JUSTICE WHITE AND THE DEMOCRATIC-REPUBLICANS

RICHARD CORDRAY*

In his discussion at the symposium, Professor Nelson posed for us an imaginative and provocative thesis: that Justice White was the last of the Democratic-Republicans. The thesis is imaginative because it attempts to project Justice White's tenure on the Supreme Court into an entirely different era. The thesis is provocative because it is difficult to assess, as the standards for evaluating this claim are quite ephemeral. The core of the argument appears to be that, much like Thomas Jefferson and his adherents, Justice White subscribed to the view that the will of the people should govern our nation, not the will of the judges. Taken in its strong form, this approach directs that humility in deferring to democratic institutions is to be taken as the lodestar that guides the courts in their performance of the judicial function.[1]

I will examine this conceit in a quite literal way, and use it to illustrate different aspects of Justice White's jurisprudence. But let me first say a word about this whole enterprise. In discussions among those of us who are his former law clerks, there has been some question about what Justice White would have thought of a conference like this one, devoted to analyzing and categorizing his jurisprudence, and there has been some amusement about what his response might have been on this point.[2] But I can attest that Justice White would not have been

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* Adjunct Professor of Law, The Ohio State University; Of Counsel, Kirkland & Ellis. Mr. Cordray served as a law clerk to Justice White during the 1987 Term, and also served as a law clerk to Justice Kennedy during the 1988 Term.

1. Jefferson's outlook in this regard is often viewed in opposition to that of Chief Justice Marshall, as discussed further below. *See, e.g.*, JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 333-334 (1996) ("Yet for all their differences, each represented a vital current in the American mainstream. Jefferson believed passionately in majority rule. Marshall, just as earnestly, feared majority tyranny.").

2. *See, e.g.*, DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 450-51 (1998) (describing Justice White's "hostility to armchair experts" of all kinds, and perhaps especially to legal academics); *see also id.* at 455 (quoting Justice White's remark that "I don't have a doctrinal legacy. I shouldn't.").

uncomfortable with the exercise that Professor Nelson posed—projecting his responsibilities as a judge into a bygone age—because I saw him engage in it myself. One day when we were in chambers, he called me into his office to discuss a pending case. In front of him were spread out two older volumes of the U.S. Reports, and he said to me with a chuckle that he sometimes liked to go back and look at some of his "older" opinions. On a closer look, I saw that he was perusing two decisions written by Chief Justice White (no relation!) from the early part of the century.[3] I recall that this incident occurred in a First Amendment case, which tells volumes on that score as well.[4] So let us proceed with the exercise that Professor Nelson proposed to us at the symposium.

In what sense could it be said that Justice White was the last of the Democratic-Republicans? One way to illuminate the meaning of this claim is by reminding ourselves of who the Democratic-Republicans were. It would be unreasonable for me to ask for volunteers on this point, so let me identify them for you. President Jefferson appointed three Justices to the Court: William Johnson from South Carolina (1804-34), Henry B. Livingston of New York (1807-23), and Thomas Todd of Kentucky (1807-26).[5] All of these men served lengthy tenures on the Court; each is virtually unrecognizable today. President Madison appointed Gabriel Duval of Maryland (1811-35), who has been singled out by historians as perhaps the most insig-

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3. Edward D. White served on the Supreme Court from 1894 to 1921. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 252 (Table 4-1) (3d ed. 2003) [hereinafter SUPREME COURT COMPENDIUM]. He was the first sitting Associate Justice to be elevated to the position of Chief Justice, where he served from 1910 to 1921. *Id.* He apparently shared one telling characteristic with our Justice White, for Professor Currie has written that Chief Justice White's "opinion style was generally impenetrable." David P. Currie, *The Constitution in the Supreme Court: 1910-1921*, 1985 DUKE L.J. 1111, 1159.

4. Professor Currie describes Edward White's tenure as Chief Justice as follows: "The cases on freedom of expression seem to reflect an extreme insensitivity to the values underlying the amendment, in the face of an eloquent, if belated, appeal by Holmes and Brandeis." *Id.* at 1157. Chief Justice White is said to have "believe[d] that neither litigants nor newspapers are free to push their First Amendment freedoms beyond the bounds of right and wrong." Paul R. Baier, *Chief Justice Melvin Shortess: A Pencil Sketch from Life*, 61 LA. L. REV. 135, 147-48 (2000) (citing *Toledo Newspaper Co. v. United States*, 207 U.S. 402, 419-20 (1918) (White, C.J.)).

