

Fall 2005

Willful Judging of Harry Blackmun, The

Gregory C. Sisk

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Gregory C. Sisk, *Willful Judging of Harry Blackmun, The*, 70 Mo. L. REV. (2005)
Available at: <https://scholarship.law.missouri.edu/mlr/vol70/iss4/6>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

The Willful Judging of Harry Blackmun

Gregory C. Sisk*

I. INTRODUCTION: WILL AND CONSCIENCE

As an invited guest at a symposium in which a central place is given to examining the personal papers and judicial life of a jurist who is esteemed and even revered by many of those participating and attending, my playing of a negative note may sound discordant. Indeed, it may appear downright rude. Because my hosts assured me that the academic ideal of balanced perspectives and critical analysis animated this symposium, and that they would expect nothing less than such a countervailing viewpoint from me, I feel less churlish than otherwise I might.

Still, desiring to be respectful of the warm regard with which others hold Justice Harry Blackmun, I want to make clear that I do not mean fully to replicate Shakespeare's Marc Antony who said of the slain Roman emperor, "I come to bury Caesar, not to praise him."¹ I emphatically have no wish to bury Justice Blackmun, to denigrate him as a person in his private life, or to otherwise diminish his contributions to the personal lives of many participants in this symposium. At the same time, I must candidly confess that I do not come to praise him. Indeed, as legal commentator and law professor Jeffrey Rosen has written, "the qualities that made Blackmun an admirable man ultimately condemned him to be an ineffective justice."²

* Professor of Law, University of St. Thomas School of Law (Minneapolis) (gcsisk@stthomas.edu). For comments on an earlier draft of this essay, I thank Thomas Berg, Michael Paulsen, Michael Scaperlanda, and Patrick Schiltz. I remain fully and solely responsible for what follows in style and substance. This essay was written in February, 2006 and revised in April, 2006, prior to publication of LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (Henry Holt & Co. Times Books, May 2006); David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS (May-June 2005), available at <http://www.legalaffairs.org/printerfriendly.msp?id=817>; the responses by several leading legal figures to the Garrow essay, available at http://www.legalaffairs.org/issues/May-June-2005/feature_response_mayjun05.msp; and various other articles and symposia examining the Blackmun Papers. Although some matters discussed in these later venues were anticipated and addressed herein, the essay does not respond directly to any later-published commentary.

1. WILLIAM SHAKESPEARE, *JULIUS CAESAR*, Act III, Scene II ("Friends, Romans, countrymen, lend me your ears; I come to bury Caesar, not to praise him.").

2. Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC, May 2, 1994, at 13.

Although admirers, especially former law clerks and news media hagiographers, describe Justice Blackmun as the “conscience” of the Court,³ on closer inspection this means little more than that they agree with the political views enshrined in his Supreme Court opinions. As a contrasting perspective, those who regard Justice Blackmun’s most visible legacy, a constitutionally-mandated right to abortion-on-demand, as causing the death of millions of innocent unborn children certainly do not share an appreciation of Justice Blackmun’s judicial conscience. My point here is not that the pro-life detractors are correct, although I do share their underlying perspective. Rather, I mean to suggest that the appellation of “conscience” in this way is either meaningless, amounting to nothing more than an expression of political affinity, or is largely misplaced and misconceived by reason of the special nature and restrained purpose of the judicial role.

As pertinent to the judicial role, the term “conscience” must be grounded in integrity and fidelity to the law. When a judge is tempted to shade the facts, elide the plain text, neglect or falsely portray one of the parties, or ignore contrary precedent to reach a preferred solution, the call of conscience would be to act with candor, accurately report the facts including those which are disquieting, maintain the dignity of each party by fairly characterizing the party’s role and arguments, accept the language of the text as a touchstone, and engage honestly with precedent. On this score, Justice Blackmun has a mixed record, although his strength in appreciating the dignity of the parties and being concerned about the real impact of decisions upon human beings is deservedly praised.

When commentators describe Justice Blackmun as a jurist of conscience or as generating a jurisprudence of compassion, the bottom-line results in cases appear to be the primary basis for this positive assessment. But, to say the least, being a zealous warrior on behalf of a political agenda is an odd understanding of conscience, which ordinarily is understood to encompass fundamental principles that call one to account even when one’s preference is to act differently. Instead, a well-formed judicial conscience draws upon the rule of law, adheres to neutral principles and impartial procedures, and embraces humility lest a decree improperly override democratic governance. There is little evidence that Harry Blackmun regularly felt or finally accepted a conflict between his preferences and his judicial opinions; indeed my general thesis is that he failed to fully appreciate that there is properly a difference between them. Justice Blackmun’s opinions on the central constitutional controversies of our time are better described as acts of will than as acts of conscience.

3. See Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994).

II. WILL AND ATTITUDE

A jurist's success in resisting the temptation toward willfulness and in upholding the discipline of judicial conscience presumably is revealed in his work product. Accordingly, we might search through a lifetime of opinions to uncover those episodes in which a judge indulged his personal preferences and contrast those with instances in which he acted contrary to his presumed attitudes because he believed the law directed otherwise, looking for which approach predominated in his work.

Whatever other evaluations one might reach of Justice Antonin Scalia, examples certainly may be adduced where he has acted contrary to his presumed ideological predisposition and even joined with the so-called liberal members of the Court because he felt bound to do so by his devotion to the language and original meaning of legal texts.

For example, in *Maryland v. Craig*, the Supreme Court upheld, against Confrontation Clause challenge, a state's practice of allowing a child witness in a criminal child abuse case to testify outside of the physical presence of the accused.⁴ In an opinion by Justice O'Connor, the Court characterized the Sixth Amendment's guarantee of the accused's right "to be confronted with the witnesses against him"⁵ as merely expressing a "preference for face-to-face confrontation"⁶ that "must occasionally give way to considerations of public policy and the necessities of the case."⁷ The Court approved testimony by one-way closed circuit television in order to protect the child from emotional trauma that might impair the child's ability to communicate.⁸ In so doing, the Court held that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."⁹

Justice Scalia, in dissent, joined on this occasion by Justices Brennan, Marshall, and Stevens, refused to accept the "subordination of explicit constitutional text to currently favored public policy" in shielding alleged victims from face-to-face confrontation.¹⁰ As Justice Scalia stated, the Confrontation Clause provides "with unmistakable clarity" that the accused is entitled to be "confronted with the witnesses against him."¹¹ Although a law-and-order conservative presumably might support alternative arrangements for witnesses that facilitate prosecution and protect victims, Justice Scalia properly

4. *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

5. U.S. CONST. amend. VI.

6. *Craig*, 497 U.S. at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

7. *Id.* (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)).

8. *Id.* at 857.

9. *Id.* at 853.

10. *Id.* at 860-61 (Scalia, J., dissenting).

