A Tribute to Justice Byron R. White

Lewis F. Powell Jr.

Rhesa H. Barksdale

David M. Ebel

Lance Liebman

Columbia Law School, lliebman@law.columbia.edu

Charles Fried

Harvard Law School

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Justice Lewis F. Powell, Jr.*

On March 30, 1962, President John F. Kennedy appointed then-Deputy Attorney General of the United States Byron R. White to serve as the ninety-third Justice of the United States Supreme Court. In a public statement delivered on the day of the nomination, President Kennedy had these words to say about his chosen nominee: "He has excelled in everything he has attempted — in his academic life, in his military service, in his career before the bar and in the federal government — and I know that he will excel on the highest court in the land." 1 Few among us deserve such accolades, but President Kennedy did not exaggerate Byron White's achievements. After the Senate's unanimous confirmation, Justice White proved himself worthy of the President's confidence. I do not write here with the detachment of a judge, as Byron has been both a colleague and a friend for many years. His record speaks for itself.

Byron White's life is the stuff of which legends are made. Byron Raymond White, the son of Alpha Albert White and Maude Burger White, grew up in a small rural Colorado town. Byron was not born into privilege, if that term is defined by wealth and social class. He achieved his goal of attending college by earning an academic scholarship to the University of Colorado.

At the university, Byron excelled scholastically and athletically. He was elected to Phi Beta Kappa in his junior year, and he subsequently graduated as the valedictorian of his class. Byron was named an All-American football player, and he managed to earn varsity letters in basketball and baseball as well. Following graduation, Byron played professional football during the 1938–1939 season for the Pittsburgh Pirates — the team that chose him as its first pick in the draft. He led the National Football League in rushing that year, becoming the first rookie to accomplish that feat. He then left professional football to study at Oxford as a Rhodes Scholar.

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* Associate Justice, Supreme Court of the United States (retired).
1 Statement by the President Upon Appointing Byron White to the Supreme Court, Pub. PAPERS 283, 283 (Mar. 30, 1962).
The outbreak of World War II caused Byron to return home in 1939 before the completion of his studies in England. He then entered Yale Law School, where in 1940, he received the Edgar Cullen award for the highest grades. While excelling academically in law school, Byron played professional football for two seasons with the Detroit Lions, which had purchased his contract from Pittsburgh. The attack on Pearl Harbor interrupted Byron's legal studies. Like many other Americans jolted by the attack on our country, Byron volunteered for service in the armed forces. He served with distinction as a Lieutenant Commander in the United States Navy and was awarded a Bronze Star for his work in naval intelligence. Admiral Arleigh Burke told me that Byron personally saved American lives during the sea battle off Okinawa.

When the war ended, Byron returned to Yale Law School and received his law degree magna cum laude. He clerked for Chief Justice Fred Vinson of the United States Supreme Court for the 1946-1947 Term before he returned to Colorado to build a successful private practice. Fourteen years later, Byron again answered the call of his country by moving his wife and his two children to Washington to serve as Deputy Attorney General of the United States. He remained in that post until he took his seat on the Supreme Court in April of 1962.

Byron and I served together on the Court for fifteen years. Byron willingly discussed pending cases with other Justices, including drafts of opinions, and I welcomed hearing his views. He and I shared a nonideological and pragmatic approach to legal problems that perhaps arose from our respective years of private practice. I came to admire his intellect and to respect his judgment.

It was interesting to watch Byron at oral argument. If he did not like a lawyer's argument, he often would swivel his chair around and would appear to lose interest in the argument. His recollection of detail, however, always made clear that he had been attentive, as he would remember specifics that other Justices had overlooked.

Byron and I are personal friends. When the Court was sitting, Byron usually had lunch in his Chambers that he had brought from home or that his messenger had bought for him in the Court's cafeteria. Occasionally, he and I would leave the Court for lunch on Saturdays. One of his favorite restaurants is — I think its name is Duke Zeibert's — just off of Connecticut Avenue. This restaurant caters primarily to famous athletes and politicians, many of whom Byron knows on a first name basis.

His wife Marion and my wife Jo are also friends. We take special pleasure in visiting the Whites as they are gracious hosts. The Whites have a son and a daughter, both of whom are also good athletes. Indeed, his daughter Nancy made the United States Olympic Team that was scheduled to go to the Soviet Union in 1980. Unhappily for
her, this was the year that the United States boycotted the Olympic games.

Byron will be missed on the Court. He plans to follow my example by sitting on courts of appeals from time to time. I always will think of what President Kennedy said about Byron when he was nominated to sit on the Court.

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_Rhesa H. Barksdale*

"The New Frontier" beckoned in January 1961 when John F. Kennedy became President, with Byron R. White as his Deputy Attorney General. Justice White's recent departure from the Supreme Court ends over thirty-two years of continuous service to our country, and marks, in a very real sense, the end of the Kennedy era. He was the last high-level Kennedy appointee in active service, the "Last of the Mohicans."

The Kennedy administration is said to have brought "the best and the brightest" to Washington. None was better, nor brighter, than Byron White. He left the Court as he has always lived and served — quietly, thoughtfully, with dignity, and with our nation's best interests at heart.

Even before he arrived in Washington in 1961, Byron White's accomplishments were well known nationally. Their breadth and depth are truly amazing — scholar, athlete, naval officer, law clerk to a Chief Justice, and lawyer. Space permits only the highlights to be noted; other achievements are great in number and equally impressive. Byron Raymond White was born on June 8, 1917, in Fort Collins, Colorado, and raised in the nearby town of Wellington. He graduated first in his high school class and, as a result, received a scholarship to the University of Colorado, from which he graduated in 1938, again first in his class. He lettered in three sports at Colorado; and his senior year, as a triple-threat tailback, he led the nation in rushing and scoring, led his undefeated team to the Cotton Bowl, was named All America, and finished second for the Heisman. His collegiate football fame as "Whizzer White" is reflected in the following poem, perhaps written by the legendary Grantland Rice. I read it in a program for a college football game played a few years ago. It went something like this:

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* Judge, United States Court of Appeals for the Fifth Circuit, since April 1990; law clerk to Justice White, October 1972 Term.
How good is Colorado, pal,
We hear the home crowd call,
How good is Colorado,
When Whizzer has the ball?

Justice White was elected in 1954 to the National Football Hall of Fame.

Selected as a Rhodes Scholar, but highly sought by the Pittsburgh Pirates (now the Steelers) to play professional football, he played for them in 1938 with the highest guaranteed salary up to then ($15,000) and led the league in rushing. He then began study at Oxford, where he made the acquaintance of John F. Kennedy, son of the Ambassador to the Court of St. James.

The outbreak of World War II in September 1939 terminated Justice White's study as a Rhodes Scholar. Justice White then entered Yale Law School, but still managed to play for the Detroit Lions in 1940 (again leading the league in rushing) and 1941, before beginning voluntary service in the United States Navy. During the war, he served in the Pacific as an intelligence officer with PT boats, destroyers, and aircraft carriers, and concluded his service in January 1946. During that service, he again came in contact with John F. Kennedy when he wrote the after-action report on the sinking of Kennedy's PT 109.

