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# Justice White and the Yale Legal Realists

The Honorable Louis F. Oberdorfer†

An old friend, classmate, sometime colleague, and unabashed admirer must defer to scholars and historians for any thoroughly objective evaluation of the work of Justice Byron White over his thirty-one-year tenure on the Supreme Court. For one thing, in recent years, Justice White graded my papers (and I didn't always pass).<sup>1</sup> But some anecdotal recollections of Justice White and some observations about his role on the Court may be of interest to scholars, historians, and others. The *Yale Law Journal* and his retirement provide an appropriate place and time for them.

On June 27, 1936, at Franklin Field in Philadelphia, President Franklin D. Roosevelt described “a mysterious cycle in human events. To some generations much is given. Of other generations much is expected. This generation of Americans has a rendezvous with destiny.”<sup>2</sup> At that time Byron White was in college. He and his contemporaries were eyewitnesses to the Great Depression. College students of the era knew well the national effort to reverse and contain it and knew that the Supreme Court seriously interfered with that effort, only to relent when the President attempted to pack the Court and, ultimately, filled fortuitous vacancies with new faces.<sup>3</sup>

As the Depression waned, war loomed. In a foreword to the *Yale Law Journal's* fiftieth anniversary issue, Professor Arthur L. Corbin recognized the post-Depression, prewar mood, observing

the effects of economic and political conflict—the struggle for survival and for power between state and nation, between the written constitutional word and the radical innovation impatient of the rule of the dead hand, between organized labor and incorporated capital.

No man can foresee the changes of a second half century. . . . Will the surging tides of war, economic and military, between classes and parties and races and peoples, allow continued existence to a law

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† Senior Judge, United States District Court for the District of Columbia.

1. See, e.g., *Lyng v. International Union*, 485 U.S. 360 (1988), *rev'g* 648 F. Supp. 1234 (D.D.C. 1986).

2. THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1936, at 235 (1938).

3. As Professor Walton Hamilton put it a few years later: “An institution had been saved by a narrow margin; an ominous go-and-sin-no-more was the price of salvation.” Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1322 (1941).

journal, or a university, or an Anglo-American system of law and government?<sup>4</sup>

On September 1, 1939, Germany invaded Poland and set off World War II. Later that month the Class of 1942 entered Yale Law School. Shortly thereafter, Byron White joined the class. He had returned from England with American Rhodes Scholars who were evacuated when the war began. Classmates anticipated him with awe and apprehension—a Rhodes Scholar and Phi Beta from the West who was also a college All-American triple-threat<sup>5</sup> back and, more recently, Rookie of the Year and leading ground-gainer in the National Football League, recruited and coached by the legendary John McNally (who played and coached under the assumed name of “Johnny Blood”). However, White quickly established himself as a serious but unassuming, friendly fellow who was as ready as the next for fun and games: squash at the Payne-Whitney gym, tape-measure home runs in pick-up softball games, movies, and endless bull sessions—beer was neither forbidden nor neglected.

Contemporaries recall White the student as a fixture in the library, arriving early, leaving late, a picture of total concentration.<sup>6</sup> They also recall his classroom performances: invariably and thoroughly prepared, having mastered all the cases assigned for the day plus the footnotes and, more often than not, the cases cited in the footnotes. Students and surviving professors still mention White’s formidable jousting with professors, who were sometimes not as well-prepared or resourceful as he.

At the post-Depression, pre-Pearl Harbor Law School, classes came under the influence of a remarkable faculty, animated by two generations of the Yale school of legal realists.<sup>7</sup> Indeed, Professor William O. Douglas, a leader of the legal realists of the time, would have become the Law School Dean in 1939 but for his appointment to the Supreme Court in the spring of that year.<sup>8</sup> There was Arthur L. Corbin, one of the pioneer legal realists:<sup>9</sup> he taught the common law of contracts, fact by fact and case by case, the abstractions seasoned by flashbacks to his stint as a practitioner in Cripple Creek, Colorado. Then in his mid-sixties, Corbin played a steady first base and batted cleanup for the faculty softball team.

