Justice Blackmun and the "World Out There"

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Harry Blackmun fooled everyone. When Richard Nixon appointed him to the Supreme Court at age sixty-one, who would have predicted that this "safe" conservative would retire twenty-four years later—the year Nixon died—as the Court's last liberal?[1] Would anyone have guessed how sharply he would break from his "Minnesota Twin," Warren Burger, or brake the Burger Court's retreat from the Warren Court? Did any foresee that a member of so many majorities[2] would someday emerge as the *Carolene Products*[3] Justice of the Rehnquist Court: the spokesman for the have-nots, the excluded, the discrete and insular minorities?[4]

Why Blackmun changed has offered steady fare for pundits, but no longer presents a true puzzle. Part of the explanation, as the Justice himself noted, is that the Court itself listed rightward.[5] The Court he joined ranked among the most liberal in history, while the one he leaves surely stands among the most conservative.[6] In many areas, his jurisprudence remained strikingly consistent

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1. Nixon chose Blackmun as his third choice to fill Abe Fortas' seat, only after the Senate had balked at Nixon's "Southern strategy" of nominating first Clement F. Haynsworth, Jr. and then G. Harrold Carswell. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 56–57, 74–75, 86–88 (1979).

2. *See* John R. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, Dec. 6, 1970, § 6 (Magazine), at 61 (dubbing Blackmun a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs").

3. *Compare* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.") *with* Graham v. Richardson, 403 U.S. 365, 372 (1971) (Blackmun, J.) ("Aliens as a class are a prime example of a 'discrete and insular minority' . . . for whom such heightened judicial solicitude is appropriate.") (citation omitted) *and* Toll v. Moreno, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) ("[T]he fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage.").

4. *See* Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527 (1993); *see also* Dan T. Coenen, *Justice Blackmun, Federalism and Separation of Powers*, 97 DICK. L. REV. 541, 559–63 (1993) (discussing Blackmun's role as representation-reinforcing judge).

5. Fred Barbash & Al Kamen, *Blackmun Says "Weary" Court Is Shifting Right*, WASH. POST, Sept. 20, 1984, at A1.

6. In 1970, Blackmun, Burger, and the second Justice Harlan formed the right wing of a Court that

during his near-quarter century on the Court: the treatment of aliens,[7] women, Native Americans, and prisoners,[8] church-state relations and affirmative action,[9] just to name a few. In other areas—the right to privacy,[10] law and medicine,[11] retroactivity,[12] commercial speech,[13] and state taxation,[14] for example—Blackmun pioneered the Court's governing doctrine, and subsequently never wavered.

Even so, as Blackmun grew more comfortable on the Court, his voice undeniably grew bolder and more distinctive. Although his personality did not change, his sense of role evolved. When he first came to Washington in 1970, Blackmun seemed the classic insider. A professional lifetime spent at Harvard College and Law School, the elite Dorsey law firm of Minneapolis, the Mayo Clinic, and the Eighth Circuit had exposed him to healthy institutions and responsible professionals. The experience imbued him with an idealistic, almost naive, faith in government and institutions. In early opinions, he deferred easily to governmental authority and seemed out of touch with common problems.[15]

But Blackmun took his job seriously and did his own work. The Court's sprawling docket exposed him to a broader, more brutal slice of life than he had ever known. The relentless cascade of arguments, briefs, prisoner petitions, death sentences, and daily mail—all of which he read—painted a less tranquil picture: an America of antagonistic classes, racial conflict, governmental errors, and intense personal suffering. From the Court, he wrote, "[o]ne sees what people . . . are litigating about . . . . One gets a sense of their desires and their frustrations, of their hopes and their disappointments, of their profound

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included liberals Hugo Black, William Brennan, William O. Douglas, and Thurgood Marshall and centrists Potter Stewart and Byron White. The "conservative" Blackmun of those days would have sat at the center of any Court that included Justices Rehnquist, Scalia, and Thomas.

7. *See generally* Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51 (1985).

8. *See* Karlan, *supra* note 4, at 529–32 (reviewing cases).

9. *See* Herman Schwartz, *Justice Blackmun*, 43 AM. U. L. REV. 737, 741–44 (1994) (reviewing religion and affirmative action decisions); *see also* Penda D. Hair, *Justice Blackmun and Racial Justice*, 104 YALE L.J. 7, 14–19 (1994) (reviewing affirmative action decisions).