In 1946, Justice White married Marion Lloyd Stearns of Denver, Colorado. That same year, he graduated from Yale Law School, and, while completing his studies at Yale, began his clerkship for Chief Justice Fred M. Vinson. (The Chief Justice's inscription on the photograph he gave to law clerk White was prescient: his future would be as brilliant as his past.) Upon completing his clerkship in 1947, he returned to Denver, Colorado, where he practiced law until 1961.¹

Having played important state and national roles during the 1960 presidential campaign, Byron White was offered a variety of positions in the new administration, but chose to serve with Robert Kennedy, knowing that the President's brother would be the lightning rod for the administration. Justice White is given great credit for putting together the highly respected Kennedy Justice Department, which he essentially managed on a day-to-day basis for over a year full of momentous events. At the dawn of the civil rights era, he headed up the federal task force sent into a tense Birmingham in May 1961, commandeering mail trucks to transport the United States Marshals around the city.

¹ For a detailed and interesting review of Justice White's life through 1962, which includes extensive comments by him, see Alfred Wright, A Modest All-America Who Sits on the Highest Bench, SPORTS ILLUSTRATED, Dec. 10, 1962, at 85.
At the end of March 1962, when President Kennedy decided to nominate him as Associate Justice, Byron White was attending a meeting in Colorado. When the President telephoned to tell Justice White his decision, Justice White responded that the President was "putting him out to pasture mighty early." Following an almost immediate and extremely brief confirmation hearing (estimated at fifteen minutes), he was confirmed by the Senate on April 11, and took his oaths of office and seat on April 16, 1962. Almost forty-five years of age when he began, he served until the Court recessed on June 28, 1993, twenty days after his seventy-sixth birthday. (Justice White will continue to serve by sitting occasionally with federal courts of appeal. He was the Circuit Justice for the Fifth Circuit for many years, and we hope greatly that we will be graced by his presence — soon and often.)

It was my great fortune to serve as one of Justice White's law clerks during his eleventh year on the Court. That privilege, and my contact with him from time to time over the past twenty years, have given me insight that I am honored to share. Moreover, my service on the federal bench perhaps provides me with additional appreciation for his qualities as a judge. The lasting impression from working for Justice White was such that, although seventeen years elapsed between ending service to him and beginning service as a judge, my first day in the latter seemed only one day removed from the former. (That feeling was also experienced by another of his former clerks who became a federal judge.) My chambers, for the most part, are patterned after his; it is my hope that my clerks have some modicum of the feeling of collegiality, mutual respect, professionalism, and team effort that Justice White engendered in his chambers.

In working with his clerks, Justice White was a true believer in the adage that two heads are better than one. He invited participation, oral or written, on any matter, and his door was always open for suggestions and discussion. He would raise and discuss an issue wherever we were and whatever we were doing, quite often at lunch or on one of the not-infrequent "field trips" on which he would take us, to such places as the Library of Congress or an art museum, or by simply walking back to our office to visit and have a cup of coffee (he had reserved seating). Obviously, he did not always agree with his clerks' views, but they always received a full and fair hearing. On the other hand, he never wanted a clerk to work on an issue if she or he was uncomfortable doing so; he joked that "there are just some things you don't even ask a hired gun to do."

The great love and respect that Justice White's clerks have for him is demonstrated by the fact that eighty-three of the ninety-four attended a dinner in Washington last June to commemorate his retirement, even though the annual reunion of his clerks had been held earlier in the year in Denver. He and Mrs. White have always taken
a personal and continuing interest in his clerks, so that there is a true
feeling of family and continuity. Accompanied by Mrs. White, he has
sworn in four former clerks as federal judges (Fifth, Eighth, Tenth
and Federal Circuits).

A very private person, Justice White respects the privacy and
feelings of others. At the same time, he is a person of immense
warmth and kindness. He is friendly, personable, and possesses a
dry, quick wit. My earliest memory of the latter was in the summer
of 1972, before the Term began, when he had lunch with his clerks
and included a friend of ours from another chambers. One of the hot
issues at the time (at least to the clerks) was whether a public school
could control the length of a student's hair. The clerk from the other
chambers asked if the Justice had an opinion on that issue; Justice
White replied quickly that indeed he did. The clerk awaited further
response; receiving none, he asked: "What is your opinion?" Justice
White smiled and replied: "Everyone is entitled to one."

The preceding example reflects Justice White's good humor and
cheer. More importantly, it is consistent with his proper refusal ever
to discuss an issue that might come before the Court. This policy is
but one of many examples of the way in which he exemplifies the
best qualities in a judge. Another is his careful avoidance of even the
slightest, most remote, possible appearance of impropriety. Yet an­
other is his active participation at oral argument, where his insightful,
penetrating questions are designed to bring the real issues into sharp
focus, to try to find answers to questions prompted by the briefs. As
he has said, he does not view oral argument as a means of giving due
process to counsel, but as a means of trying better to understand the
case.

Well grounded in legal history and principles, thoughtful and ex­
tremely careful with every word in his opinions, Justice White does
not go beyond the issue at hand. Not doctrinal, he has not pursued
a personal agenda. Instead, he has dealt with the issues as they have
arisen, and has kept them — and the resulting holdings and judgments
— as narrow as possible, so that there could be reasoned, and rea­
sonable, predictability to the law for the American people, in order
that the law could properly develop in a careful, studied way, consis­
tent with the doctrine of stare decisis. He always considers not only
how an issue springs from the past and should be applied in the
present, but also what effect it might have in the future. His opinions
reflect his unwavering confidence and faith in our majoritarian, dem­
ocratic system. He understands the limited role of the courts, espe­
cially the federal courts, in that system, feeling confident that the
affairs of our nation are best managed by its people and their elected
representatives. ²

² For a classic, and well known, example of these views, see his dissent to Roe v. Wade,
Byron White’s selfless, unrelenting service to our country as a Justice spanned eight administrations. He sat with twenty Justices, including three Chief Justices. He got along with all of them; he made it a point to. And, whatever their backgrounds or legal persuasion, they liked him. He was never personal in his opinions, and was always gracious and thoughtful in his dealings with each member of the Court.

Perhaps the word “solid” best describes Byron White. His life is one of solid achievement; a life marked by excellence. Indeed, he personified the pursuit of excellence long before that phrase came into vogue. He has never sought the limelight. He has served in order to serve. Including the current Court, 107 Justices have served; Justice White’s service of thirty-one years, two months and twelve days is the ninth longest. (His tenure is narrowly eclipsed by that of Justice John McLean, who served only eleven days longer (January 11, 1830–April 4, 1861). The parallels in their tenure are most interesting; both were forty-four when they took the bench, and seventy-six when they left it. Happily, the parallels end there — death was the reason for Justice McLean’s departure; Justice White is in good health.) In this century, Justice White’s tenure is exceeded by that of only three Justices: William O. Douglas (thirty-six years and almost seven months), Hugo L. Black (thirty-four years and one month), and William J. Brennan, Jr. (two months shy of thirty-four years). Justice White served for nine or more years with each of them.

Because he is in good health, Justice White easily could have established a record for tenure on the Court. He probably could have served another ten years at least. But in this, as in all things, it is not his way to seek personal recognition. Records, for records’ sake, mean nothing to him. Believing that new blood should come to the Court, he stepped aside.