11. *Id.* (quoting U.S. CONST. amend. VI).

concluded that the constitutional guarantee to the criminally accused is categorical, however worthy the interest that government seeks to balance against it.¹²

A similar example involves Justice Scalia's resistance to the Court-created exception to the Federal Tort Claims Act¹³ – the so-called *Feres* doctrine¹⁴ – which bars military servicemembers injured incident to service from recovering against the federal government.¹⁵ In *United States v. Johnson*, the Supreme Court revisited the *Feres* doctrine and, by a vote of five-to-four, extended this judicially-implied exclusion of military personnel from recovering under the FTCA to injuries caused by the negligence, not of those in the military hierarchy, but of civilian employees of the federal government.¹⁶ Justice Scalia, in a dissent joined by Justices Brennan, Marshall, and Stevens, described the confusion, uncertainty, unfairness, and anomalous results wrought by the *Feres* doctrine – that other persons are permitted to recover under the FTCA for wronging by the military, while the serviceman is left without a remedy when injured under identical circumstances; that jointly responsible third-parties can implead the United States for injuries to a private party or even a federal civilian employee, but not when a serviceman is injured, etc.¹⁷ Most importantly, as Congress had codified no exception for servicemen, and indeed by adopting an exception for combatant military activities implicitly left the door open to such suit, Justice Scalia rejected the purported rationales for the judicial exclusion of military servicemembers from the FTCA remedy.¹⁸ Although his dissent would have expanded the liability of the sovereign United States, and put him in company with members of the Court ordinarily considered his ideo-

12. Yet another, and perhaps more prominent, example from the Court's constitutional decisions of Justice Scalia's unexpected alignments for principled legal reasons, but instances in which he did not separately write, is the pair of flag-burning cases: *Texas v. Johnson*, 491 U.S. 397 (1989) and *United States v. Eichman*, 496 U.S. 310 (1990). In each case, Justice Brennan's majority opinion affirmed the textually-grounded and neutral principle that the First Amendment's protection of "freedom of speech" may not be circumscribed because of popular antipathy toward the expression at issue, even that which debases a revered national symbol. *Johnson*, 491 U.S. at 407-10; *Eichman*, 496 U.S. at 318-19. In both *Johnson* and *Eichman*, Justice Scalia, along with Justices Marshall, Blackmun, and Kennedy, joined Justice Brennan's reaffirmation of the "bedrock principle underlying the First Amendment, [which] is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414; *Eichman*, 496 U.S. at 319. Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented in each case. *Johnson*, 491 U.S. at 421; *Eichman*, 496 U.S. at 319.

13. 28 U.S.C. §§ 1346(b), 2671–2680 (2000).

14. See *Feres v. United States*, 340 U.S. 135 (1950).

15. See 28 U.S.C. §§ 2671-2680.

16. *United States v. Johnson*, 481 U.S. 681, 691-92 (1987).

17. *Id.* at 701-03 (Scalia, J., dissenting).

18. *Id.* at 697-700.

logical opposites, Justice Scalia was led ineluctably to his conclusion by his fealty to the plain language of the statutory text.

Comparable episodes in which Justice Blackmun faithfully submerged his political will in favor of adherence to legal rules and standards do not readily come to mind. The closest example might have been his original recognition that the death penalty, however much he may have opposed it as a matter of personal or political values, was legally sustainable. However, Justice Blackmun surrendered this vestige of his judicial conscience at the close of his judicial tenure when here too, at the end, he unleashed his personal preferences.

Three illustrative episodes, drawn from highly visible areas of constitutional adjudication, suggest that on the crucial questions of the day Justice Blackmun recurrently surrendered to the temptation to impose his will into the law. Discussed below are three encounters by Justice Blackmun with controversies in constitutional law on which he harbored strong personal preferences: abortion, religious liberty, and the death penalty. One could have sketched similar stories of Justice Blackmun from other fields of law, such as environmental law, gay rights, and affirmative action for racial balance, but the following three examples suffice to make the point.

A. Justice Blackmun and Abortion

Any discussion of Justice Blackmun's jurisprudence necessarily begins with the constitutionally-embedded right to elective abortion, and Justice Blackmun worked energetically to ensure that this legacy would endure.

Seldom in the history of American law has a judicial body so deliberately and absolutely adopted one value at the expense of another and with so little grounding in law or even the pretense of a legal basis. In *Roe v. Wade*, the Supreme Court, through Justice Blackmun's majority opinion, announced a generalized and fundamental constitutional right to privacy, which encompassed the power to undertake conduct with significant social and moral ramifications.¹⁹ The *Roe* decision created a nearly absolute right to abortion during the first trimester of pregnancy, permitted legal restraints on abortion in the second trimester only in the interests of the health of the mother, and allowed only for very limited regulation of abortion even late in pregnancy.²⁰

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

20. *Id.* at 164-65 (summarizing Court's holding). By the *Roe* opinion's own formulation, the purported allowance for limited restraints on abortion in the interests of fetal life during the third trimester was illusory. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 995-96 n.4 (2003) (explaining that the "life or health" of the mother exception to permissible regulation even during the third trimester is defined so broadly in *Roe* and the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), "as including a wish to abort for 'family' or 'emotional' reasons," that the right to abortion is preserved even in the third trimester "for essentially any reason").

Although Justice Blackmun purported to avoid “the difficult question of when life begins,”²¹ the nature of his decision and his aggressive withdrawal of protection from fetal life effectively answered that question, in his view anyway.²²

In *Roe*, Justice Blackmun elevated the value of individual autonomy over the value of the “continued existence . . . [of] life or potential life,” while simultaneously pretending not to make such a choice and failing (or not really trying) to demonstrate a constitutional warrant for preferring one value over the other.²³ Michael John Perry has characterized *Roe*’s dismissal of the moral concern about protection of fetal life as “plainly imperial.”²⁴ John Hart Ely’s contemporary summation of *Roe* still resonates today. He forthrightly called *Roe* “bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.”²⁵ Even an admiring former clerk to Justice Blackmun acknowledges that “[t]he opinion’s actual legal argument is stunningly brief.”²⁶

The general consensus among legal scholars, whatever their view of abortion or of the ultimate result in the case, remains that the *Roe* opinion is intellectually and legally shoddy.²⁷ As Michael Paulsen has bluntly, but accurately, described it, “[t]he opinion is obtuse, indifferent to constitutional text, poorly reasoned, and unquestionably ‘legislative’ in its style and substance.”²⁸ Nonetheless, Justice Blackmun stubbornly refused to ever acknowledge any weakness in the opinion. Two decades later, he insisted that he would still “craft it about the same way” and that he would “stick with [his] guns on that one.”²⁹

21. *Roe*, 410 U.S. at 159.

22. Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1185 (1991) (book review); see also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF* 254 (1993) (noting that the *Roe* Court could “reach the result that it does only by declining to define the fetus as human”).

23. *Roe*, 410 U.S. at 222 (White, J., dissenting) (the Court’s “marshaling of values” to prefer “the convenience of the pregnant mother” over “the continued existence and development of the life or potential life that she carries” was accomplished without “constitutional warrant for imposing such an order of priorities on the people and legislatures of the States”).

24. MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 175 (1988).

25. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

26. EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 366 (1998).

27. See Paulsen, *supra* note 20, at 1008 (noting that there has never been “a serious scholarly defense of *Roe*’s reasoning, on its own terms, by a distinguished legal academic (or even by an undistinguished one)”).

28. *Id.* at 1021.

29. The Justice Henry A. Blackmun Oral History Project 206-07 (1994-95), available at <http://lcweb2.loc.gov/cocoon/blackmun-public/collection.html> [hereinafter Blackmun Oral History Project].

