can’t Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125 (2006).

⁴⁸ *Id.* at 126.

⁴⁹ *Id.*

⁵⁰ *Id.* at 131-37.

⁵¹ *Id.* at 141.

⁵² *See id.* at 142.

⁵³ GREENHOUSE, *supra* note 2, at 250.

is a fitting metaphor not only for Justice Blackmun's life, but for the view of the Constitution arguably implicit in his jurisprudence and championed by Ronald Dworkin among others. Under this view, the Constitution outlines broad principles and aspirations that gain content through the lessons and developments of time.⁵⁴ The "world out there" does not write the Constitution, but it informs it deeply. In analyzing constitutional doctrine, the articles in this symposium issue shed light on the application and desirability of this interpretive approach. In analyzing the connection between jurisprudence and judicial biography, the articles connect doctrine to experience at a personal level. Such emphasis on the relationship between the Constitution and lived experience befits Justice Blackmun, a man who, according to his successor Justice Stephen Breyer, managed to find in his "cloistered [Supreme Court] office . . . not a narrowing, but a broadening of mind, of outlook, and of spirit."⁵⁵

⁵⁴ See *supra* text accompanying notes 20-21.

⁵⁵ GREENHOUSE, *supra* note 2, at 249-50.