4. Arthur L. Corbin, *The First Half-Century*, 50 YALE L.J. 740, 741-42 (1941).

5. A triple threat can run, pass, and punt.

6. The late Justice Potter Stewart, a member of the class of 1941, reportedly recalled that he “often saw White in the library in his steel-rimmed glasses, only to read about him in the next day’s paper as the game-winning ‘Whizzer White.’ To Stewart and his classmates, White was both Clark Kent and Superman.” BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 65 (1979).

7. See generally LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 80 (1986).

8. *Id.* at 138.

9. For a sketch of Professor Corbin’s role in the school of legal realism, see WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 26-40 (1973).

Leader of a younger generation of legal realists was Myres McDougal, himself a Rhodes Scholar. His mellifluous Mississippi accent failed to mask a lightning-quick mind and tongue or to dampen his exposure of platitudes of judges—and students. His jousting colloquies with White are still-remembered classics.

Others were also vital elements of the chemistry of the place. Harry Shulman, later Dean, a protegee of his former professor and then recently appointed Justice Felix Frankfurter, taught torts. Still echoing in memory is the slight foreign accent with which Professor Shulman pronounced “Palsgraf”<sup>10</sup> and “Touche Niven”<sup>11</sup> as he demonstrated how common-law judges like Benjamin Cardozo adapted that law to changing circumstances.

Professor Underhill Moore, also an early fact-focused legal realist, having exhausted all the students’ explanations of the whys and wherefores of a check, would furiously slap his desk, shouting: “Don’t you know by now! A check is a check!” Walton Hamilton, the imaginative preacher’s-son-turned-economist, and nonlawyer member of the Georgia Bar solely by act of the legislature, taught a unique and provocative course entitled “Public Control of Business,” focusing on antitrust policy, if not law.

White himself has eulogized sharp, quick Professor Wesley Sturges with a description of his classroom style that remarkably resembles almost any Supreme Court practitioner’s account of a colloquy with Justice White: “His insistent, driving analysis was a kind of classroom surgery which produced exceedingly thin slices of case, principle and judge, so thin that they were transparent to even the dimmest eye.”<sup>12</sup>

Last, and shortest, but not least was Professor James William Moore, former cowhand, boxer (probably flyweight), clerk of the District Court of Montana, and a right hand to Dean/Judge Charles E. Clark, a principal draftsman of the Federal Rules of Civil Procedure of 1938. J.W., as he was known, had a rough-and-ready teaching style, often enlivened by tough but amiable jibing with White. Each student stood to recite; uncertain ones were sharply (but with a smile) admonished to “make a noise like a lawyer.” Questioners who threatened to seize the upper hand in a dialogue were sometimes told to “see my book” for the solution.

The 1940-41 academic year coincided with the fiftieth anniversary of the *Yale Law Journal*. The Yale faculty contributed fifteen of the thirty-two articles that appeared in Volume 50, including three by Professor Corbin,<sup>13</sup>

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10. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

11. *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931).

12. Byron R. White, *To Students, the Deftness of a Master Surgeon*, 18 U. MIAMI L. REV. 1, 1 (1963) [hereinafter White, *To Students*].

13. Corbin, *supra* note 4; Arthur L. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762 (1941); Arthur L. Corbin, *William Reynolds Vance*, 50 YALE L.J. 195 (1940).

three by Professor Hamilton,<sup>14</sup> and a stirring rendition of legal realism by Professor McDougal.<sup>15</sup> These articles reflect the academic climate that the Class of 1942 experienced.