When interviewed for his oral history project, Justice Blackmun was strangely uninterested in discussing the legal ground for the decision, that is, the legal theory or constitutional basis, even when asked directly.³⁰ Instead, he proudly confirmed that his extensive library research, his primary agenda in asking questions at the oral arguments, and the crucial substance of his opinion had focused upon the provenance and history of the physicians' Hippocratic Oath,³¹ an extra-legal factor that had been ignored by all of the parties to the case but which Justice Blackmun nonetheless apparently viewed as central.³² In the *Roe* opinion, he attempted to undermine the Hippocratic Oath, which forbids physicians from participating in abortion, as not widely accepted in ancient Greek society and further contended that both Plato and Aristotle commended abortion.³³ Justice Blackmun's amateur dissertation on medical ethics, including the Hippocratic Oath, and on ancient philosophy has been challenged on several points and been revealed as based primarily upon biased pro-abortion sources.³⁴ The more fundamental question, however, as put by one commentator, is "why Plato and Aristotle should be considered authority for such a controversial moral and political issue, or how the support of philosophers provides a persuasive legal or institutional argument for the Court's expansion of privacy rights."³⁵ Surely Justice Blackmun did not mean to suggest that, because infanticide also was practiced in the ancient world, a constitutional right to infanticide should follow. And yet, Justice Blackmun offered extraneous non-legal observations of questionable accuracy to justify judicial activism.

With the release of Justice Blackmun's personal papers, we have learned more about how *Roe* proceeded in a straight line from his previous personal opinions about abortion, about how he appealed to and perceived other members of the Court through the lens of his political stance on the controversial question, and about how *Roe* radicalized a previously moderate jurist into a

30. *See id.* at 201.

31. *Id.* at 194, 197-98, 489-90.

32. *But see* Ely, *supra* note 25, at 925 n.42 (questioning how discussion of the Hippocratic Oath was relevant to the legal issues); Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 691 (1990) (noting that he "count[ed] some twenty-three pages of such material [medical ethics and philosophy in the *Roe* opinion] before the Constitution is again mentioned (and then only to concede that its text does not mention a right to privacy)").

33. *Roe v. Wade*, 410 U.S. 113, 131(1973).

34. Martin Arbagi, *Roe and the Hippocratic Oath*, in ABORTION AND THE CONSTITUTION 159, 162-63 (Dennis J. Horan et al., eds. 1987); John M. Dolan, *Is Physician-Assisted Suicide Possible?*, 35 DUQ. L. REV. 355, 384 (1996); *see* Neomi Rao, Comment, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1379-80 & n.29 (1998).

35. Rao, *supra* note 34, at 1379-80.

willful judge ready and willing to impose his view of the preferred answer to controversial political, social, and moral questions into constitutional mandate.

Before he ever donned the black robe, dating from his days as a practicing lawyer, Harry Blackmun had been opposed to statutes limiting abortion.³⁶ His personal papers reveal that, almost from the moment that he ascended to the Supreme Court bench, he was primed to formulate a constitutional right to abortion through a right to privacy, having been prepared to do so in a case preceding *Roe*.³⁷ Thus, *Roe* flowed rather easily from his predispositions.

Despite *Roe*'s dubious legal warrant, Justice Blackmun expanded and elevated his invention at every turn. He attempted to transform the creation of his will into a fundamental right on the same level and owed the same fealty as the right to equal protection of the laws for persons of all races, which was guaranteed directly by the Fourteenth Amendment and advanced in the venerable anti-segregation decision of *Brown v. Board of Education*.³⁸ The arrogance exhibited thereby cannot be reconciled with any claim that Justice Blackmun was a judge of humility or restraint. While many have described him as personally modest and unassuming, Jeffrey Rosen aptly observes that his opinions "were often anything but modest."³⁹

Justice Blackmun defended his fabricated constitutional right with zealous ardor. As Stuart Taylor has said, Justice Blackmun saw "every abortion case as a new front in a holy war in which he had a highly personal stake."⁴⁰ When the Court was unwilling to mandate public funding of abortion, Justice Blackmun characterized the holding as "alarming."⁴¹ When it appeared that *Roe* might be overruled, he waxed apocalyptic, saying that "the signs are evident and very ominous, and a chill wind blows."⁴² Even as the Court preserved *Roe* at the moment it seemed in greatest danger of reversal, Justice Blackmun again warned of future catastrophe in almost gothic romantic language, saying "now, just when so many expected the darkness to fall, the flame has grown bright[,] [but] I fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light."⁴³ Justice

36. Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1 [hereinafter, Greenhouse, *Documents Reveal*].

37. *Id.*

38. See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986) (citing *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), to castigate legislatures for adopting restrictions on abortion).

39. Rosen, *supra* note 2, at 13.

40. Stuart Taylor, Jr., *Justice Blackmun's Jurisprudence of Compassion*, LEGAL TIMES, Apr. 11, 1994, at 26.

41. *Harris v. McRae*, 448 U.S. 297, 348 (1980) (Blackmun, J., dissenting).

42. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 560 (1989) (Blackmun, J., concurring in part and dissenting in part).

43. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922-23 (1992) (Blackmun, J., concurring in the judgment in part, and dissenting in part).

Blackmun's unusually emotional and personal remarks were more suited for the pulpit or the political soapbox than for the bench.⁴⁴

Nor was the distorting effect of Justice Blackmun's preoccupation with abortion and the *Roe* decision manifested only on the subject of the basis, definition, scope, and precedential preservation of the abortion right. As a jurisprudential black hole that drew in and deformed everything that came near its wandering path through spacetime, *Roe's* gravitational pull collapsed Justice Blackmun's approach to every area of law into a pro-abortion singularity,⁴⁵ including questions of standing to sue,⁴⁶ standards of appellate review,⁴⁷ and freedom of expression.⁴⁸ Justice Blackmun decided every question on the periphery of the abortion controversy in the manner that most aggressively promoted ever-expanding abortion rights while simultaneously contracting the rights of those who protested abortion and the power of the states to restrain the abortion license.

The passionate and emotional bond to the abortion license did not emerge only in Justice Blackmun's rhetoric in his published opinions. As Justice Blackmun's personal papers reveal, the politicization and even personalization of the matter spilled over into the memos written by his law clerks, such as one that questioned whether Chief Justice Rehnquist "deserves to be called 'justice' on this one" and another which referred to Justice Scalia

44. *Cf.* Blackmun Oral History Project, *supra* note 29, at 461 (saying of his comments in a death penalty opinion that he "sound[s] like a clergyman at this point").

45. See generally James Bopp, Jr. & Richard E. Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 *BYU J. PUB. L.* 181 (1989).

46. For Justice Blackmun's consistent efforts to extend standing to third-parties to challenge laws constraining or refusing to fund abortion, see, for example, *Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (Blackmun, J., plurality opinion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). On the distortion of standing law in the original abortion cases, see generally Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 *SUP. CT. REV.* 159, 160-67.

47. See, e.g., *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 825-26 (1986) (O'Connor, J., dissenting) (objecting to majority's willingness to decide merits of case before trial or factual development in trial court, a significant departure from the limited role of appellate courts with respect to the factual record).

48. For Justice Blackmun's consistent efforts to restrain the speech of anti-abortion protestors, see, for example, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (joining majority); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 307, 345 (1993) (joining dissents by Justices Stevens and O'Connor); *Frisby v. Schultz*, 487 U.S. 474 (1988) (joining majority). On the suppression of the speech rights of pro-life protestors, see generally Lynn D. Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists*, 62 *ALB. L. REV.* 853, 881-915 (1999).

as the “evil Nino.”⁴⁹ Although the memo’s author now says these statements did not reflect Justice Blackmun’s views, she describes them as intended “to make this true American hero smile once in awhile.”⁵⁰ This certainly suggests that the clerk expected Justice Blackmun would find such derogatory remarks to be amusing. And there is no evidence that Justice Blackmun ever discouraged such a demonization of the opposition or exercised supervision to prevent this decline in the atmosphere of his chambers from one of judicial integrity and conscience toward one of political combativeness.⁵¹ Given Justice Blackmun’s public comments at the Harvard Law School a couple of years later, in which he stated that he wanted “to hang around and prevent those jokers from overruling *Roe*,”⁵² the temperament in his chambers may well have emanated from the Justice himself.