10. *See* Diane P. Wood, *Justice Blackmun and Individual Rights*, 97 DICK. L. REV. 421, 422–28 (1993) (reviewing privacy cases); *see also* Randall P. Bezanson, *Emancipation as Freedom in* Roe v. Wade, 97 DICK. L. REV. 485 (1993).

11. *See* Harold Hongju Koh, *Rebalancing the Medical Triad: Justice Blackmun's Contributions to Law and Medicine*, 13 AM. J.L. & MED. 315 (1987); Alan A. Stone, *Justice Blackmun: A Survey of His Decisions in Psychiatry and Law*, 13 AM. J.L. & MED. 291 (1987).

12. *See* Coenen, *supra* note 4, at 550 n.48 (reviewing cases).

13. *See* Karen Nelson Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29, 31–43 (1985); William S. Dodge, Balancing With Bite: Justice Blackmun's Commercial Speech and Public Forum Opinions (Sept. 23, 1994) (unpublished manuscript on file with author).

14. *See* Moore, *supra* note 13, at 43–49.

15. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973) (upholding $50 bankruptcy filing fee against equal protection claim by indigent); New York Times v. United States, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting) (voting for government in *Pentagon Papers* case); Wyman v. James, 400 U.S. 309 (1971) (rejecting Fourth Amendment challenge to New York law conditioning welfare benefits on in-home visits by caseworkers).

personal concerns, and of what they regard as important and as crucial. . . . We see . . . a constant, seething economic, domestic, and ethical struggle."[16] Cases like *Roe v. Wade*[17] and *Furman v. Georgia*[18] subjected him to "an excruciating agony of the spirit."[19] *Roe*, in particular, won him passionate admiration and vicious harassment. "Think of any name," he once recalled, "I've been called it . . . : Butcher of Dachau, murderer, Pontius Pilate, Adolph Hitler."[20] In public places, he was picketed and embraced, threatened and celebrated, and once literally fired upon, in his own living room. These searing experiences taught him that Justices have no choice but to take sides, and to bear the consequences. He began to realize that all social institutions are not equally responsible, and that in the face of institutional abuse, well-meaning deference can amount to unconscionable abdication. By 1992, Blackmun saw the world in different tones. Asked what he had learned on the Supreme Court, he answered: "That feet today indeed are made of clay, and that there seems to be an element of larceny and of the unethical in so many people in public life; that life is or can be cruel; that man's inhumanity to man still prevails; that life itself is controversy; and that we still are a racist society deep down in the core of our being."[21]

Blackmun's awakening forced him to rethink his judicial role. Muted leitmotifs in his earlier thinking recurred and intensified. Asked at his 1970 confirmation hearing about his "views of the Supreme Court as the protector of our basic liberties," Blackmun answered: "[M]y record and the opinions that I have written . . . will show, particularly in the civil rights area and in . . . the treatment of little people, what I hope is a sensitivity to their problems."[22] Working amid the Court's sheltered splendor, surrounded by words and abstractions, Blackmun came to see "another world 'out there,'" that the Court "either chooses to ignore or fears to recognize."[23] In that world, he realized, antagonism and not altruism dominates. Lessons that Thurgood Marshall learned through bitter experience, Blackmun grasped through human empathy and sheer hard work. "[W]here a presumed majority . . . punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-

16. Harry A. Blackmun, *Remarks at the Commencement Exercises of Mayo Medical School*, 55 MAYO CLINIC PROC. 573, 573–74 (1980).

17. 410 U.S. 113 (1973).

18. 408 U.S. 238 (1972).

19. *Id.* at 405 (Blackmun, J., dissenting).

20. John A. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine), at 20, 26 (quoting Justice Blackmun).

21. Harry A. Blackmun, Address at the 69th Annual Dinner of the American Law Institute (May 14, 1992), *in* AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES AT THE 69TH ANNUAL MEETING 47, 47–48 (1992) [hereinafter ALI Address].

22. *Nomination of Harry A. Blackmun, of Minnesota, to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 37 (1970) (testimony of Hon. Harry A. Blackmun) [hereinafter *Confirmation Hearing*].

23. Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

hindmost," he wrote in 1977, "[t]his is not the kind of thing for which our Constitution stands."[24] Judges, he began to argue, should construe the Constitution "as a force that would serve justice to all evenhandedly and, in so doing, . . . better the lot of the poorest among us."[25] When interpreting grandly worded constitutional provisions, Blackmun insisted, the Court should "adopt a 'sympathetic' reading, one which comports with the dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[26]

As Blackmun's sense of his judicial role crystallized, so too did his willingness to rethink old positions. "[I]n law," he wrote as a circuit judge, "there is constant movement. We should be aware of this, anticipate it, and not resent it."[27] "As times have changed," he testified at his Supreme Court confirmation hearing, "Justices have changed. People take a second look."[28] Relentlessly open-minded, during his tenure on the Court, Blackmun began to revisit old votes and to reexamine early views.

Federalism, separation of powers, and the death penalty were but three areas in which Blackmun took another look. After casting a tentative deciding vote for the majority's position in *National League of Cities v. Usery*,[29] Blackmun watched and reflected, then wrote the opinion that interred that decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[30] Although he joined the Court's sweeping rejection of the legislative veto in *INS v. Chadha*,[31] the rigid logic of that decision's separation-of-powers reasoning gave him pause,[32] and ultimately led him to uphold the federal sentencing guidelines under a "flexible understanding of separation of powers" in *Mistretta v. United States*.[33] In his final term, after years of "vot[ing] to enforce the death penalty," while publicly "doubt[ing] its moral, social, and constitutional legitimacy," he found himself "morally and intellectually obligated simply to concede that the death penalty experiment has failed."[34] To be sure, in each of these areas, Blackmun changed. In each, however, his

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24. *Id.* at 462–63.

25. *Id.* at 463.

26. DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

27. Harry A. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 359 (1967).

28. *Confirmation Hearing*, *supra* note 22, at 43.

29. 426 U.S. 833, 852 (1976) (creating Tenth Amendment immunity for "traditional governmental functions" of states); *see also id.* at 856 (Blackmun, J., concurring).

30. 469 U.S. 528, 531 (1985) (overruling *National League of Cities*' "traditional governmental functions" test as "not only unworkable but . . . inconsistent with established principles of federalism").

31. 462 U.S. 919 (1983).

32. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 776–77 (1986) (Blackmun, J., dissenting) (arguing "that 'executive' powers of the kind delegated to the Comptroller General under the Deficit Control Act need not be exercised by an officer who serves at the President's pleasure").

33. 488 U.S. 361, 381 (1989).

34. Callins v. Collins, 114 S. Ct. 1127, 1130 & n.1 (1994) (Blackmun, J., dissenting from denial of certiorari).

"second look" was the more probing and revealing. In none was his turnabout abrupt or capricious. In each, he changed only after studying the doctrine's impact on society and realizing he could no longer pretend "that the desired level of fairness has been achieved" once and for all time.[35]

Although detractors deemed him undisciplined, guided by "sentimentalism" and "compassion" over hard-headed reason,[36] these critics confused emotionalism with candor, doctrinal wavering with maturing judgment. Change and growth are not the same. As Judge Richard Arnold has noted, "Especially in matters of constitutional interpretation, it may be more important to be right than to be consistent, and Justice Blackmun has been unremitting in his pursuit of what is right."[37] "Judgment, judgment, judgment," Blackmun himself wrote, "It grows by experience and it grows by learning."[38] That credo led him to constancy when warranted, change when times demanded. "Revolted" by stare decisis for its own sake,[39] he asked, "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit . . . new issues?"[40] Sometimes, he adjusted to modern social realities simply by recognizing the obvious: that "[i]n order to get beyond racism, we must first take account of race";[41] that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas";[42] and that *Bowers v. Hardwick* was a case not about "'a fundamental right to engage in homosexual sodomy,'" but "about . . . 'the right

35. *Id.* at 1128. A quarter-century earlier, as a circuit judge, Blackmun had declared that he was "not convinced of the rightness of capital punishment as a deterrent in crime." *Confirmation Hearing*, *supra* note 22, at 59; *see* Maxwell v. Bishop, 398 F.2d 138, 153–54 (8th Cir. 1968), *vacated and remanded*, 398 U.S. 262 (1970); *see also* Furman v. Georgia, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting) ("I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty . . ."). Lynn E. Blais, *Simple Justice/Simple Murder: Reflections on Judicial Modesty, Federal Habeas and Justice Blackmun's Capital Punishment Jurisprudence*, 97 DICK. L. REV. 513 (1993) (reviewing Blackmun's death-penalty jurisprudence); William J. Brennan, Jr., *Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 1–4 (1994) (examining current state of Court's views on death penalty); *cf.* Coenen, *supra* note 4, at 551–52 (tracing evolution of Blackmun's views on separation of powers); Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of A Misguided Doctrine*, 99 HARV. L. REV. 84 (1985) (tracing evolution of Blackmun's and the Court's views on Tenth Amendment).