5. *See* SUPREME COURT COMPENDIUM, *supra* note 3, at 250 (Table 4-1), 316-17 & 321 (Table 4-8).

nificant Justice ever to serve on the Court.[6] His other appointment was Joseph Story of Massachusetts (1812-45), who is admittedly difficult to classify. In line with most legal historians, Professor Nelson suggested that Justice Story was a closet Federalist, an assessment with which I will simply agree, thus setting him aside for our purposes here.[7] (Justice Story thus stands as the first major example of an archetype in Supreme Court history—a Presidential mistake, of which he was by no means the last.[8]) Finally, President Monroe had but a single appointment, Smith Thompson of New York (1823-43).[9] To the extent the second President Adams can still be considered a Democratic-Republican, by then a dying breed of politicians, he too had only one appointment, Robert Trimble of Kentucky (1826-28), who did not last through Adams' single term in office.[10]

What these men had in common, for the most part, was that they were judicial nonentities who contributed little to the actual direction of the Court. The Virginian Presidents who made these appointments had expected them to shift the Court in the direction of greater deference to the States and a more limited role for the Federal government; later in life, Thomas Jefferson expressed exasperation that he and his successors had sent men to the Court who promptly fell under the spell of John Marshall and, as a result, did very little to rein in Federalist dominance of judicial decisionmaking.[11] It is perhaps ap-

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6. *See* SUPREME COURT COMPENDIUM, *supra* note 3, at 250 (Table 4-1), 314 (Table 4-8); *see also* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466 (1983).

7. *See generally* Gerald T. Dunne, *Joseph Story: The Germinal Years*, 75 HARV. L. REV. 707 (1962) (describing Justice Story's relationship to the New England Federalists).

8. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 69-70 (3d ed. 1992).

9. *See* SUPREME COURT COMPENDIUM, *supra* note 3, at 250 (Table 4-1), 321 (Table 4-8).

10. *See id.*

11. *See, e.g.*, PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 239 (1997) (Jefferson "saw Marshall and his Court as the dedicated enemies of American republicanism: The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated republic.") (quoting Jefferson); 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 59-94 (1919) (extended account of how Chief Justice Marshall's personality allowed him to continue to dominate a majority-Republican Court as fully as when its members had largely shared his own political faith and views of government).

propriately ironic, however, that in practice their self-denying judicial philosophy led them to have such little impact on the Court's role in the evolving system of government.

Is there any respect, however, in which Justice White can be characterized as belonging to the same category as these uninfluential Justices? I do not think he can possibly be viewed as a mere judicial cipher, given his strong, independent voice on the Supreme Court, where he largely embodied the virtues of rugged individualism. Justice White was a modest man and a humble judge, but humility taken to an extreme of contributing little to the Court as an institution—an unattractive quality which marked the Democratic-Republican tradition on the Supreme Court—was not reflective of either Justice White's character or his judicial approach. In contrast, for much of his tenure Justice White was the most active member in setting the Court's agenda.[12] He also played an active part in deciding the great mass of the Court's cases, consistently writing more than his share of majority opinions,[13] and forcibly staking out his positions even if he did not always pull the Court his way in high-profile cases.[14]

All of this is not to deny that Justice White would have undoubtedly developed a real affinity for the homespun charms of John Marshall, just as he developed a deep affection for the friend he called "Billy" Brennan. But Justice White was never mesmerized by this affection, and he always maintained his own independent judgment while on the Court—contributing strongly to many of the Court's progressive decisions on gender and race, but powerfully stating his disagreement with other

12. *See, e.g.*, HUTCHINSON, *supra* note 2, at 355-56, 382, 400-01, 419-21 & 431 (discussing Justice White's influence in Court's private conferences, particularly in setting agenda for Court's docket); *see also* Margaret Meriwether Cordray and Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 788-90 (2001) (describing Justice White's vigorous and influential role in the Court's decisionmaking at the certiorari stage).

13. *See* SUPREME COURT COMPENDIUM, *supra* note 3, at 630-37 (Tables 6-16 to 6-19) (showing that Justice White led or tied for the lead in numbers of majority opinions authored in 13 of his 31 terms on the Court).

14. Justice White's record in leading the Court in his direction was mixed, but not without its notable successes, particularly in the area of equal protection. In addition, the Court eventually gravitated toward many of the law-and-order positions he had staked out on the Warren Court, and moved his way also in later cases involving the separation of church and state. He was less successful in other areas such as free speech, where the Court usually rejected his views. *See generally* HUTCHINSON, *supra* note 2, at 335-443 (detailing Justice White's role on the Court).

decisions that constitutionalized matters of criminal procedure and erected new due process obstacles to various forms of social legislation.[15]

If the immediate similarities between Justice White and the other Democratic-Republican Justices thus are not apparent, the explanation may lie partly in the difficulties we now have in recreating an agenda for those Justices, who served so long ago and who contributed so little to the Court. So another way to approach this inquiry is to contrast Justice White's judicial approach with the more discernible agenda of the Federalist judges, which President Jefferson had intended the Democratic-Republican judges to oppose.

