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Justice White and the Law

Kate Stith†

Let me begin where Justice White began.

First, Justice White believed in the law. He believed both in its power and in its legitimacy. His constitutional judgments were rooted in a fundamental premise—that the application of law in a democracy is not something to be feared; rather, the exercise by government of legitimate authority is essential, and welcome, in a free and democratic land.

Second, Justice White did not equate the "law" with courts or the decisions of courts. Justice White did not embrace the notion, commonly expressed across the political spectrum, that the Third Branch is actually the *first* among the coordinate branches of our federal government.[1] For him, the preeminent lawmakers in our constitutional government—through which law derives its legitimacy from the consent of the governed—are our legislatures, with federal law clearly supreme over state authority. In his view, whenever the United States Supreme Court constructs new limitations on agencies of government, it bears the heavy burden of justifying its refusal to defer to Congress, state legislatures, juries, and the other institutions of republican democracy.

Third, Justice White had confidence in democratic institutions, and, at the threshold, he had confidence in public officials. He began with a presumption that those who hold positions of public trust generally act in good faith. To be sure, the presumption was rebuttable, and it surely could be overcome or destroyed by the factual record before him. But he never

† Lafayette S. Foster Professor of Law, Yale Law School; Law Clerk to Justice White, October Term 1978. A slightly revised version of this Tribute was delivered at the Memorial Service for Justice White held at the Supreme Court on November 18, 2002. For an analysis of White's jurisprudence, including topics addressed and not addressed in this Tribute, see Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L.J. 19 (1993); and Kate Stith, *Crimes and the Supreme Court: An Essay on the Criminal Jurisprudence of Justice Byron White*, 74 U. COLO. L. REV. (forthcoming 2003).

1. *See, e.g.*, NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002). *But see* Akhil Reed Amar, *Shouldn't We, the People, Be Heard More Often by This High Court?*, WASH. POST, June 30, 2002, at B3 ("Nowhere does the Constitution proclaim the Supreme Court as the ultimate arbiter, or even first among equals (Congress, in fact, is mentioned first) . . . .").

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expected or demanded perfection from government, for he well understood that neither human beings nor any institution they create can be flawless.

These principles on which Justice White built his jurisprudence—respect for the law, respect for Congress as the principal engine of legitimate self-government, and respect for government and its officials—were, in Professor Dennis Hutchinson's apt metaphor, "chords" from the New Deal era that "resonate insistently throughout White's judicial career."[2] These principles were not fashionable in the legal academy during much of his time on the Court. Knowing Justice White, my hunch is that he was more reassured than troubled by any criticism from law professors.

Justice White had an ambivalent relationship with the legal academy. On the one hand, he clearly appreciated the values of reasoning, criticism, and scholarship; on the other hand, he believed in facts and in history, and he had no patience for intellectual vogues or for theory unmoored from facts and from context. In all events, he had not the slightest interest in winning a popularity contest on law school campuses—or, for that matter, in editorial boardrooms or anywhere else. It was not in his character to mold his own considered analysis of an issue, or his own principled understanding of his role, in order to win praise or approval from any quarter. To try to please commentators or critics was simply not something he could imagine doing. Byron White was an exemplar of independence and intellectual integrity.

The resulting jurisprudence did not easily fit into the broad and shifting categories of "liberal" or "conservative"—either during his three decades on the Court or now, a decade later. Scholars and commentators who hew to the usual baselines, to the conventional wisdom of political classification, will be confused, applauding some parts of his work while rejecting other parts—and never appreciating the substance and the coherence of the whole.

Consider two fundamental concerns that permeate his decisions—first, the role of Congress and the reach of federal legislative power, and, second, the role of the Supreme Court in explicating the Constitution.

In some ways, these two lines of decisions are counterpoints; for Justice White, they were two sides of the same coin. Rereading these two sets of opinions reminds us of certain salient aspects of his decisional style—an analytic bent of mind, his pragmatism, a lack of interest in the elaboration of abstract theory, and an insistent attention to historical context.

Justice White did not doubt the primacy of federal legislative power, and he never had occasion to find that Congress and the President had exceeded their legislative authority under either the Commerce Clause or

2. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 446-47 (1998).

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Section 5 of the Fourteenth Amendment. In the spirit of Chief Justice Marshall, he gave a wider berth to Congress in interpreting its own powers than to the Court in construing those powers. Because he understood federal legislative authority as fundamental to the functioning of our constitutional democracy, he was not disposed to read the Tenth Amendment as a limitation on either Congress's regulatory power or the reach of the Supremacy Clause, to read the Eleventh Amendment as an irrevocable grant of state sovereign immunity, or to read the grant of authority in Section 5 of the Fourteenth Amendment as merely procedural.