Byron Raymond White is a national treasure, one of the greatest sons our nation has produced. Great persons come seldom; seldom, if ever, will the Court, or this nation, see his likes again. The national issues and mood have changed constantly, but he has been constant, steadily crewing our Ship of State. Truly, he was, remains, and always will be, the best and the brightest.

GODSPEED.

My first impression of Justice Byron R. White was of his massive hands. I had just walked into his office to be interviewed as a prospective law clerk. As he approached me, I was not particularly struck by his size. However, when he grabbed my hand, I immediately sensed the solidness, the strength, and the directness that have defined Justice White throughout the nearly thirty years that I have known him.

He quickly settled down to business in the interview. He asked what I thought about some of the cases decided by the Supreme Court during the previous Term and about one or two issues currently pending before the Court. He addressed me in a matter-of-fact tone with no effort to cross-examine my responses. The atmosphere was pleasant yet businesslike. At some point in the interview, however, he found out that my wife's maiden name was Nordby and that she came from Minneapolis. Immediately, the tone of the interview changed as he was reminded of Judge Gunnar Nordbye, a federal district judge in Minnesota. The Justice proceeded to speak about Judge Nordbye with a warmth and personal interest that was quite different in character from the preceding part of the interview. His interest in the personal lives of his friends and acquaintances has proved to be an enduring quality.

His clerkship offer came several weeks later by phone. The entire conversation went something like this: “Hello, David, this is Byron White. If you're still interested, I'd be happy to have you clerk with me when you graduate.” I immediately accepted, and he then closed by saying, “Good. You can expect a confirming letter from me in the next several days. Good luck during the rest of your time at Michigan.” That was the extent of the call. Direct and to the point. Again, vintage BRW (BRW are the Justice's initials, and that was the manner in which we addressed written communications to him).

On my first day at work, my co-clerk and I had lunch with the Justice in the public lunchroom in the basement of the Supreme Court building. Somehow, the conversation turned to atomic physics, a subject in which I had a layman's interest. As I was discussing a theory, I suddenly felt myself being pulled, without warning, into a vortex of questions from the Justice from which there appeared to be no escape. The questions came with a rapidity and an incisiveness for which I was totally unprepared. Each question seemed to identify a weakness in my theory or a gap in my knowledge. Once my plight became as apparent to him as it was to me, the questions stopped as suddenly as they had begun. This progression from incisiveness to

* Judge, United States Court of Appeals for the Tenth Circuit; law clerk to Justice White, October 1965 Term.
vigorous questioning and, ultimately, to mercy was one that I saw repeated over and over again on subjects as diverse as art, philosophy, history, politics, sports, and of course, legal issues.

This same approach was often reflected in the Justice's questioning from the bench. Although his questions were penetrating, he never asked them just to score debating points or to embarrass counsel. If Justice White had already figured out the answer, he saw no point in making counsel squirm under his questioning. It is as instinctive for Justice White to respect the dignity of others as it is for him to expect that others will respect his dignity.

A strong focus on the task at hand marked life in Justice White's chambers. The average work schedule consisted of ten- to twelve-hour days plus a "light" Saturday, which typically concluded with a late lunch with the "boss" at a local restaurant. In addition, we usually took briefcases full of work home at night. The Justice maintained the same long hours, but what was most remarkable about his work habits was the intensity of his work. He seemed to be researching, writing, thinking, and analyzing all at the same time. There was a decidedly physical aspect to his thought processes as he approached each case with the same energy that he had previously reserved for opposing linebackers while playing football for the University of Colorado and in the National Football League.

The Justice's typical routine before oral argument was to call my co-clerk and me into his office to discuss the cases that would be argued the next day and to ask for our input. It would have taken a dense clerk not to have figured out within the first week of the clerkship that any thoughts we expressed had better have substance behind them. The Justice wanted data, precedent, concrete arguments, legislative history, facts from the record, and the like, rather than our unsupported judgment. If we had something to add, he would listen. As soon as we ran out of useful information, however, the conversation on that case would end. He had an uncanny ability to know when that moment arrived, and it would have been foolhardy to attempt to extend the discussion beyond our resources. The only effective way to deal with ignorance was forthright admission. Such an admission never drew criticism or a lecture. It simply constituted an acknowledgment that it was time to move on to something else.

The stakes went up considerably when it came to preparing the first draft of an opinion. The Justice would often do his own first draft on an old manual typewriter. His powerful fingers were nimble, and he could, without any discernible typing technique, turn out a page with remarkable speed. Sometimes, however, the Justice would invite us to prepare a first draft in accordance with his reasoning and logic. Such an offer came with a string attached. He would announce that, in his spare time, he might also be working on a first draft of the same opinion. We knew that if he completed his draft first, we
would all work with his draft, and our draft would become only a research memo. Although this practice may have had its origin in the Justice's competitive nature, I think it was just as likely an expression of his impatience, his economy, and his oft-repeated belief that in writing opinions two heads are better than one.

Whatever the logic behind this practice, the effect on his law clerks was pronounced. We would invoke the benign, if somewhat conspiratorial, assistance of his secretary, Jane Pike, to keep us advised of the progress the Justice was making on a particular opinion upon which we also were working. We willingly worked into the early morning hours to get our draft to the Justice before he completed his own version. We won some of those races, and we lost some. Of course, victory only meant that our horse got out of the starting gate. The Justice's editing sometimes left us with only a bare paragraph or two that could someday be shown to our grandchildren as the product of our work.

The intensive work schedule was occasionally relieved by a late afternoon basketball game or paddle tennis match. The Justice would come in and ask, "What do you say if we go up and shoot a few baskets?" The invitation sounded so innocuous, even innocent. We would retire to the basketball court on the top floor of the Supreme Court building, which was appropriately known as "the highest court in the land." (When Justice White was himself a law clerk to Chief Justice Vinson, he once created so much noise on that same court playing a competitive game of badminton that the Justices had to send up a note asking him to stop during oral argument.)

If it were just the Justice and his two law clerks, he would typically start with a game of "Horse." The Justice had an accurate one-handed set shot and a pretty fair hook shot, as well as a collection of idiosyncratic shots like his over-the-back free throw. The intensity would pick up when we moved to a two-on-one scrimmage with the Justice. However, his competitive side was more prominently displayed on those occasions when law clerks from some of the other chambers joined us in a game. On those days, elbows and bodies would be flying every which way. Typically, the elbows belonged to the Justice and the bodies belonged to the rest of us. We never experienced any actual broken bones, although I understand that subsequent clerks were not always so fortunate.

Sometimes, on a Saturday afternoon after work, we would walk to the National Gallery of Art with the Justice. En route the Justice would discuss some of the art that we would be seeing and the reasons why he liked or disliked it. On our first visit, as we walked into the initial room of the gallery, the Justice pointed out one of the pictures that he had discussed on the walk. I went over to examine it more carefully, but when I looked up, the Justice was nowhere to be seen. I hurried to catch up with him several rooms later where, once again,
he pointed out something in a picture that had caught his attention. I approached that picture to examine more carefully what the Justice had observed, and when I looked up, once again I was alone. The pace picked up after that. In each room, the Justice would make a comment or observation about one or more of the pictures. However, once the remarks were made, that was it. The Justice offered neither elaboration nor processing time for us to integrate his comments.