36. *See, e.g.*, Jeffrey Rosen, *Sentimental Journey*, NEW REPUBLIC, May 2, 1994, at 13; Stuart Taylor, Jr., *Justice Blackmun's Jurisprudence of Compassion*, LEGAL TIMES OF WASHINGTON, Apr. 11, 1994, at 26.

37. Richard S. Arnold, *Justice Harry Blackmun: Some Personal Notes*, 43 AM. U. L. REV. 699, 703 (1994).

38. Harry A. Blackmun, *Some Goals for Legal Education*, 1 OHIO N.U. L. REV. 403, 408 (1974).

39. "Like Justice Holmes, I believe that '[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.'" Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citation omitted).

40. Sierra Club v. Morton, 405 U.S. 727, 755–56 (1972) (Blackmun, J., dissenting), *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 455 (1983) (Blackmun, J., dissenting) (criticizing majority's "archaic judicial response to a modern social problem").

41. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.).

42. Stanton v. Stanton, 421 U.S. 7, 14–15 (1975).

most valued by civilized men,' namely, 'the right to be let alone.'"[43]

Blackmun retired in a characteristic act of self-discipline, saying simply, "[I]t's time."[44] Yet as his farewell contribution to this journal reveals,[45] even as he retired, he was still growing and learning. When he spoke of the other "world out there," Blackmun meant, of course, the other America, the world inhabited by the poor, the alien, the minority, the child. But increasingly, his sensitivity to difference led him to another kind of understanding as well: of the world beyond our borders and law's role in it. In the years ahead, this overlooked, international facet of Blackmun's jurisprudence will form an increasingly prominent part of his judicial legacy.

Blackmun approached the task of understanding international law, like all he faced, with diligence and thoroughness. Trained as a corporate lawyer, he instinctively grasped the impact of legal rules on transnational business practices.[46] Like his fellow "internationalist" Justice, William O. Douglas, he traveled widely while on the Court.[47] On several occasions, he taught and defended the American constitutional system to foreign lawyers,[48] and in annual sessions on "International Justice," he grappled with the limits of law in a world of power politics.[49] A historian by temperament,[50] he revisited the first principles underlying the foreign affairs power and the role of

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43. 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing majority opinion and Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting)).

44. *Statements by Blackmun and Clinton on Retiring*, N.Y. TIMES, Apr. 7, 1994, at A24 (remarks of Justice Blackmun).

45. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994).

46. *See, e.g.*, Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522, 548 (1987) (Blackmun, J., concurring in part and dissenting in part) (calling majority's view "of this country's international obligations . . . particularly unfortunate in a world in which regular commercial and legal channels loom ever more crucial"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (upholding international arbitration clause of agreement in light of "need of the international commercial system for predictability in the resolution of disputes"); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408 (1984) (developing rules of *in personam* jurisdiction in transnational business setting); Japan Line, Ltd. v. County of L.A., 441 U.S. 434 (1979) (developing Court's foreign commerce clause test in state tax cases).

47. Over the years Blackmun traveled to places as far afield as Aix-en-Provence, Berlin, England, Haiti, Ireland, Israel, Paris, Rome, and Salzburg. Interview with Justice Harry A. Blackmun, Washington, D.C. (Sept. 16, 1994); *see* David H. Souter, *A Tribute to Justice Harry A. Blackmun*, 104 YALE L.J. 5, 5 (1994) ("[S]ince I've known him, . . . he has chosen to sally out to deliver probably more speeches than any of his colleagues."); *cf.* Jules Lobel, *Justice Douglas the Internationalist: The Connection Between Domestic Liberty and Foreign Policy*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 279, 279 (Stephen L. Wasby ed., 1990) (chronicling Douglas' travels).

48. *See* ALI Address, *supra* note 21, at 49–50 (describing teaching American law to lawyers from Europe, Africa, and the Middle East) ("[W]e were forced to defend [our legal system], and in any event, to examine it critically. Perhaps it was not the easiest assignment, but it was for me a worthwhile one.").