Moreover, Justice Blackmun’s self-reported assessment of other members of the Court on the abortion issue confirms his slide away from the judicial role toward one of political and interest group campaigning. In his videotaped oral history, Justice Blackmun said that he had suspected that Justice O’Connor was becoming uncomfortable on the abortion issue because “she is a woman and may fear somewhat any accusation of being a traitor to her sex,” an accusation that Justice Blackmun suggested women’s organizations would make.⁵³ Justice Blackmun further revealed in his papers that in a private meeting with Justice Kennedy, he shared letters from women who were thankful for having been able to choose abortion.⁵⁴

Following Justice Blackmun’s political overtures, Justices O’Connor and Kennedy (joined by Justice Souter), rendered a co-authored opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, announcing their decision to retain the “essential holding of *Roe v. Wade*.”⁵⁵ Offering only a cursory defense of the constitutionalization of abortion policy, these

49. Tony Mauro, *First Look Yields Trove of Court Trivia: Blackmun’s Papers Detail Shifting Alliances in Key Cases, as Well as the Personal Side of Sitting on Supreme Court*, LEGAL TIMES, Mar. 8, 2004, at 10.

50. *Id.*

51. See Charles Lane, *How Justices Handle a Political Hot Potato; Blackmun Offers Rare View of Abortion Case*, WASH. POST, Mar. 5, 2004, at A01 (saying that Justice Blackmun’s papers reveal that the abortion case was “viewed through a political lens in Blackmun’s chambers”). Anecdotal evidence from former clerks in other Supreme Court chambers of the period suggest that disrespectful remarks about other Justices not only were not viewed as entertaining but were not tolerated. As the decades pass and the personal papers of other Justices from that era are released, we will learn whether this conduct indeed was idiosyncratic to the Blackmun chambers.

52. Jeff Bucholtz, *Justice Blackmun Brings Overflow Crowd to Its Feet*, HARV. L. RECORD, Mar. 11, 1994, at 1 (quoting Justice Blackmun).

53. Blackmun Oral History Project, *supra* note 29, at 505.

54. David G. Savage, *Roe’s Author Found Himself a Bystander in ‘92 Abortion Fight*, L.A. TIMES, Mar. 5, 2004, at A14.

55. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992) (opinion of Justices O’Connor, Kennedy, and Souter).

justices instead emphasized *stare decisis*.⁵⁶ They characterized their decision to preserve *Roe v. Wade* as a principled refusal to “surrender to political pressure,” arguing that “to overrule under fire” would threaten the continued legitimacy of the Court.⁵⁷ As Earl Maltz has commented:

The [*Casey*] analysis cites the political firestorm created by the holding in *Roe* as a reason for refusing to re-examine the holding itself. In essence, the opinion places the defenders of abortion rights in a position much like that of the child who murders its parents and then asks for mercy on the grounds that he is an orphan.⁵⁸

And, while the *Casey* decision is remembered for saving the basic premise of *Roe* through the Kennedy-O’Connor-Souter joint opinion, commentators tend to gloss over the substance of Justice Blackmun’s dissenting opinion. His praise of the three-justice joint opinion, calling it “an act of personal courage and constitutional principle,”⁵⁹ is often mentioned. That Justice Blackmun nonetheless found even this *pro-Roe* result to be insufficiently all-encompassing, and thus dissented from it in part, typically is ignored. In fact, Justice Blackmun’s position was so extreme that even the most modest of state regulations on abortion – such as provisions requiring counseling, a 24-hour waiting period, informed parental consent, and reporting by abortion providers of medical information – could not be sustained under his absolutist method.⁶⁰

Justice Blackmun’s increasingly radicalized approach to abortion, his personalized and emotional rhetoric in abortion decisions, and anecdotes from former Supreme Court clerks over the years⁶¹ that he often viewed other cases, even in entirely different fields of law, in terms of their potential impact upon abortion jurisprudence, all reveal his, one might say, *obsession*

56. *Id.* at 854-69.

57. *Id.* at 867.

58. Earl M. Maltz, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeast Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 27-28 (1992).

59. *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

60. *Id.* at 926.

61. These anecdotes are confirmed by notes in Blackmun’s recently released papers. See Joseph F. Kobylka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun’s Judicial Legacy*, 70 MO. L. REV. 1075, 1109-12 (2005) (discussing Justice Blackmun’s personal attachment to *Roe*, as reflected in his notes and memoranda regarding other cases, both those involving abortion and those that did not).

with *Roe v. Wade*.⁶² Indeed, in his oral history interviews, he says that at one point his feelings went beyond discouragement to where he was “almost depressed” by the prospect that *Roe* might be overruled.⁶³

Justice Blackmun’s fixation reminds me of one of my favorite works of literature, George Eliot’s *Silas Marner*,⁶⁴ to which I was introduced as a high school student. The lead character of that story succeeded in amassing a small fortune in gold pieces. Rather than providing him with security and fulfillment, the treasure trove weighed heavily on his mind, such that guarding his hoard haunted his every thought and virtually imprisoned him in his isolated home, separating him from the life of the community around him.⁶⁵ Silas Marner found liberation only when the gold was stolen away from him, serendipitously replaced in his affections by an innocent and orphaned child who he discovered abandoned at his home.⁶⁶ Unfortunately, the focus of Justice Blackmun’s obsession was never removed nor, as those who decry *Roe v. Wade* on its merits would say, did he ever come to appreciate the innocence and vitality of the unborn child, even as a small factor to be weighed in the balance.

Aside from the merits of the abortion controversy, *Roe v. Wade*, a decision that was indefensible as a matter of any meaningful theory of constitutional interpretation beyond result-oriented preferences, became the distorting occasion for Justice Blackmun to lose sight of the rule of law as a concept distinct from politics and attitudinal preferences. As Fred Barbash of the *Washington Post* so aptly says, Justice Blackmun “ended [his tenure on the Court] as an unabashed crusader.”⁶⁷

B. Justice Blackmun and Religious Liberty

In the realm of the Establishment Clause of the First Amendment,⁶⁸ while certain nuances can be identified, Justice Blackmun is aptly labeled a strict separationist.⁶⁹ In *Lee v. Weisman*, Justice Blackmun adhered to the

62. See JOHN C. JEFFERIES, JUSTICE LEWIS F. POWELL, JR. 370 (1994) (describing, from Justice Powell’s perspective, “Blackmun’s intensity of feeling,” his “odd stridency,” and his “parental protectiveness for *Roe v. Wade*”).

63. Blackmun Oral History Project, *supra* note 29, at 273.

64. GEORGE ELIOT, *SILAS MARNER* (Q.D. Leavis ed., Penguin Books 1967) (1861).

65. *See id.*

66. *See id.*

67. Fred Barbash, *Blackmun’s Papers Shine Light Into Court; Justice’s Trove Opened by Library of Congress*, WASH. POST, Mar. 5, 2004, at A1.

68. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

69. Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 9-10, 121 (1998) (saying “Blackmun could be classified as a fairly strong ‘separationist,’” although arguing he was not “an estab-

unyielding and ahistorical interpretation that the “purpose [of the Establishment Clause] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”⁷⁰ In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, he adopted the curious view that “secular liberty” encapsulates what “it is the purpose of the Establishment Clause to protect.”⁷¹ As Michael McConnell later observed, the Framers instead understood themselves as protecting “religious liberty,” and “gave it pride of place in our First Amendment.”⁷² Still, as stringent as it was and as removed as it may have been from any original understanding of the clause, Justice Blackmun’s position on Establishment Clause matters was not remarkably different from that of other members of the Court.