This is illustrative of a general characteristic of the Justice that I have observed over the years. He simply does not need much processing time to absorb and integrate information. A brief statement travels fully clothed into his consciousness with all of the trappings of nuance, comparison, structure, and context that, for most of us, require articulated analysis and, even more importantly, time. For most people, some repetition is useful because it provides time to process the information. For Justice White, repetition and elaboration are often a waste of time. I am convinced that this characteristic contributes to the common misperception of Justice White as brusque or abrupt.

Notwithstanding all that has been written about the Justice's competitive spirit, he also has a nurturing and affectionate side. The Justice has had approximately one hundred law clerks over his thirty-one years on the Court, and he keeps up with nearly all of them. Mrs. White takes top honors in that department, however, as she also keeps track of the children and even the grandchildren of the former clerks. The Justice frequently invites his present and former clerks to join him and Mrs. White on skiing trips back in Colorado, and it is not uncommon to see him leading a dozen or more of them down a Colorado mountainside, sometimes against their better judgment. I have also been fly-fishing with the Justice, and I know many of his clerks have joined him on similar adventures long after their clerkships were over. When several of his former clerks suffered serious illness, they invariably received calls or visits from the Justice. Four of his clerks have now become Court of Appeals judges, and upon each investiture the Justice was there to preside over the occasion with parental pride.

The Justice's affection for, and personal interest in, others goes well beyond his law clerks. During the winter of the year I clerked, there was a terrific snowstorm in Washington, D.C. My co-clerk and I had managed to get to work after quite a struggle, but the Justice was not there. By late morning, we began to worry that he might be stuck on the highway, and we eventually tracked him down. In fact, what he had been doing was going from house to house to see if his neighbors needed help with their cars or other assistance.

One day, the son of one of Justice White's old football buddies walked into chambers unannounced. Apparently, his father had been confident that Justice White would welcome him, and that confidence
was well placed. The Justice dropped everything and gave that young man a forty-five-minute tour of the Court. Another time we heard the sounds of gruff affection coming from his office. It turned out that an older woman had walked into chambers and was visiting with him. We later learned that she was a retired employee from the University of Colorado whom the Justice had known during his college years. She felt she could simply walk into the Justice's chambers to visit him whenever she was in Washington, and he obviously concurred in that judgment.

I remember another group of unannounced visitors that generated a different response from the Justice. One afternoon we had taken a brief break from work to engage the Justice in a putting competition. This game required all of us, including the Justice, to stand in the clerks' room and to putt a golf ball from there, across the secretary's area, and into the Justice's office through a series of connecting doors. The object was to cause the golf ball to stop as close as possible to a particular leg of one of his side chairs. This task was made more complicated because of the placement of furniture and because of deceptive wear lines in the carpet that frequently altered the ball's course.

On this occasion, the Justice was holding the putter, which was dwarfed by his hands just like everything else that fell within their grasp. He was standing over the ball near the front entrance when the door opened and in peeked several nuns on a tour of the Court. They all stood transfixed, Supreme Court Justice and nuns in full habit, staring at each other for a long, awkward moment. The Justice blinked first; then he retreated to his office, leaving it up to us to assist the nuns and to explain what was going on. This experience produced an expression on the Justice's face that I had not seen before or since — an expression of sheepishness.

During the year I spent clerking for him, I came to realize that the Justice had been strongly influenced by his roots, particularly in his pragmatic approach to the law. He is a product of Wellington, Colorado, a small farming community in north central Colorado, just south of the Wyoming border. There the winters are harsh, the spring winds strong, and the summers often hot. He worked in the sugar beet fields as a youth, and his early experiences revolved around hard work, sports, fishing, and practical people engaged in agriculture and small business. So, although his extraordinary intellect has allowed him easily to appreciate the subtle nuances and philosophical implications of the issues before him, at the core he is guided by common sense and practical judgment.

Let me close by recounting one last event that occurred just about one year ago when the Justice was in Denver. We walked into a jewelry and Indian artifact store that was a landmark even in the days when Justice White was a young lawyer in Denver. The Justice
took an obvious interest in the owner, who was now well into her seventies or beyond. He inquired not only about her and the long tradition of her store, but also about the history, techniques, and detail of much of the artwork and many of the artifacts. When she asked who he was, he declined to tell her. (He did, however, point to me and explain that I was a federal judge.) At that point, she had taken some expensive jewelry out of a locked cabinet for the Justice to examine, and she briefly went into the back room, leaving us alone with the jewelry. When she returned, the Justice said that she should not leave valuable jewelry in front of strangers because they might steal it. She responded, matter-of-factly, that if he had run out of the store with the jewelry, she would have raced after him and grabbed him. (She could not have weighed more than ninety pounds, even throwing in a couple of pounds for self-confidence.) The Justice asserted that he could have outrun her. She disputed that, and pretty soon I was watching a good-natured debate about which of them was faster.

As I stood there watching this improbable encounter, I once again witnessed the Justice's interest in people, his inquisitive nature, and, of course, his competitive instincts. I had observed these characteristics so many times before. Some things never change.

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Lance Liebman*

Of 107 Justices in 205 years, only twelve have served longer than thirty years, and every long-serving Justice has made a substantial contribution to the institution — offering a steady and dedicated response to the judicial challenges of an era, asserting leadership at a time of national crisis, or articulating a large constitutional vision. The personal qualities and life experiences that a new Justice brings to the Court contain the seeds of the individual's judicial service. Justice White, a skeptical but unflinching democrat, was no exception.

I served as a law clerk to Justice White during the 1967 Term. Former law clerks can be perfect celebrants of a retired judge, but

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* Dean and Lucy G. Moses Professor of Law, Columbia University School of Law; clerk to Justice White, 1967 Term.

1 Clerking in any court, and especially in the Supreme Court, is an ideal transitional role from promising law student to responsible adult. Every law clerk needs to be told once (for most of us only once) that she or he was not confirmed by the Senate. Then the clerk accepts full responsibility for the correct votes and the clever lines, while taking a "who, me?" attitude toward the clunkers. Never again to achieve such a perfect combination of elite dignity and freedom from responsibility, the law clerk nearly always looks with reverence at the judge whose most brilliant decision was to select this particular clerk.
they may be less reliable as analysts of his judicial contribution. The year of intimate observation and personal contact may create an emotional lens that distorts clear perception of the published jurisprudence. In my case, I followed and felt that I understood Justice White's opinions for perhaps five years after I was his clerk. Later, particularly after Watergate, the social context had changed so much that I no longer felt that I had special purchase on his relationship to the law. Reading now the published results of this judicial career, my sense is that Justice White's approach to the job changed very little through the three decades of his service. From beginning to end, he saw the appropriate limits of the position more clearly than its dramatic possibilities. He knew well that particular historical contingencies had placed him on the Court and that the institution was far bigger than he. His job, as he saw it, was to decide cases: to read the briefs, to question the lawyers rigorously, to find the flaws in general statements about the law, and to see, as far as humanly possible, the consequences of each decision and its supporting rationale. Thus his powerful intelligence was largely focused on predicting, skeptically, the consequences of conclusion and reason — the consequences for other applications of a rule, and the real-world consequences of a Supreme Court decision. Perhaps no one who has ever sat on the Court has been more consistently aware that he was one participant in a large system for governing 250 million people, and that others — in Congress, in the executive branch, in state and local governments, on school boards, in police departments, and in important positions in the private sector — must act and decide as well.