49. During 18 summers, Blackmun co-taught a Justice and Society seminar at the Aspen Institute. *See* Norval Morris, *HAB*, 43 AM. U. L. REV. 730 (1994). Materials discussed included, *inter alia*, the famous Melian Dialogue in Thucydides, *The Peloponnesian War*; Stanley Hoffmann's *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics*; and writings of Louis Henkin on International Human Rights. *See* THE ASPEN INSTITUTE, SEMINAR READINGS ON JUSTICE AND SOCIETY 299, 300, 305, 375 (5th ed. 1992).

50. *See* Karlan, *supra* note 4, at 533 n.38 (noting Blackmun's inclination toward detailed historical research).

"[i]nternational law [as] part of our law."[51] During his last judicial decade, Blackmun drew these strands together into a vision of law's global domain.

Although far from coherent, four themes increasingly run through the current Court's "global jurisprudence." First, the Court has broadly deferred to executive power to deal with perceived exigencies, largely unchecked by individual rights, framework statutes, or judicial oversight.[52] Second, the Justices have rarely treated treaty or customary international law rules as meaningful restraints upon U.S. action, often construing them out of context to permit U.S. actions that plainly offend the underlying purposes of the international-law norm.[53] Third, the Court has paid lip service to international comity as a reason unilaterally to restrict the scope of U.S. regulation.[54] Fourth, the Court has largely refused to look beyond parochial U.S. interests to the needs of an ordered international system when assessing the legality of extraterritorial action.[55]

Taken together, these tenets have empowered the executive branch to act unilaterally in the international realm, based upon subjective and sometimes myopic assessments of our national interests. In so acting, U.S. officials have generally consulted local rules, customs, and cultures, while ignoring extraterritorial impacts, foreign laws and sensibilities. Congress, our treaty partners, and other affected nations and nationals have found few meaningful avenues of protest, as our courts have construed ambiguities in previously negotiated accords—both interbranch and intergovernmental—to permit the executive action. Injured individuals have had little recourse, deemed to lack standing or even rights to challenge arbitrary executive action. The grim result: a realist world in which Hobbesian obsession with national self-interest trumps human rights (of citizens, and especially of aliens), democratic decisions, and the settled expectations that flow from negotiated agreements and shared norms.[56]

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51. The Paquete Habana, 175 U.S. 677, 700 (1900), *cited in* Blackmun, *supra* note 45, at 40. *Compare* Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 PACE L. REV. 237 (1988) (tracing career of Ambassador and Chief Justice John Jay) *with* Blackmun, *supra* note 45, at 49 ("Modern jurists also are notably lacking in the diplomatic experience of early Justices such as John Jay and John Marshall, who were familiar with the law of nations and comfortable navigating by it.").

52. *See generally* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 117–49 (1990) (reviewing cases).

53. *See* Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391, 2413–23 (1994) (reviewing cases).

54. *See, e.g.*, Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993) (holding that principle of international comity did not bar district court from exercising Sherman Act jurisdiction over foreign reinsurance claims). *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2392 (1991) (reviewing "discernible decline in the American deference to foreign sovereignty")

55. *But cf.* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(e)–(f) (1987) (claiming that reasonableness of extraterritorial exercise of jurisdiction depends, in part, on importance of regulation to international system and extent to which regulation is consistent with international system's traditions).

56. *See* Koh, *supra* note 53, at 2409–34 (tracing this pattern in context of recent Haitian refugee crisis).

In a series of opinions during his last decade on the Court, Justice Blackmun challenged each of these guiding tenets. His dissent in *Regan v. Wald* contested the first, expressing skepticism about overblown claims of executive power in foreign affairs in the face of detailed legislative commands.[57] His dissent in *Sale v. Haitian Centers Council, Inc.* recognized rules of statutory and treaty construction as powerful restraints upon executive action, construing those rules in context to effectuate the underlying purpose of negotiated commitments.[58] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[59] and *Société Nationale Industrielle Aérospatiale v. United States District Court*,[60] Blackmun recognized international comity as "not just a vague political concern favoring international cooperation when it is in our interest to do so. Rather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and good will."[61] Finally, in those same two cases, Blackmun looked beyond the United States' immediate interests to the "mutual interests of all nations in a smoothly functioning international legal regime."[62] He urged judges to

> consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and "stability through satisfaction of mutual expectations." These interests are common to all nations, including the United States.[63]

