

The Father of Roe v. Wade

Reviewed by Akhil Reed Amar
Sunday, May 8, 2005

BECOMING JUSTICE BLACKMUN

Harry Blackmun's Supreme Court Journey

By Linda Greenhouse. *Times*. 268 pp. \$25

Linda Greenhouse has written a "becoming" book. As suggested by its title, this book traces how Harry Blackmun, the man, became Justice Blackmun, the man of history -- how a moderate Republican appointed to the Supreme Court by President Nixon and initially dubbed a "Minnesota twin" of Nixon's first appointee, Warren Burger, ultimately became a judicial ally of the liberal William Brennan and a disappointment to the increasingly conservative Burger.





Advertisement Greenhouse's book is also "becoming" in the dictionary sense. She provides a graceful account, filled with well-chosen quotations, apt observations and elegant legal summaries. Fans of Greenhouse's newspaper reporting -- she has covered the court for the New York Times since 1978 and won a Pulitzer Prize in 1998 -- will not be disappointed.

As Greenhouse makes clear from the start, *Becoming Justice Blackmun* does not aspire to be a full-blown biography of Blackmun or a detailed analysis of his judicial product. Instead, she offers glimpses of his career through the window of his recently unsealed papers, which occupy some 600 shelf feet of library space. Blackmun was a world-class pack rat, which means that Greenhouse (and anyone else with a library card) had access to early drafts of judicial opinions, sly notes passed back and forth between the justices at oral argument, Blackmun's many memos to himself, letters sent and received and much more. (Greenhouse does not say whether Blackmun filed away his grocery lists, but I wouldn't be surprised.)

With the benefit of hindsight and this massive paper trail, Greenhouse identifies *Roe v. Wade* as the pivot point in Blackmun's career. Today, Roe and Blackmun have become virtually synonymous in the American mind -- like Lincoln and the Emancipation Proclamation or former Chief Justice Roger B. Taney and the *Dred Scott* case. But as Greenhouse shows, when Roe was decided in 1973, the matter was rather different.

When he wrote it, Blackmun surely did not see his *Roe* opinion as his and his alone. In announcing the "opinion of the Court," he acted as a team player, speaking on behalf of seven justices who signed on to the decision that Burger had assigned him to write. (By contrast, Lincoln emphatically acted alone in freeing the slaves; and Taney, too, spoke for himself in *Dred Scott*, a case in which every one of the nine justices wrote a separate opinion.) But in the maelstrom that followed *Roe*, Blackmun became the public face of the right to abortion -- the Great Emancipator of Women to some and the Great Defender of Evil to others. Gradually, Harry Blackmun the man came increasingly to identify himself with -- to define himself by -- his leading role in *Roe*.

As Blackmun came to see the world through *Roe*'s colored glasses, he viewed other areas of law in new ways (for him). For example, Greenhouse shows how his strong support for the free-speech rights of commercial advertisers grew out of his first major engagement with the issue, in a case arising out of ads run by an abortion-referral service. The abortion issue also influenced his views about the general rights of poor persons to government-provided services. In one pre-*Roe* case, he had upheld charging persons seeking to enter bankruptcy a \$50 filing fee, reasoning that under an installment plan the

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fee was less than the weekly "price of a movie." Dissenting, Justice Thurgood Marshall accused Blackmun of being sadly out of touch: "The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity." In Roe 's aftermath, however, Blackmun came to embrace the idea that poor women deserved access to abortion, even if the government sometimes had to pay for the procedure. Though he failed to carry the court on this issue, he began to sound more like the pre-Roe Marshall than the pre- Roe Blackmun: "Implicit in the Court's holdings is the condescension that [a poor woman] may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: 'Let them eat cake.' "

In defending himself and *Roe* as the two came to be one (in both the public mind and his own), Blackmun reinvented both himself and Roe 's central rationale. In 1973, Blackmun -- a former lawyer for the Mayo Clinic -- had placed significant weight on the rights of physicians to perform abortions. But his later opinions stressed the rights of pregnant women far more than the rights of practicing doctors. In *Roe* , he had described abortion in terms of privacy and liberty; later on, he came to highlight the link between the right to abortion and women's equality.

In his first few years on the court, Blackmun could hardly be described as a strong crusader for women's rights across the board. In fact, he voted against several early equal-rights claims brought by lawyer Ruth Bader Ginsburg and other feminists; as late as 1980, when the court was still all male, he even protested against eliminating the traditional title "Mr. Justice." The mid-to-late-career Blackmun, however, came to hire more women than men as his law clerks. By his retirement, Greenhouse reports, he had worked with more female law clerks than all the other sitting justices combined.

His position on the death penalty also evolved over the years. Named to the court by Nixon, a president who had flamboyantly campaigned in 1968 on a law-and-order platform, the early Blackmun voted to uphold capital punishment in certain cases. But in his final year on the court, he was ready to strike down all death sentences as inevitably "fraught with arbitrariness, discrimination, caprice, and mistake" -- a position that no other justice in 1994 (or since) has embraced. Here, too, Blackmun's commitment to *Roe* may help explain the evolution. Given that Blackmun in his later years was willing to resist a strong conservative movement targeting *Roe* , why did he need to defer to conservative politicians who demanded the death penalty? If anything, a robust judicial role is easier to justify in the context of the criminal justice system -- where, as a judge, Blackmun had seen the legal regime up close in a way that few ordinary voters would or could -- than in the context of abortion, where a justice's views about the meaning of unborn life were perhaps not entitled to any more weight than those of any other thoughtful American.

Greenhouse is at her best when tracing one particularly poignant story line: how Burger and Blackmun, who had been fast friends in boyhood and had remained close prior to their joint service on the court, gradually drifted apart. And, as it happens, even the Burger/Blackmun story line travels through the *Roe* junction. Though Burger joined Blackmun's opinion in *Roe* , the chief justice began distancing himself from the start -- trying to limit the scope of the decision and delaying the announcement of the opinion until after Nixon's second inauguration -- and eventually became a sharp critic of Blackmun's efforts to expand *Roe* in later cases.

In the mid-1970s, Blackmun cooperated with Bob Woodward and Scott Armstrong's reporting for their muckraking account of the high court; Burger did not. Unsurprisingly, Burger came off looking rather oafish in the resulting book, *The Brethren* . Greenhouse's portrait of the chief here is far more subtle, and also more generous. To make Blackmun look good merely by making Burger look bad would be, well, unbecoming. .

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