Byron White was a member of the confident and initially optimistic generation that served in World War II and embarked on professional careers immediately after the war. Having succeeded as scholar and athlete, and having made the American opportunity system work for him, he practiced law in growing Denver before he played a major role in the victorious political campaign of John F. Kennedy, his acquaintance from England and the Pacific. Justice White and President Kennedy, from such different backgrounds, shared the anti-ideological, pragmatic values of their generation. Justice White's service in the executive branch as Deputy Attorney General was strenuous and basically successful as the new administration sought a responsible path through the early (and easier) stages of the civil rights revolution.

I suspect he would find it a perfect example of the American system of opportunity and diversity that a Justice who grew up in the foothills of the Rockies and fought in World War II has been succeeded by a Justice from Brooklyn who played a major role in the struggle for gender equality that has been such a large part of the past quarter century.
During Justice White's thirty-one years on the Court, the American system of government met turbulent times. The President who appointed him was assassinated. Robert F. Kennedy, his superior at the Department of Justice and close collaborator, was killed in 1968, very possibly on his way to the White House.³ It became clear that the nation's racial divisions would not be easily bridged. Richard Nixon, whom Justice White entered politics to oppose, became President. Watergate challenged the basic structures of the political system. The Brethren⁴ threatened, if not the Supreme Court, at least the terms of Justice-clerk trust that were especially meaningful to Justice White, the first former law clerk to become a Justice.

From his first Term to his last, Justice White was skeptical. He doubted that a code of police conduct, declared by the Supreme Court, would assure the constitutional rights of defendants without unacceptable costs to law enforcement.⁵ He refused to assent to the Court's "exercise of raw judicial power" to give priority to "a spectrum of possible impacts on the mother" over "the continued existence and development of the fetus."⁶ He doubted that the country would be better off if disputes over state aid to religious schools, so potentially destabilizing to a society, were taken out of the political process.⁷

On the other hand, his skepticism sometimes led him to challenge conventionalities that were no longer defensible. He was readier than many of his colleagues to find no rational basis in a legislative enactment;⁸ clear about the availability — in limited circumstances to be

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³ I sat in Justice White's chambers on the day after Senator Robert Kennedy was shot. The Justice had to cope first with a news report of irreparable brain damage and then with the announcement that the Senator had died. This was also the term of Martin Luther King's murder, of the Poor People's March on Washington, of the Washington riots, and of the first large protests outside the Supreme Court building.

⁴ BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979). The authors claim to have interviewed more than 170 former law clerks and to have had from one to four sources within the chambers of each Justice for every Supreme Court Term from 1969 to 1975. See id. at 3–4. When I was a clerk (albeit pre-Watergate), it was unimaginable that any law clerk would talk to a reporter about matters discussed in chambers or in conference. I have little doubt that, after The Brethren, relations between Justices and clerks in many chambers became less open, at least for a period of time.


⁶ Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) ("This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."). Although it appeared in Doe v. Bolton, Justice White's dissenting opinion applied as well to Roe v. Wade, 410 U.S. 113 (1973).


⁸ See, e.g., Lyng v. Castillo, 477 U.S. 635, 643 (1986) (White, J., dissenting) (arguing that distinctions in the definition of household were "irrational" and violated the Equal Protection Clause when used to determine food stamp benefits); Attorney Gen. v. Soto-Lopez, 476 U.S.
sure — of substantive due process review; unafraid to reconsider First Amendment dogma in light of the vast powers of the modern press; willing to overturn the traditional structure of American school finance; and doubtful about congressional justifications for excluding women from the draft.

898, 916 (1986) (White, J., concurring in the judgment) (arguing that the civil service employment preference granted to veterans who are New York residents should be invalidated under rational basis review); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–50 (1985) (holding that the application of a zoning ordinance to a group home for the mentally retarded was based on "an irrational prejudice" and failed rationality review under the Equal Protection Clause).

9 See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 542–44 (White, J., dissenting). Characteristically, his clearest statement was a quotation:

[The liberty guaranteed by the Fourteenth Amendment's Due Process Clause] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .

Id. at 542–43 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J. dissenting) (citations omitted)). Having accepted such open-ended authority in the Supreme Court, Justice White explained the restraint with which that authority should be exercised:

That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . The Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Id. at 544.

This is the best description of the reasoning behind Justice White's votes in Miranda, Roe v. Wade, and Bowers v. Hardwick, 478 U.S. 186 (1986). He also discussed the subject acutely in his dissent in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), in which he criticized the substantive protection afforded to abortion in Roe v. Wade and argued that Roe v. Wade should be overruled, see id. at 786–97 (White, J., dissenting).

10 See Gertz v. Robert Welch, Inc., 418 U.S. 323, 402 (1974) (White, J., dissenting) ("The case against razing state libel laws is compelling . . . in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few."); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 263 (1974) (White, J., concurring) ("[I]f there is any absurdity . . . to leave the people at the complete mercy of the press . . . when the press . . . is steadily becoming more powerful . . . .").

11 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 63–70 (1973) (White, J., dissenting) (arguing that a Texas school-financing scheme based on local property tax revenues failed rational basis review under the Equal Protection Clause due to its discriminatory impact on poor school districts). Had Rodriguez, a 5–4 decision, been decided as Justice White advocated, it would have resulted in federal court-supervised structural change with a level of disruption and controversy similar to that brought on by reapportionment and school desegregation.

Justice White was a democrat, committed to a healthy political process\textsuperscript{13} and ready to allow that process to work.\textsuperscript{14} Endlessly questioning, Justice White looked for data and expertise\textsuperscript{15} and encouraged executive and administrative agencies to take responsibility for important public choices.\textsuperscript{16} He was also flexible, ready to allow new government structures to meet new conditions. This was clearest in

\textsuperscript{13} See, e.g., Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 509 (1985) (White, J., dissenting) (refusing to “second-guess” the legislative judgment that “large-scale expenditures” threaten the electoral process); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 308 (1981) (White, J., dissenting) (“Recognition that enormous contributions from a few institutional sources can overshadow the efforts of individuals may have discouraged participation . . . and undermined public confidence in the referendum process.”); Buckley v. Valeo, 424 U.S. 1, 264–66 (1976) (White, J., dissenting) (“It is critical to . . . dispel the impression . . . that federal offices are bought and sold . . .”).

\textsuperscript{14} An interesting exception, which I have tried and failed to explain, is affirmative action. See Lance Liebman, Justice White and Affirmative Action, 58 U. Colo. L. Rev. 471, passim (1987). He was first receptive and then hostile to politically developed solutions. Compare Fullilove v. Klutznick, 448 U.S. 448, 480–92 (1980) (upholding, in an opinion joined by Justice White, racial and ethnic criteria for a minority set-aside program with remedial goals) and United Steelworkers v. Weber, 443 U.S. 193, 209 (1979) (holding, in an opinion joined by Justice White, that Title VII of the Civil Rights Act of 1964 does not disallow certain voluntary private sector affirmative action plans to eliminate racial imbalance in traditionally segregated jobs) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 358–69 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part) (concluding that a state university may adopt race-conscious admissions criteria to combat effects of past discrimination) with Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (White, J., concurring in the judgment) (stating that the Equal Protection Clause forbids a public school board from laying off white workers who would not otherwise be laid off in an effort to keep blacks on the job). Yet Justice White’s approach to other areas of the Constitution suggested a readiness to let employers and government find their way through the challenges of a diversifying society. My suspicion is that his commitment to the legitimacy of merit-based devices for rewarding effort led him to reject the use of affirmative action.