What was the defining Federalist agenda? I would argue that it had three principal elements. First, as exemplified so famously by the decision in *Marbury v. Madison*,[16] Chief Justice Marshall was committed to carving out a central role for the Supreme Court within the framework of American government. He thus took a muscular view of the consequences of Article III, which made it "*emphatically* the province and duty of the judicial department to say what the law is," even at the expense of the authority otherwise vested in the other branches of government and particularly insofar as it required some meaningful control over the state courts.[17] Second, the Federalists strongly affirmed the scope of federal power as vested in the Congress by Article I, most notably in cases upholding congressional power to regulate commerce, like *Gibbons v. Ogden*,[18] and those wielding the doctrine of implied powers, as articulated so convincingly in *McCulloch v. Maryland*.[19] Third, the Federalists held a fairly limited view of the Bill of Rights, which had been explicitly restricted to exert no curb upon the states and which were, as far as I am aware, never invoked

15. *See, e.g.*, Michael Herz, *Nearest to Legitimacy: Justice White, Equal Protection, and Non-deferential Judging*, 74 U. COLO. L. REV. 1329 (2003); Kate Stith-Cabranes, *Criminal Law and the Role of the Court: An Essay on the Jurisprudence of Byron White*, 74 U. COLO. L. REV. 1523 (2003); Dennis J. Hutchinson, *Two Cheers for Judicial Restraint: Byron White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409 (2003).

16. 5 U.S. (1 Cranch) 137 (1803).

17. *Id.* at 177 (emphasis added).

18. 22 U.S. (9 Wheat.) 1 (1824).

19. 17 U.S. (4 Wheat.) 316 (1819).

during Chief Justice Marshall's tenure to invalidate a single enactment or action by the federal or state governments.[20]

So how does Justice White's jurisprudence stack up in comparison to this constitutional vision? I would contend that there is no opposition here at all; indeed, for all practical purposes, this set of principles is actually very close to his own constitutional vision. Justice White had no hesitancy about asserting the Court's authority to play its appointed role under Article III, as exemplified most notably in the school desegregation cases, where he forcibly advocated for broad judicial remedies to effectuate the constitutional mandate.[21] He certainly embraced Congress's potent authority to exercise its full range of powers under Article I, to the point of brushing off the countervailing arguments couched in the rubric of federalism.[22] And he took a relatively circumscribed position about when the provisions of the Bill of Rights—including the First, Fourth, Ninth, and Tenth Amendments, as well as the whole area of constitutional criminal procedure—constrained governmental action.[23] In all of these respects, indeed, Justice White was far more an adherent of the Federalists than a supporter of the Anti-Federalists or the Democratic-Republicans.

In important respects, the issues facing the early Court were transformed by the Civil War, Reconstruction, and perhaps most pertinent here, the New Deal. All of these develop-

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20. *See, e.g.*, Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833) (holding that the provisions of the Bill of Rights do not constrain the authority of state governments).

21. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 762 (1974) (White, J., dissenting) (courts should be able to order an inter-district remedy to the constitutional violation of segregation in schools); Missouri v. Jenkins, 495 U.S. 33 (1990) (White, J.) (federal court could impose an increase in property tax to fund desegregation of schools).

22. *See, e.g.*, New York v. United States, 505 U.S. 144, 208-10 (1992) (White, J., concurring in part and dissenting in part). This is perhaps more apparent from the cases that Justice White joined than those which he wrote. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

23. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part) (speech under First Amendment); Lemon v. Kurtzman, 403 U.S. 602, 661 (1971) (White, J., concurring in part and dissenting in part) (religion under First Amendment); United States v. Leon, 468 U.S. 897 (1984) (Fourth Amendment); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring) (Ninth Amendment); New York v. United States, 505 U.S. 144, 188 (1992) (White, J., concurring in part and dissenting in part) (Tenth Amendment); Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting) (custodial interrogation under Fifth and Sixth Amendments).