Put simply, Justice White was a federalist—not as that term is often used today, but a federalist "in the tradition of Alexander Hamilton and John Marshall."[3]

Justice White likewise understood the Constitution to grant Congress (and the President in his legislative capacity) significant authority to develop new mechanisms of governance and administration. In a series of powerful opinions, mostly in dissent, he rejected formalistic conceptions of the "separation of powers." Trained at Yale Law School in the afterglow of the New Deal and during the height of legal realism, Justice White fully accepted "the advent and triumph of the administrative state."[4] In the spirit of Justice Jackson's concurrence in the *Steel Seizure Case*, he understood the Constitution to allow a range of political solutions to new problems and challenges, refusing, in his words, to limit the power of the political branches "'based on isolated clauses or even single Articles torn from context.'"[5] Thus, in Justice White's understanding of our constitutional system, Congress (with the President) has an expansive, and maybe even expanding, reservoir of lawmaking and regulatory powers.

Justice White conceived of a different, but equally important, role for the Court—not creating new rights and duties but, rather, securing for the *whole* nation the fair and full enforcement of rights explicit and implicit in the Constitution or created through constitutional processes, and ensuring remedies where those rights have been denied by private, state, or federal actors.[6]

In interpreting the Constitution, Justice White was neither an "originalist" nor a "textualist." While he insisted that the Court's exposition

3. Jonathan D. Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371, 371 (1987).

4. Bowsher v. Synar, 478 U.S. 714, 761 (1986) (White, J., dissenting).

5. INS v. Chadha, 462 U.S. 919, 978 (1983) (White, J., dissenting) (quoting Youngstown Tube & Sheet v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

6. *See* Nixon v. Fitzgerald, 457 U.S. 731, 789-90 (1982) (White, J., dissenting) ("[I]t is not the exclusive prerogative of the Legislative Branch to create a federal cause of action for a constitutional violation. In the absence of adequate legislatively prescribed remedies, the general federal-question jurisdiction of the federal courts permits the courts to create remedies, both legal and equitable, appropriate to the character of the injury.").

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of constitutional rights and limitations must have "cognizable roots" in the Constitution itself, he never examined constitutional text in isolation from constitutional function, purpose, and history. Ever mindful of the so-called *Lochner* era and the constitutional crisis that ensued, he was sensitive to the imperative of the historical evolution of organized society: He recognized that constitutional law as propounded by the Court has changed, and must change, over time. As he said in an opinion late in his judicial career (significantly, a *dissenting* opinion in an abortion-rights case), "The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it."[7]

Justice White also understood that there is no clear (and no single) dividing line between "making" law and "applying" law. For Justice White, however, what was important was not the theoretical point that every time a court acts it inevitably creates some modicum of new law, but rather, the practical point that some judicial decisions involve a lot *more* lawmaking than others.

Two areas where Justice White insisted there *is* judicial power to achieve significant transformation of society were desegregation and voting rights; yet, in neither was the Court acting on its own. The text and purpose of the Reconstruction Amendments, and the exercise of congressional power granted in those Amendments, reinforced the authority—indeed the obligation—of the Court to act forcefully.

But where these factors were missing—where constitutional foundation and purpose were missing, where discernible national consensus was missing, where avenues of democratic participation would be cut off—Justice White urged the Court not to discover and announce on its own new, fundamental, socially transformative rights. Having come of age during the New Deal, he viewed such claims against the backdrop of what he called the "painful[] . . . face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses."[8] The lesson Justice White learned from that earlier "painful face-off" was that overreaching would make the federal courts the target of intense and prolonged political conflict, damaging their authority and persuasiveness in situations where its muscular intervention *is* constitutionally necessary, and undermining their own legitimacy.

7. Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting).

8. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

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Some would be heard to complain that Justice White's approach left insufficient room for elaboration of his constitutional "vision." But that is precisely the point: Justice White declined the invitation to propound a constitutional law on the basis of "vision"—his "vision" or the "vision" of anyone else, including that of his critics. Rather, he placed his faith where he understood the Constitution to place it: in the law fashioned by a free and self-governing people. The foremost obligation of Justice Byron White was to ensure the full, fair, and consistent realization of that law. He performed that duty with vigor and rigor, personal modesty, and unflinching independence. This legacy, in its full measure, will endure.

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