An analysis of the Free Exercise Clause,⁷³ the other side of the religion-clause coin offers, a more revealing window onto Justice Blackmun’s approach to constitutional controversies. In addition, the question of whether the Free Exercise Clause affords protection to religious conscience by way of exemption in appropriate circumstances from laws of general application is one that cuts across presumed ideological and jurisprudential lines. Thus, the most important inquiry is not how Justice Blackmun comes out on the result in these cases (the ends) but rather how he gets there and why (the means).

In *Employment Division v. Smith*, the Supreme Court, in an opinion by Justice Scalia, held that the Free Exercise Clause did not prohibit enforcement of Oregon drug laws against sacramental use of peyote by Native Americans.⁷⁴ More significantly, the Court ruled that Oregon did not need to establish any compelling governmental interest to justify application of these laws in a manner that burdened a religious practice.⁷⁵ Enforcement of a law of general application that is formally neutral toward religion, the Court ruled, does not infringe upon the free exercise of religion, notwithstanding that application of such a general law may significantly burden the exercise of reli-

lishment absolutist” because he accepted some measure of governmental accommodation of religion, most notably “preservation of a role for legislatures in fostering free exercise by lifting the burdens of modern government on religion through carefully drawn, judicially monitored exemptions”); Herman Schwartz, *Justice Blackmun*, 43 AM. U. L. REV. 737, 743 (1994) (saying Justice Blackmun “supported a high wall of separation”).

70. *Lee v. Weisman*, 505 U.S. 577, 601 (1992) (Blackmun, J., concurring) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting)).

71. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

72. Michael W. McConnell, “*God is Dead and We Have Killed Him!*”: *Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 174 (emphasis added).

73. U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

74. *Employment Division v. Smith*, 494 U.S. 872, 874-90 (1990).

75. *Id.* at 882-89.

gious faith through religious practice.⁷⁶ Thus, a general law does not even implicate the First Amendment and is not subject to any constitutional scrutiny.

Concurring in the judgment in *Smith*, Justice O'Connor concluded that a government interest in controlling the use and possession of drugs was sufficiently compelling,⁷⁷ but rejected the conclusion that the Free Exercise Clause offers no protection to acts of religious conscience.⁷⁸ Importantly, in addition to canvassing prior precedents, she focused on the actual text of the constitutional provision at issue.⁷⁹ The majority had ruled that the Free Exercise Clause protects "the right to believe and profess whatever religious doctrine one desires,"⁸⁰ but does not extend protection to religious practices that contradict generally applicable law.⁸¹ However, the constitutional text does not refer to the holding of religious beliefs; it refers to the "free exercise" of religion.⁸² As Justice O'Connor stated: "[T]he First Amendment does not distinguish between religious belief and religious conduct."⁸³

By contrast, Justice Blackmun's separate dissent in *Smith* bypassed any considered examination of either the text or the history of the Free Exercise Clause. Instead, after briefly citing what he regarded as the "settled and inviolate principle" established by prior precedent, Justice Blackmun trained his rhetorical fire upon the impact of the *Smith* rule on minority religions.⁸⁴ To be sure, Justice Blackmun had joined the pertinent part of Justice O'Connor's concurrence in *Smith*, thereby implicitly accepting a text-based argument. Nonetheless, while he found space in his separate opinion to extol precedent and to complain about the consequential effects of the decision, he could not spare a word for legal text. Moreover, when Justice Souter more fully developed the case for a broader understanding of the Free Exercise Clause grounded upon the text and historical understanding in *Church of the Lukumi Babalu Aye, Inc. v. City of Haileah*,⁸⁵ Justice Blackmun did not join in that

76. *Id.* at 878-82.

77. *Id.* at 891-907 (O'Connor, J., concurring in the judgment).

78. *Id.*

79. *Id.*

80. *Id.* at 877 (majority opinion).

81. *Id.* at 878.

82. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

83. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring in the judgment). See Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115-16 (1990) (arguing that a reading of "free exercise" to prevent the government from enacting laws that make a religious practice illegal is the "more obvious and literal meaning").

84. *Smith*, 494 U.S. at 907-09 (Blackmun, J., dissenting) (citing supposed "settled law" and expressing concerns about "repression of minority religions").

85. 508 U.S. 520, 574-77 (1993) (Souter, J., concurring in part and concurring in the judgment).

analysis. In sum, Justice Blackmun's approach to the Free Exercise Clause seemed oddly detached from the text and history of the provision.

Nor was Justice Blackmun's disagreement with the *Smith* ruling animated by a brightly affirmative attitude toward a vigorous religious faith in American public life. As noted above, he was willing to turn the Establishment Clause on its head, reversing its protection of religious freedom into an endorsement of secular liberty. Moreover, other opinions by Justice Blackmun reflect some antipathy, or at least skepticism, toward mainstream or traditional religious values. In *Bowers v. Hardwick*, for example, he equated religious ethics concerning homosexual conduct with the intolerance of racist animus that must be treated as suspect.⁸⁶ In *Lee v. Weisman*, he portrayed religious faith as divorced from human deliberation and rationality, thus impairing healthy public dialogue.⁸⁷ He insisted that "[r]eligion has not lost its power to engender divisiveness,"⁸⁸ as though voices of faith pose a unique danger to democratic ideals, a proposition betrayed by the reality of tens of millions who died in the last century at the hands of secular ideological tyranny. Moreover, in yet another of Justice Blackmun's peculiar digressions that reveal his personal presuppositions, he quoted Sigmund Freud, no friend of religious faith, in a footnote for the indictment that even a "religion of love" is "hard and unloving to those who do not belong to it."⁸⁹ These are hardly the words of a man who appreciates a rich multitude of diverse voices, including religious ones, in the public square. Whether or not Justice Blackmun was guilty of outright "hostility toward religion,"⁹⁰ as he was once accused by Justice Kennedy, his opinions do not ring with approval of or even of tolerance toward religious values with which he disagrees or toward those who hold them.⁹¹

In the end, Justice Blackmun's approach to the Free Exercise Clause is yet another manifestation of his motivating theme that "outsiders" were espe-

86. 478 U.S. 186, 211-12 (1986) (Blackmun, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

87. *Lee v. Weisman*, 505 U.S. 577, 607 (Blackmun, J., concurring).

88. *Id.* at 607 n.10.

89. *Id.*

90. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Blackmun responded that these charges were "as offensive as they are absurd." *Id.* at 610 (majority opinion).

91. *Cf. Gregory C. Sisk, How Traditional and Minority Religions Fare in the Courts: Empirical Evidence From Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1041-46, 1054 (2005) [hereinafter Sisk, *Traditional and Minority Religions*] (suggesting that judges, as members of the cultural elite, may be less open to the religious liberty claims of traditional religious believers that challenge modern liberal secularist policies).

cially deserving of constitutional protection, indeed, of outright preference.⁹² He appeared more moved by the fact that the claimants that he favored in Free Exercise cases were minorities than that they happened to be religious; his writings on free exercise always emphasized protection of the minority or the unconventional. In *Smith* itself, he insisted that the Free Exercise Clause must be “scrupulously appl[ied]” to protect “the religious claims of Native Americans, however unorthodox they may be.”⁹³ In *Goldman v. Weinberger*, in which he dissented from the majority’s decision that the military’s refusal to permit servicemembers to wear religious headgear was constitutionally legitimate, he worried that a military standard of permitting religious items only when unobtrusive would discriminate against unconventional faiths.⁹⁴ In sum, Justice Blackmun’s primary concern was, as Mark Rahdert identifies it, “to apply the Free Exercise clause with sensitivity to and solicitude for the plight of truly discrete and insular religious minorities.”⁹⁵

To be sure, protection of religious minorities is one of the integral values underlying the Free Exercise Clause,⁹⁶ but it does not describe the whole of the cathedral. In arguing that the Religion Clauses “should not be reduced simply to protecting or equalizing minority religions,” Thomas Berg observes that these constitutional provisions “embody other values: free exercise rights for all faiths; equality of status between religious and nonreligious citizens; recognition of the relevance of religion to public life; and others.”⁹⁷ As I have argued elsewhere, based upon the plain text and the framing history of the Free Exer-

92. Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 97 DICK. L. REV. 527, 527 (1993) (offering a tribute to Justice Blackmun and saying that “his treatment of ‘outsiders’ [is] the distinctive, recurring theme that represents his major contribution to American law”).