One of Professor Corbin's papers ranged outside his special field of contracts to address *Erie R.R. Co. v. Tompkins*.<sup>16</sup> He made an elegant legal realist's plea to judges whom *Erie* required to administer state law in federal court to ensure that

every litigant's day in court shall be a day in a real court of justice, a court that consults "all the available data" and reaches its decision as to his rights by that high judicial process that has made constitutions and statutes and the common law render a living service according to the changing needs of men. This is the "judicial power" that is conferred by our Constitution.<sup>17</sup>

Corbin's article elaborated upon his disdain, expressed years earlier, for

the "rules" and doctrines and generalizations of men, often (if not always) based on quite insufficient life experience and inaccurate observation, but solemnly repeated down the corridors of time. . . . [T]he meaning and value of any "rule" or generalization are wholly dependent on the specific items of life experience and observation on which they are based.<sup>18</sup>

McDougal's contribution to Volume 50 was more topical. He argued, among other things, for release from judicial restraint of those hard at work to achieve certain humanitarian and democratic ideals shared by "most of us": "[C]ivil liberties, social security, more goods to more people, healthful housing, conservation and full utilization of resources, collective bargaining, farm security, socialized medicine, protection of consumers, protection of investors, cheaper and better administration of justice, and so on."<sup>19</sup> In McDougal's view, although the courts might be "indispensable . . . for the preservation of many of our old and continuing values," they are "utterly helpless" when confronted by "many of our modern, complex problems, requiring as they do . . . a continuous and informed exercise of highly specialized skills."<sup>20</sup>

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14. Walton H. Hamilton, *Coal and the Economy—A Demurrer*, 50 YALE L.J. 595 (1941); Hamilton & Braden, *supra* note 3; Walton H. Hamilton, *Trial by Ordeal, New Style*, 50 YALE L.J. 778 (1941).

15. Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827 (1941).

16. 304 U.S. 64 (1938).

17. Corbin, *The Laws of the Several States*, *supra* note 13, at 777.

18. Quoted in TWINING, *supra* note 9, at 31.

19. McDougal, *supra* note 15, at 836.

20. *Id.* at 837.

These and other writings of the Yale faculty in the anniversary volume are a rich source for any inquiry into the academic environment of the era. But there were conspicuous omissions. Little in that volume (or the curriculum, as recalled) addressed society's primordial concern about crime and a criminal justice system that effectively coped;<sup>21</sup> about civil rights, as distinct from civil liberties; about the political and constitutional tensions inherent in Congress' need to delegate broad administrative power to "nonpolitical" experts while exercising appropriate oversight;<sup>22</sup> or about a principled method for choosing between "our old and continuing values" as articulated in our written Constitution and other values "requiring . . . a continuous and informed exercise of highly specialized skills."<sup>23</sup>

Although by 1941 the wars abroad replaced the Depression as a "brooding omnipresence," they were remote from the day-to-day life of the Law School—until December 7, 1941. It is mind-boggling to recall Pearl Harbor and the sudden plunge of the Class of 1942 from the warm, heady atmosphere of the Sterling Law Building into the tough regimen and cold reality of global war.

Classmates know little from White about his World War II experience. Modest and reticent as he is, he is most modest and reticent about the war. The intensity of his experience in the South Pacific can be gleaned from a wartime news report about "his lone forays behind Japanese lines." According to this report, "Lieut. Byron R. White's work in the Central Solomons may never be publicized, but he may some day become the outstanding hero of this war."<sup>24</sup>

Later, while serving as Air Combat Intelligence Officer on the staff of Vice Admiral Marc A. Mitscher during the U.S. invasion of the Philippines at Leyte Gulf, White and a colleague persisted in their judgment about the location of a formidable Japanese fleet, capable of great damage to the invasion force. They persuaded their superiors to supplement a standard aerial search that had failed to locate the elusive enemy fleet. The new reconnaissance succeeded, enabling U.S. carrier planes to interdict the fleet and destroy four carriers.<sup>25</sup>

A few weeks later, off Okinawa, the *Bunker Hill*, with Lieutenant White and then-Commodore (later Admiral and Chairman of the Joint Chiefs of Staff) Arleigh Burke aboard, was struck by two Kamikazes. After the episode Burke wrote to his family:

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21. Cf. David Riesman, Jr., *Law and Social Science: A Report on Michael and Wechsler's Classbook on Criminal Law and Administration*, 50 YALE L.J. 636 (1941) (discussing criminal law with focus on its relationship to social science).