It is interesting that, in his penultimate opinion, Justice White distinguished the arguments for affirmative action in creation of election districts from the arguments for affirmative action in employment that, in recent years, he rejected. See, e.g., Shaw v. Reno, 113 S. Ct. 2816, 2842–43 (1993) (White, J., dissenting) (“State efforts to remedy minority vote dilution are wholly unlike . . . ‘affirmative action.’ . . . [R]emedyng a Voting Rights Act violation does not involve preferential treatment. It involves, instead, an attempt to equalize treatment . . ..”) (citations omitted)). From his days in the Justice Department and his first days on the Court, Justice White saw that effective African-American participation in the political process is the country’s best route to social progress and racial peace.

\textsuperscript{15} See, e.g., UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1210, 1215–16 (1991) (White, J., concurring in part and concurring in the judgment). Whereas Justice Blackmun was ideologically committed and adamant in striking gender-specific employment limits, Justice White was unconvinced by the data that supposedly showed fetal risk. He was ready to consider future evidence, properly evaluated by experts, that would justify employment limits adopted to protect fetal health.

his dissents from the Court's decisions in the 1980s that struck down new procedural devices for carrying on the business of government.\(^{17}\)

A Supreme Court Justice has three tasks. The first is to assist in the orderly functioning of an immensely complicated system of government. To do this, a Justice must live by the highest ethical standards, address every case with a clear head, and be as honest as possible in giving reasons and identifying the connections between cases. In the history of the Court, no one has performed this role better, longer than Justice White. He has done so with an immensely sophisticated awareness of the structure of our public life and with a deep commitment to progressive evolution of the institutional forms of our federalist democracy. He has also demonstrated an absolutely extraordinary capacity, from age forty-four to age seventy-five, to take up a case as a problem, to analyze it in great detail, to see deeper into it than most, and to give his judgment and justifications. This is the core of the daily task we assign to our Supreme Court Justices.

Second, a Supreme Court Justice sits in readiness to respond to crises. At certain points in the nation's history, the system of government comes under attack or is in urgent need of reform. Individual rights must be affirmed. They are likely to be unpopular rights, hence the failure of our democratic institutions to respond to them. This is the role the Supreme Court played in *Brown v. Board of Education*,\(^{18}\)

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\(^{17}\) See, e.g., Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting) (arguing that the Gramm-Rudman-Hollings Act budget procedures are not unconstitutional); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 967–68, 1002 (1983) (White, J., dissenting) (arguing that the one-house legislative veto provision of the Immigration and Nationality Act is not unconstitutional); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, n5-18 (1982) (White, J., dissenting) (arguing that the jurisdiction granted to Article I bankruptcy judges by the Bankruptcy Act of 1978 is not unconstitutional). In *Bowsher*, Justice White criticized the majority's "distressingly formalistic view of separation of powers as a bar to the attainment of governmental objectives through the means chosen by the Congress and the President in the legislative process established by the Constitution." *Bowsher*, 478 U.S. at 759 (White, J., dissenting). In *Chadha*, he wrote:

> We should not find the lack of a specific constitutional authorization for the legislative veto surprising . . . . From the summer of 1787 to the present the Government of the United States has become an endeavor far beyond the contemplation of the Framers . . . . But the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions.

*Chadha*, 462 U.S. at 978 (White, J., dissenting). The eighteenth-century constitutional text, for Justice White, was often not the answer to contemporary questions but the source of information about the values that the Supreme Court is required to interpret. His method was succinctly defined in his *Northern Pipeline* dissent:

> I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Art. III. The inquiry should, rather, focus equally on those Art. III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Art. III values should then be measured against the values Congress hopes to serve through the use of Art. I courts.

*Northern Pipeline*, 458 U.S. at 115 (White, J., dissenting).

in its reapportionment cases, in the Pentagon Papers Case, and in Watergate. I slept well knowing that Justice White was on the bench. I knew he breathed the deep values of the American experiment — opportunity, equality, diversity — and that when we needed him, he would be there.

Third, a Supreme Court Justice articulates constitutional visions. These visions help us understand what the Court is doing and how we should think about our laws and our system of government. To articulate constitutional visions, a Justice must commit generalizations. But generalizations simplify and limit. As written, they are usually wrong. Visions, even constitutional ones, are also fuzzy and egotistical. For the past three decades, the Court has given the academy as many generalizations as we have needed, but Justice White delivered fewer than his share. Rather, Justice White decided cases. He understood deeply the defects of general statements. He thus gave us very few incorrect generalizations, though perhaps not enough helpful ones. Fortunately, he served alongside twenty-one Justices, hardly any his match in intellect, none his master in devotion to the job, but many readier than he to opine generally.

Justice White did his part as the Supreme Court kept American democracy on a tolerably even keel through thirty-one remarkable years. Not a simplifier, a generalizer, or a turner of cheap phrases, Justice White contributed the toughest questions, the sharpest distinctions, and the purest honesty. He contributed in these ways because he knew himself and his country, needed no honors or rewards beyond those he earned in full, and saw perfectly the role that history had handed to him. Byron White was an American Justice — molded by his life experiences and guided by his pragmatic skepticism and deep democratic beliefs. He has set a magnificent example for those who will follow.


22 The exception is Bowers v. Hardwick, 478 U.S. 186 (1986), which is, for me, his least convincing opinion. (Every Justice seems to have a worst decision. For the revered Justice Harlan, it was Flemming v. Nestor, 363 U.S. 603 (1960).)

23 He would not want me to write "an All-American Justice," and so I won't, at least not in the text. More than once during my year as his clerk, the Justice's secretary, Jane Pike, was asked on the phone, "How does he spell Whizzer?" She always answered, "B-Y-R-O-N."
Over his career, Justice White has annoyed quite a few people. It is hard to escape the sense that the sharpest annoyance stems from a simple dissatisfaction with his position on one of the most contentious issues ever to arise before the Court: abortion. His dissent in Roe v. Wade was strong stuff and must have earned him many enemies among those for whom this issue transcends the more abstract questions of craft and doctrine. And that enmity can only have deepened when he recalled some of the harshest aspects of that dissent in his majority opinion in Bowers v. Hardwick. Surely, this hostility also includes some sense of betrayal: John F. Kennedy appointed Justice White, and so he was supposed to owe allegiance to what are identified as liberal causes (not only did he dissent in Roe, but he joined the dissent in Miranda). Or perhaps it was just the result of expectations raised by a position in one case, then dashed in the next, as when, after joining without comment Justice O'Connor's controlling opinion in City of Richmond v. J.A. Croson Co., which subjected to strict, and thus fatal, scrutiny a city's racial set-aside, the next Term he joined without comment Justice Brennan's opinion for the Court in Metro Broadcasting, Inc. v. Federal Communications Commission, an opinion that was clearly, even provocatively, inconsistent with Croson.
Justice White was indeed hard to predict in race cases. In *Regents of the University of California v. Bakke,* he joined with Justices Brennan, Marshall, and Blackmun in a partial dissent that would have given very free constitutional rein to affirmative action schemes that favored African-Americans. In *United Steelworkers of America v. Weber,* he joined Justice Brennan’s majority opinion that had the same effect under Title VII of the Civil Rights Act. Yet five years later, in *Firefighters Local Union No. 1784 v. Stotts,* he wrote an opinion of indefinite sweep, condemning race-conscious affirmative action remedies that benefited individuals who were not identified victims of Title VII violations. In *Local 28 of the Sheet Metal Workers’ International Association v. Equal Employment Opportunity Commission* and *United States v. Paradise,* he seemed to hold to the latter position in delphic dissents.