93. *Employment Div. v. Smith*, 494 U.S. 872, 921 (1990) (Blackmun, J., dissenting); see also Blackmun Oral History Project, *supra* note 29, at 410 (acknowledging “there’s always that possibility” that he was influenced in *Smith* by the fact that a Native American practice was at issue, and then further agreeing “that might have been a factor that affected this case”).

94. *Goldman v. Weinberger*, 475 U.S. 503, 526-27 (1986) (Blackmun, J., dissenting).

95. Rahdert, *supra* note 69, at 49.

96. See generally Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919 (2004). And, if any minority religion were entitled to exceptional treatment, it might well be the beliefs of Native Americans, as “their ancestors were here first,” that is, they are indigenous, and because Native American cultures, as uniquely tied to the American continent, “are situated differently from those of any other group in the United States.” Kevin J. Worthen, *Eagle Feathers and Equality: Insights on Religious Exemptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 1003-04 (2005). Still, protection of minority religions is only one of the many purposes of the Free Exercise Clause.

97. Berg, *supra* note 96, at 941.

cise Clause, “the manifest purpose of the clause is straightforward—to recognize and protect the positive good of religious faith and practice.”⁹⁸

Yet the concept of religious liberty as an end in and of itself seemed of secondary concern to Justice Blackmun. And, judging from the rhetoric in his opinions, legal protection for religiously-grounded principles (at least those that did not correspond to his own attitudes) fell at the low end of his personal hierarchy of constitutional values. Consider the scenario of a Catholic hospital objecting to government-sponsored accreditation agencies that imposed an obligation to provide abortion training, or the claim of an evangelical Christian landlord resisting a local housing rights ordinance that precluded the exclusion of homosexual tenants from a spare room in his own home. Based upon the evidence from his opinions, it seems unlikely that Justice Blackmun would have been able to muster much of his famous empathy for a mainstream Christian claim of conscience for exemption from a law promoting a secular value with which Justice Blackmun agreed.⁹⁹ A commitment to the even-handed assurance of religious liberty, for traditional and non-traditional, for conventional and unconventional, is not readily detected in his jurisprudence.

Most importantly, for Justice Blackmun, the Free Exercise Clause was but another vehicle by which to advance what Mark Rahdert characterizes as his ongoing agenda to enable individuals to “listen to, and abide by, the commands of their personal conscience, in an environment as free as possible from governmental interference.”¹⁰⁰ To the extent that he meant to convert the clause into a protection of conscience generally, thereby further expanding individual autonomy, Justice Blackmun depreciated its distinctly religious element and, without legal warrant, would have expanded the clause beyond its textual parameters.¹⁰¹

98. Gregory C. Sisk, *Stating the Obvious: Protecting Religion for Religion's Sake*, 47 DRAKE L. REV. 45, 45 (1998) [hereinafter Sisk, *Stating the Obvious*].

99. For further discussion of claims of religious conscience by traditionalist religious believers and the obstacles they face in the court, see generally Sisk, *Traditional and Minority Religions*, *supra* note 91, at 1033-54.

100. Rahdert, *supra* note 69, at 21.

101. See JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* xxiii (2d ed. 2005) (saying that we must “acknowledge the explicitly religious sources that helped to form the First Amendment” and that “[w]e cannot pretend that the First Amendment is a purely secular trope, or just another category of liberty and autonomy, and expect citizens to believe in it”); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1600 (1997) (book review) (arguing that “[w]e do not protect religious liberty for secular society's sake” and that the “secondary benefits to society” from protecting religious exercise are incidental to its primary purpose of protecting religion); Sisk, *Stating the Obvious*, *supra* note 98, at 62-63 (arguing that “[t]aking religion seriously, valuing religious faith as a good in itself and not merely as a manifestation of individual autonomy, and elevating the religious claim of conscience above arguments from secular humanist philosophy may mystify or even offend the elite

Not at all incidentally, Justice Blackmun's approach to religious liberty, as in other areas of constitutional concern, was marked by "a preference for case by case balancing,"¹⁰² which often leaves ample room for exercise of ad hoc discretion and arbitrary results. As elsewhere in his constitutional jurisprudence, Justice Blackmun sought through the Free Exercise Clause to open the door wide for the expression of his own will as legal decree.

C. Justice Blackmun and the Death Penalty

Justice Blackmun's personal opposition to the death penalty long predated his ascendancy to the Supreme Court and persisted through his years on the Court. As he stated in his oral history, "the death penalty has always concerned me."¹⁰³ And, in this area of the law as well, where an appreciation of the restrained role of the jurist was expressed at the beginning, Justice Blackmun lost whatever self-discipline he originally possessed and, in the end, allowed his personal preferences full dominion across the field of constitutional jurisprudence.

Not only had Justice Blackmun always been opposed to the death penalty as a matter of policy, he fervently wished to make that opposition publicly known through the venue of his judicial writings. In a draft opinion in a death penalty case written when he was serving as a judge on the United States Court of Appeals for the Eighth Circuit, he had appended a concluding paragraph expressing doubts about the death penalty and urging executive clemency in the case at hand.¹⁰⁴ When two other judges called the remarks "gratuitous," then-Judge Blackmun removed the paragraph, although he remarked at the time that this "[p]aragraph was written out of a feeling of sincerity and conviction on my part."¹⁰⁵

While writing in a memo to himself that he was "on record as opposing the death penalty as a policy matter," Justice Blackmun began his tenure on the Supreme Court with the belief that the matter properly belonged to the democratic process rather than resolution by judicial edict.¹⁰⁶ Thus, he dissented in 1972 when a splintered majority of the Court held all existing death penalty statutes unconstitutional in *Furman v. Georgia*,¹⁰⁷ and concurred in 1976 when the Court effectively reinstated the death penalty by upholding a revised state statutory regime for imposition of the penalty in *Gregg v. Georgia*.¹⁰⁸

who dominate our cultural and educational institutions" but is the understanding that animated the founders, that still resonates with most Americans today, and, most importantly, that is enshrined in the text of the First Amendment).

102. Rahdert, *supra* note 69, at 120.

103. Blackmun Oral History Project, *supra* note 29, at 35.

104. Greenhouse, *Documents Reveal*, *supra* note 36, at A1.

105. *Id.*

106. *Id.*

107. 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting).

108. 428 U.S. 153, 227 (1976) (Blackmun, J., dissenting).