ments encouraged a stronger role for the Federal government, and a consequently expanded role for the Supreme Court in interpreting and mediating the growing body of Federal law. But the judicial and political standoff that marked the early years of the New Deal, especially, convinced many (including Justice White) that it was important for the Court not to deploy the Due Process Clause to erect insurmountable obstacles to experiments in social legislation.[24] To the extent that Justice White was a New Deal judge, however, his outlook remained generally consistent with Federalist principles imported into a more modern setting: vigorous support for congressional power, an unapologetic and resolute vision of the Court's central duties, but a modest sense of the constitutional impediments to governmental action.[25]

Perhaps there is a third sense, though, in which we could consider Justice White to be a kind of a "Democratic-Republican." Here we can return to the basic assertion that Justice White, in common with Thomas Jefferson, ultimately believed that the will of the people should govern America rather than the will of the judges. What does this mean, exactly? Does it mean that Justice White, as described in Mr. Dooley's well-known phrase, would be a judge who simply "follows th' iliction returns?"[26]

Of course, it goes without saying that Justice White was not a "political" judge of this narrow sort. Yet he was, in some important senses, a political judge, or at least a judge with meaningful political roots. Justice White was a committed Democrat, whose adult life was grounded in and respectful of political activity. After all, he served in the trenches for years as a local committeeman before eventually joining up with John F. Kennedy's Presidential campaign and helping get him elected in 1960.[27] Nonetheless, as a member of the Supreme Court, Justice White presented an independent voice on legal and constitutional issues. He was not committed either politi-

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24. *See, e.g.*, HUTCHINSON, *supra* note 2, at 145-56. Nonetheless, Professor Hutchinson is somewhat skeptical about the New Deal ideology as a more general explanatory key to Justice White's jurisprudence. *Id.* at 445-47.

25. *See, e.g.*, Kate Stith, *Byron White, Last of the New Deal Liberals*, 103 YALE L.J. 19 (1993); William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 BYU L. REV. 313, 343-47.

26. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1900).

27. *See* HUTCHINSON, *supra* note 2, at 223-59 (describing Justice White's Democratic political involvement in Colorado).

cally or ideologically to further the policy directions taken by his own party, on such diverse subjects as affirmative action and abortion.[28] Rather, he was always thinking about these subjects for himself and analyzing them in terms of law rather than politics. Accordingly, Justice White became a Democratic judge who could and would be seen as an ally by Democratic and Republican Presidents alike.[29] Undoubtedly he is not the last jurist of this ilk, but we must candidly acknowledge that recently they have been in short supply.

I believe that both the public and the Court are rendered the poorer by this development, at least to the extent that such bipartisan approval (or disapproval) is used as a measure of how likely it is that a jurist is substituting his or her own will for the will of the people as expressed in the law.[30] And on this point it is surely correct to say that Justice White would rarely, if ever, commit such a transgression. I would also accept the claim that Justice White's capacity to defy easy political or ideological categorization was grounded in part in his deep humility as a man and as a judge. Quite simply, it would have been completely out of character for Justice White to seek to impose his own personal will in governing the nation.[31]

Instead, what Justice White brought to his job was a lawyerly but practical approach that eschewed the easy and comforting patterns of general ideologies in favor of the much more disordered approach of case-by-case judgments based on an intensive study of particulars. His jurisprudence thus was rigorously procedural more than it was substantively elegant. His work as a judge was marked by such humble tasks as scouring the record carefully, insisting on an honest view of the

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28. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (Justice White joined Justice O'Connor's majority opinion in full, which struck down state and local affirmative action programs); Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992) (Justice White joined both Chief Justice Rehnquist's and Justice Scalia's dissents from a decision reaffirming the validity of *Roe v. Wade*, 410 U.S. 113 (1973)).

29. *See, e.g.*, Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?*, 24 AKRON L. REV. 393, 393 (1990) (noting that Justice White often provided an important swing vote for either the conservatives or the liberals in different cases).

30. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962). *See also* HUTCHINSON, *supra* note 2, at 447 (quoting Justice White's comment that Professor Bickel "would have made a good appointment to the Court").

31. *See, e.g.*, HUTCHINSON, *supra* note 2, at 454-57.

facts presented and the legal questions to be answered, avoiding expansive writings that seek to explain too much, and never presuming too much wisdom or foresight about the future. If these characteristics mark the legacy of a craftsman rather than a statesman, so be it. For in marked contrast to what we regard today as the Federalist legacy, Justice White was not a great fan of judicial statesmanship.

On the whole, then, would it be fair to classify Justice White as a Democratic-Republican? I would say no, though I would certainly concede that the intellectual effort to shoehorn his judicial career into this category—or any other category, for that matter—is a valuable exercise that helps us better understand the fiercely independent jurisprudence of our own Justice White.