In *Griggs v. Duke Power Co.,* he joined the Court in instituting a very broad effects test for employment discrimination under Title VII. Yet in *Washington v. Davis,* he wrote to reject that test as a measure of constitutional right. In his dissent in *City of Mobile v. Bolden,* he appeared to be returning to *Griggs* in arguing that effect might be a sufficient proxy for intent. Continuing this favorable disposition toward effects tests, in *Thornburg v. Gingles* he joined the Court’s opinion that made electoral success a principal

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11 See id. at 362 (Brennan, J., concurring in the judgment in part and dissenting in part).


13 See id. at 200–08.


15 See id. at 578–83.


18 See Sheet Metal Workers, 478 U.S. at 499–500 (White, J., dissenting); Paradise, 480 U.S. at 196 (White, J., dissenting).


20 See id. at 432.


22 See id. at 239.


24 See id. at 102–03 (White, J., dissenting). In fact, in *Bolden,* Justice White argued that, under the standard adopted by the Court in *Washington v. Davis,* effects can be substantial evidence of intent. See id.

criterion of fair access to the political process under the newly amended Voting Rights Act. Yet in Wards Cove Packing Co. v. Atonio, he wrote an opinion that many thought largely undid Griggs.

There were other stunning reversals of ground. Having written the Court's opinion in Swain v. Alabama, he joined in overruling it in Batson v. Kentucky, which subjected peremptory challenges to intent test scrutiny for racial motives. Having written the opinion of the Court in McNally v. United States, which seemed to limit the use of federal mail fraud convictions to cases that looked like standard thievery, the very next Term, in Carpenter v. United States, he once more permitted a quite expansive use of that federal prosecutorial tool.

All in all, these seeming inconsistencies were a sign of strength and integrity. They showed that Justice White was not out to please or to garner the accolades — newspaper editorials, law review symposia, testimonial dinners — that are the only currency with which interested parties may without impropriety suborn the judiciary. In Justice White's case, this disposition is a sign not only of good character — a character unconcerned with flattery — but also of a good judge. It is not possible to have seen Justice White in the courtroom, to have argued before him, without getting a sense of a strong intelligence. He knew the case. He had worked out its intricacies — he obviously loves a puzzle. He delighted in asking just the question that displayed a weakness the advocate was trying to skate over, or perhaps had not even noticed. "Skewer" is the word that comes to mind. So if there was inconsistency in his positions over the years, it could not have been from inattention or a lack of intellectual power. My guess is that he came closer than most Justices to trying to make sense out of each case, one at a time. Doctrinal consistency just did not weigh very heavily with him if it led to a conclusion that did not make sense. With no other Justice would you get so little mileage

26 See id. at 35, 77.
30 See id. at 89–98.
32 See id. at 352, 356, 360.
34 See id. at 27–28.
35 Some scholars, however, have criticized him for this approach:
White's trademark . . . is a lawyerly case-by-case analysis. "Justice White has almost from the beginning been a person who didn't develop doctrines or frameworks or ways of looking at things that would influence other justices" . . . "As a result, he has been among the least influential. If he is replaced by anyone with a more systematic approach, that could over time be more influential of other justices."

from quoting his own words back to him.\textsuperscript{36} Another virtue of this disposition was Justice White's willingness to go along to "make a Court" — a subordination of personal punctilio to the goal of making the Court's work useful to, not to say usable by, the lower courts and the profession.\textsuperscript{37}

But that is not all there was. Although he did not wear his theoretical commitments on his sleeve — in part because they were often more intuitive than explicit — there was more than a thread of continuity in Justice White's work. Contrast him to Justice Felix Frankfurter, whose theoretical commitments, although very explicit, perhaps did not fully account for his conclusions after all.

There was one place where Justice White's commitments were right on the surface, and he explained them with rigor, passion, and strength: separation of powers. It was only with \textit{Buckley v. Valeo}\textsuperscript{38} that the Burger Court began to revive a muscular constitutional separation of powers jurisprudence. This development gathered steam

\textsuperscript{36} Compare McNally v. United States, 483 U.S. 350, 352, 356, 360 (1987) (White, J.) (holding that, in a case in which government officials had defrauded the public through a "self-dealing patronage scheme," § 1341 of the federal mail fraud statute is "limited in scope to the protection of property rights" and does not protect "the intangible right of the citizenry to good government") with Carpenter v. United States, 484 U.S. 19, 27–28 (1987) (White, J.) (holding that confidential, pre-publication information of a newspaper is "property" protected by § 1341).

Another example is Morrison v. Olson, 487 U.S. 654 (1988), a case in which Justice White joined the majority. In \textit{Morrison}, the Court stated that the powers to investigate and prosecute are "not inherently 'Executive'; indeed, they are directly analogous to functions that federal judges perform in other contexts." \textit{Id.} at 681. Earlier, in \textit{Buckley v. Valeo}, 424 U.S. 1 (1976) (per curiam), however, the Court appeared to have argued that investigatory power was a core executive function: "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" \textit{Id.} at 138 (quoting U.S. CONST. art II, § 3). In a separate opinion in \textit{Buckley}, Justice White appeared to echo the sentiments of the Court when he wrote: "I would be much more concerned if Congress purported to usurp the functions of law enforcement . . . ." \textit{Id.} at 285 (White, J., concurring in part and dissenting in part). In \textit{Morrison}, the Court made its decision fully aware of its previous statements, as the appellees, in arguing that prosecution was solely an executive function, cited \textit{Buckley} in their briefs, see, \textit{e.g.}, Brief for Appellees Schmults and Dinkins at 9, \textit{Morrison} (No. 87-1279); Brief for the United States as Amicus Curiae Supporting Appellees at 10, \textit{Morrison} (No. 87-1279), and during oral argument, see, \textit{e.g.}, Oral Argument of Solicitor General Fried as Amicus Curiae, Supporting Appellees at 57–58, \textit{Morrison} (No. 87-1279).

\textsuperscript{37} On his last day on the bench, Justice White stated:

Since I remain a federal judge and will likely sit on Courts of Appeals from time to time, it will be necessary for me to follow the [Supreme] Court's work. No longer will I be able to agree with or dissent from a court opinion. . . . Hence, like any other Court of Appeals judge, I hope the Court's mandates will be clear, crisp, and leave those of us below with as little room as possible for disagreement about their meaning.