22. Cf. *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto).

23. McDougal, *supra* note 15, at 837; cf. Hamilton & Braden, *supra* note 3, at 1344-57.

24. Arthur Daley, *The Whizzer Is Still a Whizzbang*, N.Y. TIMES, July 3, 1944, at C1.

25. C. VANN WOODWARD, *THE BATTLE FOR LEYTE GULF* 138-40 (1947).

We were in *Bunker Hill* when she was hit. A good many of our staff were killed . . . , and many others were wounded, and some suffered from shock. . . . The fires were pretty bad, smoke was bad, and many people suffocated. The ship was saved by some courageous fire fighting. . . . There were some fine stories of bravery [that] came out of that burning, exploding mess with gasoline fires all over the decks . . . and tremendous explosions caused by our own bombs and ammunition exploding. (Lieutenant B.R.) White [and two others] . . . also fought fires and brought out suffocated men. . . . These men are wonderful.<sup>26</sup>

After World War II, White delayed his return to the “real world” to complete his interrupted law school career. The postwar law school term featured the McDougal-Laswell addition to the jurisprudence of legal realism: their course in Law, Science, and Policy “treated law and science ‘as instruments of public and private policy.’”<sup>27</sup> Forty years later, Professor McDougal recalled that in that seminar “Byron and I did argue a lot, despite our mutual respect and affection.”<sup>28</sup>

White followed graduation with a heady one-year tour as a law clerk to Chief Justice Vinson, newly appointed to succeed Chief Justice Stone. Some of the cases before the Court that Term have lived on as important reference points: *Adamson v. California*,<sup>29</sup> *SEC v. Chenery Corp.*,<sup>30</sup> *Everson v. Board of Education*,<sup>31</sup> and *Louisiana ex rel. Francis v. Resweber*.<sup>32</sup> The 1946 Term’s clerks also witnessed the unfortunate personal tensions between some Justices that grew out of the reported jockeying for position to succeed Chief Justice Stone.<sup>33</sup>

The returning veterans who clerked during the Supreme Court’s 1946 Term were not above some sophomoric *lèse-majesté*: one Saturday, the group posed for a photograph in the courtroom, with Chief Justice Vinson’s clerks huddled around his chair and their colleagues arrayed accordingly up and down the bench—only to be apprehended by the Marshal, who confiscated the film. Roger Wollenberg, who clerked for Justice Douglas and was a fair country

26. Quoted in KEN JONES & HUBERT KELLEY, JR., *ADMIRAL ARLEIGH (31-KNOT) BURKE: THE STORY OF A FIGHTING SAILOR* 144 (1962).

27. KALMAN, *supra* note 7, at 181.

28. Letter from Myres S. McDougal to the author (July 13, 1987) (on file with author).

29. 332 U.S. 46 (1947) (refusing to incorporate Fifth Amendment privilege against compelled testimony into Fourteenth Amendment and rejecting Justice Black’s contention that Fourteenth Amendment incorporated entire Bill of Rights *in haec verba*. See *id.* at 71-72 (Black, J., dissenting)).

30. 332 U.S. 194 (1947) (rejecting any rigid requirement that a federal agency depend solely on rulemaking as opposed to adjudication).

31. 330 U.S. 1, 16 (1947) (holding that, although “[the] wall between church and state . . . must be kept high and impregnable,” state funding for transportation of children to parochial schools does not violate Establishment Clause).

32. 329 U.S. 459 (1947) (holding that electrocution after earlier, failed attempt violates neither Cruel and Unusual Punishment, Double Jeopardy, nor Equal Protection Clause).

33. See WILLIAM O. DOUGLAS, *THE COURT YEARS: 1937-1975*, at 28-32 (1980).

badminton player, recently recalled undertaking to teach White to play badminton, only to lose the very first game. More than once during that Term, the Marshal, swallowtail coat flying, broke up a badminton or basketball game while the Court was in session—the gym was immediately above the courtroom, where the games sounded, according to the Marshal, like distant thunder.