Indeed, in recognition of the demands of restraint when acting in a judicial role, Justice Blackmun separately dissented in *Furman* to say that judges “should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these.”¹⁰⁹ He further commended elected legislators as being “far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man’s dignity, than are we who sit cloistered on this Court.”¹¹⁰ Sadly, Justice Blackmun’s expression of judicial humility was forgotten a year later when he overturned every abortion law in the nation in *Roe v. Wade*.¹¹¹ And even in the context of capital punishment, he later characterized his restraint in *Furman* as “obviously a mistaken position to take.”¹¹²

In fact, even while uttering words of respect for democratic governance, Justice Blackmun could not resist the temptation to proclaim in his *Furman* dissent that he “yield[ed] to no one in the depth of [his] distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds.”¹¹³ He related that the death penalty violated his “childhood[] training and life[] experiences,” as well as his “philosophical convictions” and “sense of ‘reverence for life.’”¹¹⁴

As time went on, Justice Blackmun with growing regularity, and with increasing emotional vehemence in his opinions, rejected the application of the death penalty in each case that came before the Court.¹¹⁵ As Martha Dragich Pearson notes in her review of his capital punishment decisions, “the distinct tracks of Justice Blackmun’s personal view (reflected in his opinions) and his decisions (marked by his voting record)” ultimately came to a “point of . . . convergence.”¹¹⁶

109. *Furman*, 408 U.S. at 411 (Blackmun, J., dissenting).

110. *Id.* at 413.

111. *See supra* Part II.A.

112. Blackmun Oral History Project, *supra* note 29, at 188.

113. *Furman*, 408 U.S. at 405 (Blackmun, J., dissenting).

114. *Id.* at 405-06.

115. *See, e.g.,* *Lockett v. Ohio*, 438 U.S. 586, 604-17 (1978) (Blackmun, J., concurring in the judgment); *Barefoot v. Estelle*, 463 U.S. 880, 899-938 (1983) (Blackmun, J., dissenting); *Darden v. Wainwright*, 477 U.S. 168, 188-175 (1985) (Blackmun, J., dissenting); *Cabana v. Bullock*, 474 U.S. 376, 394-407 (1986) (Blackmun, J., dissenting); *Coleman v. Thompson*, 501 U.S. 722, 758-74 (1991) (Blackmun, J., dissenting). For reviews of Justice Blackmun’s death penalty opinions, see Malcolm L. Stewart, *Justice Blackmun’s Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271 (1998); Martha J. Dragich, *Justice Blackmun, Franz Kafka, and Capital Punishment*, 63 MO. L. REV. 853 (1998).

116. Dragich, *supra* note 115, at 858.

Finally, in his last term on the Court, after a law clerk had suggested that the justice publicly adopt an "abolitionist position" on the death penalty,¹¹⁷ Justice Blackmun took the occasion of the denial of certiorari in a death penalty case, *Callins v. Collins*, to say that he was "morally and intellectually obligated simply to concede that the death penalty experiment has failed."¹¹⁸ Having thus elevated his moral opinion to the level of constitutional magnitude, he concluded that any efforts to fairly and consistently administer capital punishment were "doomed to failure," expressed his doubts that any procedural scheme could be developed for legitimate administration of capital punishment, and declared that he would "no longer . . . tinker with the machinery of death."¹¹⁹

Linda Greenhouse of the *New York Times* describes Justice Blackmun as always regretting his earlier failure to highlight his opposition to the death penalty and characterizes his *Callins* dissent as "a long-delayed expiation."¹²⁰ Indeed, Greenhouse says that the death penalty cases coming before the Court over the decades forced Justice Blackmun "to confront a question that troubled him throughout his judicial career: how to reconcile his personal opposition to capital punishment with his vision of the role of the judge."¹²¹ Looking back on his whole career, we now know how he ultimately answered this conflict; in the end he could not hold back the tide of his personal will.

III. WILL, THE LAW, AND THE JUDICIAL ROLE

In presenting three illustrative dissertations on Justice Blackmun's approach to abortion, religious liberty, and the death penalty, I should not be understood as merely giving vent to my own disagreements with Justice Blackmun. In fact, of the three subjects discussed above, I agree with Justice Blackmun as a matter of policy on two of the three, and I concur as well on the constitutional implications of one question to a substantial degree and on another at least in part. Importantly, however, even when we arrive at the same place, we often do not arrive there in the same manner. My concern in this essay is not a lack of conformity between my political preferences and Justice Blackman's, but rather with Justice Blackmun's resort to judicial decree to insinuate his preferences into the supreme law of the land.

Nor is my unflattering appraisal premised upon an isolated passage or comment, a solitary opinion, one episode, or even a single area of law addressed by Justice Blackmun during his more than twenty years on the Court. Some instances of his judicial behavior and rhetoric discussed above, if considered separately and disconnected from the whole, might be characterized

117. Greenhouse, *Documents Reveal*, *supra* note 36, at A1.

118. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

119. *Id.* at 1146, 1159.

120. Greenhouse, *Documents Reveal*, *supra* note 36, at A1.

121. *Id.*

as something other than a meaningful deviation from the range of appropriate judicial responses or excused as a modest if unfortunate departure from a proper judicial posture. However, the recurrent pattern of subjectivity and willfulness revealed in the collective opinions and by the attitudes expressed in the overall set of papers and the complete narrative would remain.

The Constitution is a legal text, and, because it is a legal text, judicial decisions based upon the Constitution must be grounded in legal sources and legal analysis. Constitutional judicial review should not be seized by politicized jurists as the opportunity for subjective moral evaluation of public policy. Constitutional law is not a species of moral philosophy. In an earlier work, I have disputed the suggestion that “our society’s dialogue about values [should] proceed in the context of the Constitution, and more particularly, in the arena of constitutional litigation with primacy given to the courts as moral tutors.”¹²² While constitutional judicial review is vital to safeguard our constitutional freedoms, embedding a judge’s moral and philosophical preferences into judicial decrees improperly supersedes public debate and undermines democratic governance.

One need not retreat into formalism, nor argue that compassion must be exiled wholly from the province of judging,¹²³ to insist that constitutional decisionmaking be carefully bounded by the text, historical understandings, legal doctrine, and a modest view of the role of the judiciary. There remains ample room for justice without abandoning the theory of a rule of law governed by neutral principles. As Alexander Bickel said, while simultaneously resisting judicial activism, courts must not neglect the immediate human element in judging, that is, the “flesh and blood of . . . actual case[s].”¹²⁴

Every judge must remember that a legal case involves the lives and concerns of the actual people before the court. This does not mean, however, that a judge, especially an appellate judge laying down the law for future cases with different parties and different facts, should strive to do equity in each case *without* reference to rules of law. There will be many instances in which, notwithstanding the appearance of inequity in an individual case, adherence to established and justified principles of law mandate a particular outcome. Statutes of limitations are one such example. Depriving an individual of a legal remedy because of a time period limitation may seem unjust in an individual case but the cause of justice in general is promoted by precluding stale claims. As Justice William Brennan noted, “statutes of limitations ‘are practi-

122. Gregory C. Sisk, *Questioning Dialogue by Judicial Decree: A Different Theory of Constitutional Review and Moral Discourse*, 46 RUTGERS L. REV. 1691, 1696 (1994).

123. *Cf. DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (arguing that constitutional provisions should be given “a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging”).

124. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 26 (2d ed. 1986).

cal and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost."¹²⁵

When the result in an individual case appears unjust, it may be the occasion for the court to reconsider whether the legal rule mandating that result is itself justified. While a constitutional or statutory command, or a clear silence or omission from the Constitution or statutory code, indeed may compel the result, the apparent injustice in a particular case sometimes may signal a flaw or shortcoming in the articulation or application of a rule of law. Thus, the moral claim for justice of the individual litigant serves to call attention to the need for continual evaluation of legal doctrine, in a manner consistent with and faithful to the constitutional or statutory provision at issue and the overriding principle of the rule of law. The rule of law is not static in time nor blind to the claims of justice.