\textsuperscript{38} 424 U.S. 1 (1976).
in *Immigration & Naturalization Service v. Chadha*,\(^{39}\) which explicitly or implicitly invalidated hundreds of congressional statutes and a device — the legislative veto — that had been a fixture of the political landscape since the 1930s.\(^ {40}\) It received perhaps its strongest statement in *Bowsher v. Synar*,\(^ {41}\) the Gramm-Rudman case. There were dissents in all these cases, and the doctrine was badly punctured in *Morrison v. Olson*\(^ {42}\) (the Independent Counsel case) and *Mistretta v. United States*\(^ {43}\) (the Sentencing Guidelines case), but none of the Justices who took up the cudgels against a more rigorous separation of powers did so with Justice White's coherence and single-mindedness.

There is a vision and a theory behind his separation of powers opinions. In their power and coherence, they are rivalled only by Justice Scalia's polar opposite view. Justice White's conception is distinctly parliamentary. The Constitution establishes the Congress as the engine of government. The legislative veto, Gramm-Rudman hammer, and legislative representation in the Federal Election Commission, which the Court struck down in *Buckley*, White thought valid because congressional action in canonical form instituted them. Not only are the substantive ends of congressional action, set out in Article I, Section 8, enlarged by that provision's Necessary and Proper Clause, but Congress's institutional enactments elaborating governmental structures are also to be judged by that expansive and permissive standard. It is not so much the political science of Justice White's defense of the legislative veto that is magisterial, but the underlying vision of Congress as fully enabled to devise not just new schemes of government, but new schemes of governing. Justice White made the pragmatic case for the legislative veto when he argued the peculiar aptness of that device to allow Congress to set the broad outlines of policy and yet, at the same time, to maintain some authority over the details of its administration.\(^ {44}\)

The welfare-administrative state, with its comprehensive reach and enormous complexity, threatens the eighteenth-century scheme of gov-

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\(^{40}\) See id. at 967–74 (White, J., dissenting).

\(^{41}\) 478 U.S. 714 (1986). In *Bowsher*, the Court held that, impeachment proceedings excepted, Congress cannot reserve for itself the powers of removal of an officer charged with the execution of the laws. See id. at 421–34.


\(^{43}\) 488 U.S. 361 (1989). In *Mistretta*, the Court upheld the Sentence Reform Act of 1984, which created an independent commission — whose membership included federal judges — to establish sentencing guidelines. See id. at 380–404.

ernmental powers with impotence or incoherence. Although Justice Scalia chose the Presidency, Justice White would have made Congress the organ of coherence, with the legislative veto the means for Congress to impose it. In the muddle created by its most recent pronouncements — Commodity Futures Trading Commission v. Schor,45 Morrison, and Mistretta, which collectively allowed a proliferation of power centers responsible neither to Congress nor to the President — the Court opted for incoherence. As it did, less comprehensively, in striking down the devices in Chadha, Bowsher, Buckley, and Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.46 It was not the wisdom of the devices, however, that moved Justice White; rather it was the sense that Congress had the authority to achieve that coherence in any way that seemed reasonable to it — any way that was "necessary and proper."

That is why his vision seems, above all, parliamentary. And in that respect we may see Justice White as the descendant of a long line of progressive thinkers, going back at least to Woodrow Wilson, who saw Congress as the American counterpart of the House of Commons, and thus as the repository of the people's sovereignty. That vision explains why Justice White would have no patience at all with the Court's analogous ventures into defining structural limits on Congress's authority over the states. To him, National League of Cities v. Usery,47 New York v. United States,48 and even the interpretive principles of Gregory v. Ashcroft49 must be anachronistic impediments

45 478 U.S. 833 (1986). In Schor, the Court held that the Commodity Futures Trading Commission's assumption of jurisdiction over common-law counterclaims did not "impermissibly threaten the institutional integrity of the Judicial Branch." Id. at 851.

46 111 S. Ct. 2298 (1991). At issue in this case was a statute that transferred control over two major airports from the Federal Government to the Metropolitan Washington Airport Authority (MWAA). This transfer was conditioned on the creation of a "Board of Review," composed of nine congressmen, which would have veto power over the MWAA decisions. See id. at 2301. The Court held that this condition violated the principle of separation of powers. See id. Justice White, however, argued that the Court's decision misapplied principles both of separation of powers and of federalism. See id. at 2312 (White, J., dissenting). Not only was the statute a legitimate enactment of Congress, see id. at 2320, but also the entire separation-of-powers argument did not apply to this case, because the Board of Review was a "creature of state law," id. at 2313.

47 426 U.S. 833 (1976) (holding that, although the Commerce Clause gives Congress the authority to enact legislation regulating disposal of radioactive waste, such legislation must be directed at individuals; Congress cannot compel state legislatures to enact and enforce these regulations).


49 111 S. Ct. 2395 (1991). In Gregory, the Court applied a "plain statement rule" in determining whether Congress intended the Age Discrimination in Employment Act of 1967 to apply to state judges. See id. at 2401. But see Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), in which Justice White joined the majority holding that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself, see id. at 242-43, and Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), in which Justice...
to rational government of the same order as Chadha, Bowsher, and Buckley.

This parliamentary conception of Congress may also explain his distaste for the Court's interference, in the name of the Establishment Clause, with legislative solutions to awkward problems of social policy.\textsuperscript{50} Also, the notion of Congress as the seat of popular sovereignty might explain Justice White's seemingly inconsistent positions in Metro Broadcasting and J.A. Croson (Congress could mandate racial set-asides, but the City of Richmond could not) and why Congress in the Voting Rights Act of 1982 could restructure the political landscape (as it could in the Federal Election Act, every part of which Justice White thought constitutional), but the courts, though acting directly under the Constitution, could not.\textsuperscript{51}

If I have put my finger on Justice White's guiding doctrinal compass, perhaps this explains as well his overall style and temperament. This allegiance to Congress might be seen as a larger sympathy for popular judgment in general, or rather an antipathy to fancy arguments of all sorts. This antipathy may never have been expressed more clearly than in the opinions for which Justice White may well most be remembered. Whatever else may be said about them, the arguments in Roe, from which Justice White dissented so vehemently, and the dissents from his opinion in Bowers, were certainly quite fancy.\textsuperscript{52}

White dissented and argued for a strict application of Atascadero's interpretive standard, see id. at 45 (White, J., concurring in the judgment in part and dissenting in part). In both these cases, Justice White apparently opposed the stance he later took in Gregory. In his dissent in Gregory, to dispel the apparent contradiction, Justice White distinguished the issues of Atascadero, see Gregory, 111 S. Ct. at 2409 (White, J., concurring in part, dissenting in part, and concurring in the judgment), but did not mention Union Gas.

\textsuperscript{50} See, for example, Aguilar v. Felton, 473 U.S. 402, 414 (1985), and School Dist. v. Ball, 473 U.S. 373, 397 (1985), in which the Court held that publicly funded programs for religiously affiliated private schools violated the Establishment Clause. Justice White consolidated his dissents in both cases into one opinion, writing, "I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools." Ball, 473 U.S. at 400 (White, J., dissenting).


\textsuperscript{52} I doubt Professor Parker would agree, but it may be that Justice White comes closest on the Supreme Court to the style Parker celebrates in "Here the People Rule": A Constitutional Populist Manifesto, 27 VAL. U. L. REV. 531 (1993).