After the clerkship interlude, White followed the majority of his classmates into private practice. He practiced commercial litigation and counseling in Denver with some specialization in antitrust and tax, enlivened by active involvement with his life's partner, Marion, in the cultural, civic, and outdoor life of postwar Denver and Colorado. A growing national reputation in the legal profession was evidenced by his appointment by Chief Justice Warren to the Advisory Committee on the Federal Rules of Civil Procedure. As the 1960 Presidential campaign approached, White joined John Kennedy, who had been a Navy colleague in the Pacific, to serve eventually as chairman of an amorphous, but apparently effective, group entitled "Citizens for Kennedy."

President Kennedy's inaugural address reminded his generation of the destiny President Roosevelt had prophesied for it twenty-five years before:

Let the word go forth from this time and place, to friend and foe alike, that the torch has passed to a new generation of Americans, born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage and unwilling to permit the slow undoing of those human rights to which this Nation has already been committed today at home and around the world.<sup>34</sup>

President Kennedy's generational reference may have been about himself, but he was also describing White, whom he promptly appointed as Deputy to Attorney General Robert Kennedy. As Deputy, White focused first on the selection of United States Attorneys and federal judges—there were scores of vacancies to be filled. He spearheaded law enforcement legislation that extended federal courts' jurisdiction over interstate crime and expanded the crime-detecting capability of the Department of Justice by means of court-supervised electronic surveillance. Historians will discover several occasions during his brief tenure in the Department when White stiffened law enforcers and protected the independence of the Department's prosecutorial discretion.<sup>35</sup>

In May 1961, President Kennedy dispatched Deputy Attorney General White to Montgomery, Alabama, in command of a force of several hundred

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34. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, 1961, at 1 (1961).

35. Indeed, Rex Lee, an early law clerk to Justice White, later Solicitor General, and most recently president of Brigham Young University, views White's brief tenure in the Justice Department as having had the greatest influence on his legal views on law enforcement, the state-federal relationship, antitrust, and civil rights. See Rex E. Lee, *A Case for "Whizzer White's" Greatness*, NAT'L L.J., May 31, 1993, at 17.

United States Marshals. Local police had permitted a mob to attack and injure the intrepid Freedom Riders who were traveling by bus through the Deep South. Judge Frank Johnson had enjoined the Ku Klux Klan from interfering with the presence or safe passage of Freedom Riders in Montgomery and enjoined local law enforcement officers to do their duty. But the local police would not obey, much less enforce, his order. On the next evening, a mob attacked and threatened to burn a church where Dr. Martin Luther King was preaching with the Freedom Riders in the congregation. In the nick of time, marshals deployed by White interdicted the mob until National Guard troops arrived and cleared the area. The next day Deputy Attorney General White met with Alabama Governor John Patterson in the State Capitol, where Jefferson Davis took his oath as President of the Confederacy. White was a physically formidable federal official, backed by his civilian force, with military units alert and poised to move, confronting a Southern governor in his own office. The Governor postured about federal interference with the state's sovereignty. In reply, White coolly advised the Governor that the federal force would be removed when the state resumed responsibility for the maintenance of law and order.

From those widely publicized confrontations, on the street and in the Governor's office, word went forth throughout the South that this generation of Americans, having lived through the Depression and won the War, had the will and the means to break, once and for all, the ugly undercurrent of violence that had facilitated "massive resistance" to constitutional edicts and perpetuated a cruel and archaic "way of life."

Predictably, when the next Supreme Court vacancy occurred, President Kennedy appointed Deputy Attorney General White. This was before the era of the "litmus test." Neither the President, the press, nor the Senate attempted to inquire about the nominee's views on issues that might come before the Court. In announcing White's nomination, President Kennedy said simply:

I have known Mr. White for over 30 years. His character, experience and intellectual force qualify him superbly for service on the nation's highest tribunal. . . . He has excelled in anything he has attempted—in his academic life, in his military service, in his career before the war and in the Federal Government—and I know he will excel on the highest court in the land.<sup>36</sup>

Shortly after Justice White was appointed to the Court, a mutual friend asked John McNally, the erudite and well-informed former coach and forever friend,<sup>37</sup> what kind of judge he expected White to be. McNally replied with

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36. PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JOHN F. KENNEDY, 1962, at 283 (1962).