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57. 468 U.S. 222, 255 (1984) (Blackmun, J., dissenting) (arguing that Court's construction "loses all sight of the general legislative purpose of the [statute] and the clear legislative intent behind the . . . clause" in question); *see also* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549, 2568 (1993) (Blackmun, J., dissenting) ("What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors—and that the Court would strain to sanction that conduct."). Blackmun has also been notable for his refusal to infer from congressional silence permission for state governments to act in foreign affairs. *See, e.g.*, Itel Containers Int'l Corp. v. Huddleston, 113 S. Ct. 1095, 1110 (1993) (Blackmun, J., dissenting); Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 18 (1986) (Blackmun, J., dissenting).

58. 113 S. Ct. at 2568 ("The Convention . . . constitutes the backdrop against which the statute must be understood."); *see also* Blackmun, *supra* note 45, at 41 (discussing United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992)) ("The Supreme Court, it seems to me, thus construed the treaty to permit the precise result that the document was drafted to forbid.").

59. 473 U.S. 614 (1985) (upholding international arbitrability of antitrust claim).

60. 482 U.S. 522, 547 (1987) (Blackmun, J., concurring in part and dissenting in part) (examining exclusivity of Hague Evidence Convention).

61. *Id.* at 555; *accord Mitsubishi*, 473 U.S. at 629 ("[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement . . . .").

62. *Aérospatiale*, 482 U.S. at 555.

63. *Id.* at 567 (citation omitted). Similarly, in *Mitsubishi*, Blackmun argued:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. . . . If [international tribunals] are to take a central place in the international legal order . . . . [I]t will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.

473 U.S. at 638–39.

Taken together, these Blackmun opinions sketch a compelling "counter-vision" of law's role in an interdependent global order.[64] In that realm, political stability depends on regimes of law, not just raw power. Within those regimes, the United States is not the only relevant actor; U.S. officials act by reference to shared, not simply local, norms;[65] and the Supreme Court represents neither the final, nor the infallible, interpreter of what is lawful.[66] By challenging the guiding tenets of the Court's global jurisprudence, Blackmun painted a world of duties beyond borders, stable and predictable commercial relations, well-functioning transnational dispute-resolution systems,[67] and judicial protection for human rights.[68]

Blackmun's fate is to be remembered as the judge who wrote *Roe v. Wade*. But if all we remember him for is *Roe*, then he would have fooled us again. For Harry Blackmun wrote about much more than just abortion. Through decades of growth and change, he recast his judicial mission from deferring to insiders to defending outsiders. He broke out of the parochialism of a Court that too often looks inward, to protect the needs of those forgotten in the "world out there," a world that lies both within and without our borders.

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64. *See* ALI Address, *supra* note 21, at 59 ("We are all in this together, and how vulnerable we all are as we see the turmoil and the struggle all over the world, including our own country.")

65. *See* Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549, 2568 (Blackmun, J., dissenting) ("The [treaty's] terms are unambiguous. Vulnerable refugees shall not be returned."); Blackmun, *supra* note 45, at 48 ("If the substance of the Eighth Amendment is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States.").

66. *See* Blackmun, *supra* note 45, at 42 ("We perhaps can take some comfort in the fact that although the Supreme Court is the highest court in the land, its rulings are not necessarily the final word on questions of international law.").

67. In *Mitsubishi*, for example, Blackmun wrote:

> The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal

473 U.S. at 639 (citations omitted); *see also id.* at 639 n.21 ("The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own.").

68. In *Haitian Centers Council*, for example, Blackmun's lone protest against our government's forced return of Haitian refugees reflected his solicitude for aliens, his skepticism about unchecked presidential discretion in foreign affairs, and his determination to construe international human rights norms in light of the needs of a well-ordered international system. *Cf.* Campbell v. Wood, 114 S. Ct. 2125, 2125 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that state-sponsored hanging violates evolving standards of decency); United States v. Verdugo-Urquidez, 494 U.S. 259, 297 (1990) (Blackmun, J., dissenting) ("[W]hen a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of 'the governed' and therefore is entitled to Fourth Amendment protections."). To the extent that Justice Blackmun believes that foreign and transnational tribunals can apply international law standards to protect individual rights even when the U.S. Supreme Court will not, his reasoning parallels that of Justice Brennan's famous article regarding the role of state courts as protectors of fundamental liberties. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).