Still, a constitutional decision, both in outcome and reasoning, must be justified by reference to *legal* authority. Moral sentiments may not override or distort the directives of legal text. As John Hart Ely has said, before the Supreme Court may make any constitutional pronouncement, "it is under an obligation to trace its premises to the charter from which it derives its authority."¹²⁶ Judicial decisionmaking calls for wise employment of that singular form of human thought known as legal reasoning.¹²⁷

Because we have not anointed our judges to rule us as a "bevy of Platonic Guardians,"¹²⁸ the values espoused in a constitutional decree must be rooted in the Constitution, not in our hopes and aspirations for a better society.¹²⁹ As Ronald Allen has commented, "[w]ith all due respect to the hard-working and honorable members of the Court, past and present, for whom in fact I have enormous respect, they are not collectively a group that commands

125. See *Texaco, Inc. v. Short*, 454 U.S. 516, 551 (1982) (Brennan, J., dissenting) (quoting *Chase Secs. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

126. Ely, *supra* note 25, at 949.

127. See Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981) (arguing that legal reasoning is a "distinct method" of "[a]nalogy and precedent" that involves "the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively").

128. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

129. Frank H. Easterbrook, *The Influence of Judicial Review on Constitutional Theory*, in *A WORKABLE GOVERNMENT? THE CONSTITUTION AFTER 200 YEARS* 170, 188 (Burke Marshall ed., 1987) ("[T]he Constitution is law, a set of rules, rather than an empty vessel into which modern theorists pour their own hopes and visions of a better society.").

our fealty because of the profundity of their moral insight.”¹³⁰ Justice Blackmun is no exception to this reminder.

When the Constitution speaks, the Supreme Court should amplify that sound loudly and with a commanding voice. But when the Constitution is silent, the Court likewise should remain silent. Reasonable judges, legal scholars, and lawyers sometimes will hear the voice of the Constitution differently. But we must be listening with *legal* attention – not with the expectation of hearing the answer to our hopes or preferences. Too often, Justice Blackmun was listening to his own inner voice.

In this regard, Justice Felix Frankfurter could have been speaking directly to Justice Blackmun when he wrote:

The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace.”¹³¹

Now, in light of my own empirical work in the field of judicial decisionmaking, I could hardly pretend that Justice Blackmun was alone in being influenced in his judicial role by his political preferences or background experiences. No social science researcher can avoid “the inescapable conclusion that judicial decisions – and particularly constitutional law decisions – are at least partially attributable to the personal values and experiences of the judges.”¹³² Having conducted several statistically rigorous studies of influences upon the lower federal courts,¹³³ I have described the results of such study as “a sobering splash in the face with cold reality for those of us who retain an aspirational faith in principled judging.”¹³⁴ Yet at the same time, it

130. Ronald J. Allen, *Constitutional Adjudication, The Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436, 440 (1993).

131. *Am. Fed. of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 555-56 (1948) (Frankfurter, J., concurring).

132. Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1552 (1966).

133. Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) [hereinafter *Judges and Ideology*]; Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. (2005); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491 (2004); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

134. Gregory C. Sisk, *Judges are Human, Too*, 83 JUDICATURE 178, 211 (2000).

must be emphasized that the empirical evidence of ideological or other influences upon judging are too frequently overstated; ideology does not color everything nor explain most things.¹³⁵ Moreover, empirical evidence for the traditional legal model, that is, the influences of texts and precedents, should not be neglected.¹³⁶ In sum, it is unwise to make unduly expansive assertions regarding statistical analysis of judicial behavior.

In any event, no empirical study, however formulated, can undermine the persistent normative appeal of the legal model of judging. Kent Greenawalt writes that “the traditional model posits as a desirable aspiration an ideal that legal decision not depend on the personality of the judge. The aspiration is not fully achievable even if all judges are intelligent, well-trained, and conscientious, but it is worth striving for.”¹³⁷ The fact that perfect objectivity and neutrality will always remain out of reach is no reason for despair or to surrender that principle.

Thus, it is a significant departure from the judicial role when a jurist not only uses law to promote a political agenda but does so regularly and with little effort to discern the difference between attitudes and law. By contending that “complex constitutional issues cannot be decided by resort to inflexible rules of predetermined categories,”¹³⁸ and instead adopting “compassion” as a guidepost for judging,¹³⁹ Justice Blackmun preserved for himself boundless discretion so as to be able to indulge his personal preferences at will.

Journalist Nina Totenberg reports that Justice Blackmun saw his judicial odyssey as unfolding from his individual answer to a self-directed question: “When one reaches here [the Supreme Court], he has to decide where he’s going.”¹⁴⁰ Unfortunately, by subjectivizing constitutional judging into a personal journey, Justice Blackmun forced the rest of us to travel along with him on this idiosyncratic road.

Justice Blackmun declared himself as not “bother[ed]” by descriptions of his approach as “writ[ing] from the heart or from compassion or something else and not from strict legal principle.”¹⁴¹ But we should be bothered—very bothered. As Jeffrey Rosen has said, “[t]here is something lawless . . . about the notion that warmhearted impulses are more important than legal reasoning.”¹⁴²

135. Sisk & Heise, *Judges and Ideology*, *supra* note 133, at 769-79.

136. *Id.*

137. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS 142 (1995).

138. Jeffrey M. Shaman, *Justice Harry A. Blackmun: The Evolution of a Realist*, 72-June A.B.A. J. 38, 40 (1986) (quoting Justice Blackmun).

139. Karlan, *supra* note 92; LAZARUS, *supra* note 26, at 279 (describing Justice Blackmun as “immers[ing] himself ever more deeply in the compassionate jurisprudence that was increasingly becoming his trademark”). For a critique of Justice Blackmun’s “Jurisprudence of Compassion,” see Taylor, *supra* note 40.

140. Totenberg, *supra* note 3, at 747.

141. Blackmun Oral History Project, *supra* note 29, at 15.

142. Rosen, *supra* note 2.

IV. CONCLUSION

Any critical summary in a few pages of the lifetime work of a public figure unavoidably will contain an element of caricature. As a judge and the author of dozens of judicial opinions, Justice Blackmun's work product certainly included the language of the law, reference to text, reliance on or distinction of precedents, and other sources and canons of law. To say that Justice Blackmun consulted nothing other than his personal preferences in deciding cases would be an exaggeration and easily disputed. No judge would or could offer nothing more than subjective statements as justifications for judicial outcomes in every case. In examining the work product over a judicial lifetime of even the most egregious of judicial activists, one still would discover some measure of balance between the push of personal preferences and the pull of the law. However, the balance struck by Justice Blackmun tilted measurably toward the former.

Looking at those cases in which the opportunity for imposing change in the law was most poignantly presented, the question remains whether on crucial and controversial legal points the determining factor for Justice Blackmun more often was the realization of his personal preferences than the directive of the law. I submit that Justice Blackmun's own words, in his opinions and in his recently-released papers and oral history, tell the story. Whether my portrayal is more parody than paradigm is for the participants of this symposium and the readers of this essay to judge.

If, at the end of the day and in the quiet of thoughtful contemplation, the observer concludes that the primary legacy of Harry Blackmun is that he voted correctly (in the eyes of his apologists) on the political or moral outcome of certain disputes, is that the legacy of a faithful jurist or instead of a willful politician? Does such conduct constitute the signature of a law-interpreter or instead the dictate of a legal-autocrat interposing his own will into the substance of the law laid down for us all?