37. John Doar, a relative of McNally and a colleague of White at the Justice Department, published a poignant memorial to McNally. The last item is a note McNally received the day before he died:

a loose paraphrase of Polonius' advice to his son:<sup>38</sup> "Byron will be Byron."<sup>39</sup>

Scholars and historians seeking to profile Justice White will search in vain for autobiographical expositions of his judicial philosophy, or much else about him.<sup>40</sup> Many of his published statements have been tributes to others such as Dean Sturges,<sup>41</sup> Justice Stewart,<sup>42</sup> and Justice Brennan.<sup>43</sup> Of each Justice White frequently said something that others might well have said about him. A tribute to Justice Stewart applauded his ability "to moderate speed changes of a machine subject to fluctuations in drive and load."<sup>44</sup> Likewise, White more frequently than some of his colleagues slowed the Court when he thought it was going too fast or too far; on other occasions he functioned as an accelerator.

Arriving at the Court from Robert Kennedy's law-enforcement-oriented Justice Department, he gave early notice to a Court strongly committed to redressing a perceived imbalance in criminal cases that he was "unwilling to sweep . . . under the rug" the "festering problem" of crime.<sup>45</sup> For him, the criminal justice system involved "[m]ore than the human dignity of the accused"; the Court should give "equal weight" to "society's interest in the general security."<sup>46</sup> In one of his earliest opinions, dissenting from a holding that punishment for drug addiction violated the Eighth Amendment, he admonished his new colleagues (several of whom had been Justices when he was a law clerk)<sup>47</sup>:

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John old friend,

I wish I could be there to see you again. Our friendship has meant a lot to me. I treasure it, there are so many good memories. Marion sends her love to you. She would like to be there. Goodbye, John, and save a place for me.

Byron.

38.

To thine own self be true,  
And it must follow, as the night the day,  
Thou canst not then be false to any man.

WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET* act 1, sc. 2. Earlier in that same scene, Polonius also advised:

Give every man thy ear, but few thy voice,  
Take each man's censure, but reserve thy judgment.

*Id.*

39. Telephone conversation with John Doar (Aug. 9, 1993).

40. An early exception is an extensive interview in *Sports Illustrated* shortly after his appointment. See Alfred Wright, *A Modest All-America Who Sits on the Highest Bench*, *SPORTS ILLUSTRATED*, Dec. 10, 1962, at 85.

41. White, *To Students*, *supra* note 12.

42. Byron R. White, Excerpts from Introductory Remarks to the Sesquicentennial Keynote Address (Nov. 2, 1974), in *YALE L. REP.*, Winter 1974-75, at 8 [hereinafter White, Excerpts].

43. Byron R. White, *Tribute to the Honorable William J. Brennan, Jr.*, 100 *YALE L.J.* 1113 (1991) [hereinafter White, *Tribute*].

44. White, Excerpts, *supra* note 42, at 8.

45. *Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting).

46. *Miranda v. Arizona*, 384 U.S. 436, 537 (1966) (White, J., dissenting).

47. White was the first Justice to have served earlier as a Supreme Court law clerk. Justices Black, Frankfurter, and Douglas were sitting then and when White was appointed in 1962.

If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.<sup>48</sup>

On the other hand, Justice White accelerated the Court's attack on the vestiges of school segregation—from his votes for the orders of the 1960's to eliminate school segregation "root and branch,"<sup>49</sup> to his 1990 opinion for the Court invoking the Supremacy Clause to suspend a state law limiting school district expenditures mandated by court order.<sup>50</sup> However, in employment discrimination cases, either White and a Court majority misread Congress, or Congress changed its mind, about the extent to which it intended to compensate for past discrimination and to give some litigation advantages to plaintiffs in those cases.<sup>51</sup>

In an affectionate, respectful tribute to Justice Brennan upon his retirement, Justice White wrote: "In interpreting the majestic, open-ended clauses of the Constitution, to be forever bound by the perhaps undiscoverable intent of the Framers was not for him."<sup>52</sup> White's analysis of the Due Process Clause and the Fourth and Eighth Amendments afforded him many occasions to illuminate the great clauses using some of the analytic tools of the legal realists. From *Massiah*<sup>53</sup> and *Miranda*<sup>54</sup> in the 1960's to *Moore*<sup>55</sup> and *Furman*<sup>56</sup> in the 1970's and most recently in *Harmelin*<sup>57</sup> and *Dixon*,<sup>58</sup> White has applied to those clauses elements of prewar legal realism: a commitment to fact-based, commonsense, common-law decisions, a palpable consciousness of historical and practical limits to the Court's role, and an aversion to rote, rule-bound decisionmaking. He was loathe to treat any of the great clauses as absolute, including particularly the First Amendment.<sup>59</sup> White's tribute to Brennan gently alluded to the two Justices' differences of opinion about First Amendment issues, particularly to White's perception that freedom for the

48. *Robinson v. California*, 370 U.S. 660, 689 (1962) (White, J., dissenting). In White's view, the Court could and should have avoided this frontier constitutional issue by construing the statute as proscribing the illegal use of narcotics rather than the condition of addiction.

49. *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

50. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

51. *See, e.g.*, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

52. White, *Tribute*, *supra* note 43, at 1116.

53. 377 U.S. 201, 207 (1964) (White, J., dissenting).

54. 384 U.S. 436, 526 (1966) (White, J., dissenting).

55. *Moore v. East Cleveland*, 431 U.S. 494, 541 (1977) (White, J., dissenting).

56. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (White, J., concurring).

57. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2709 (1991) (White, J., dissenting).

58. *United States v. Dixon*, 113 S. Ct. 2849, 2868 (1993) (White, J., dissenting).

59. *Cf. Smith v. California*, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("I read 'no law . . . abridging' to mean no law abridging.")

media had gone too far.<sup>60</sup> He voted to reinstate the death penalty only after state legislatures satisfied the pragmatic concerns that had earlier led him to vote to strike it down.<sup>61</sup> He urged his colleagues to “uphold constitutional principles” and not adopt a blanket rule that disproportionate prison sentences were beyond the reach of the Eighth Amendment even though “such scrutiny requires sensitivity to federalism concerns and involves analysis that may at times be difficult.”<sup>62</sup>

His *Miranda* dissent early summarized what scholars and historians may find to be the keynote of Justice White’s constitutional decisionmaking process, his “constitutional vision,”<sup>63</sup> if you will:

At the very least the Court’s text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions . . . the Court should also duly consider all the factors and interests bearing upon the cases . . . [T]he Court should not proceed to formulate fundamental policies based on speculation alone.<sup>64</sup>

In midcareer, he restated this proposition as common ground between the often contending views of Justice Black and Justice Harlan about the scope of the Due Process Clause:

Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension [so that] the Court has ample precedent for the creation of new constitutional rights, [that fact] should not lead it to repeat the process at will . . . . [T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause . . . .<sup>65</sup>

Suffice it to say that cases involving controversial issues such as abortion<sup>66</sup> and sodomy,<sup>67</sup> where the constitutional command was, at best, vague and about which the political process and mores of the times were, to say the least, in flux, to create new constitutional rights out of emanations and penumbras

60. White, *Tribute*, *supra* note 43, at 1114, 1116.

61. Compare *Gregg v. Georgia*, 428 U.S. 153, 153 (1976) (White, J., concurring) with *Furman*, 408 U.S. at 310 (White, J., concurring).

62. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2714 (1991) (White, J., dissenting) (objecting to Court’s denial of proportionality guarantee under Eighth Amendment).

63. Cf. Jeffrey Rosen, *The Next Justice*, NEW REPUBLIC, Apr. 12, 1993, at 21 (Justice White “uninterested in articulating a constitutional vision”).

64. *Miranda*, 384 U.S. at 531-32.

65. *Moore v. East Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting).

66. See *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting).

67. See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

confected from a mixture of several clauses, the Ninth Amendment, and phrases from the Preamble was not for him.

The flag of a realistic, common-law constitutionalist still flew over his final opinions. In one last dissent,<sup>68</sup> he took vigorous exception to what he considered exposure of a defendant to impermissible double jeopardy. He criticized “an overly technical interpretation”<sup>69</sup> and “exclusive focus on the formal elements of the relevant offenses.”<sup>70</sup> The Court had, in his view, reached a “result that is as unjustified as it is pernicious,”<sup>71</sup> stemming, he believed, “from a ‘hypertechnical and archaic approach.’”<sup>72</sup>

In addition to his signed opinions and dissents, Justice White has been the Court’s sentinel, on the alert to resolve conflicts between circuits and other sources of confusion to lower courts, the bar, and litigants.<sup>73</sup> He has done an extra share of the heavy lifting required for the administration of the Court’s burdensome original jurisdiction, particularly state boundary and complex water rights disputes.<sup>74</sup> In recent years he and Justice Brennan were the Court’s institutional memory and the source of its “internal common law.”<sup>75</sup> White’s Sturges-like analyses reportedly illuminated conferences and the vital written colloquies between chambers. He neither delivered any time-consuming, self-serving lectures nor lent his name to any revealing interviews or income-supplementing books. He has not doggedly pursued ideological causes. He has had no leaky law clerks. There have been no serious public feuds during his tenure; the Court gives the appearance of remarkable collegiality, for which White must share credit. Most important, he has jealously guarded the credibility of the Court, husbanding its power, alert to the “limits of tolerance to judicial discretion” that the legal realists had perceived after the judicial overreaching of the 1930’s.<sup>76</sup>

Justice White brought to the Court the very best that his generation produced by way of sheer intellectual power, a superb and sophisticated education, battle-tested courage, the ability of a world-class team player to be both competitive and collegial, exquisitely good judgment, indefatigable capacity to work and concentrate, a perfectionist’s attention to detail, a habit of successful achievement, and a rich experience of living and working at the

68. See *United States v. Dixon*, 113 S. Ct. 2849, 2868 (1993) (White, J., dissenting).

69. *Id.* at 2869.

70. *Id.* at 2874.

71. *Id.* at 2878.

72. *Id.* (quoting *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)).

73. See, e.g., *Sewell v. United States*, 113 S. Ct. 1367 (1993) (sixth dissent from denial of writ of certiorari to resolve conflict of circuits as to whether weight of illegal drug should include waste by-products).

74. See, e.g., *Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *Oklahoma v. New Mexico*, 111 S. Ct. 2281 (1991).

75. White, *Tribute*, *supra* note 43, at 1115.

76. Hamilton & Braden, *supra* note 3, at 1322; cf., e.g., *Gregg v. Georgia*, 428 U.S. 153, 221-23 (White, J., concurring) (deferring to state legislative judgment and community mores about capital punishment).

cutting edge of his generation's rendezvous with destiny. Justice White's work on the Court clearly reflects the influence of the legal realists of Yale. But to pigeonhole Justice White as a practicing legal realist would overstate the reach of realist jurisprudence while oversimplifying the complexity of the man, his work, and the times. For example, some legal realists were dismayed by White's interpretations of the Establishment Clause.<sup>77</sup> Nevertheless, scholars and historians who take the time to put it all together might take as a point of departure the eyewitness judgment of Justice Douglas, a staunch legal realist who shared the bench with Justice White for more than a dozen years and who very frequently disagreed with him. Justice Douglas included Byron White on his "All-American team" of justices with whom he had served, a list he intended to reflect "not an ideological line, but basic ability and judicial attitude. These Justices would have adorned any Court in our history."<sup>78</sup> Scholars and historians will likely conclude that John Kennedy and John McNally both had it right: Byron was Byron—and during his thirty-one years on the Court, he excelled in his service to it, the Constitution, and the Nation.

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77. See *Lemon v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in part and dissenting in part) (contending that Establishment Clause does not prohibit government funding of secular education within religious schools); cf. *id.* at 625, 641-42 (Douglas, J., concurring for himself and Justice Black) ("[T]axpayers' forced contribution to the parochial schools . . . violates the First Amendment.").

78. DOUGLAS, *supra* note 33, at 42. The others on the list included, alphabetically, Hugo Black, William Brennan, Felix Frankfurter, John Harlan, Charles Evans Hughes, and Earl Warren.

