JUSTICE WHITE'S FEDERALISM: THE (SOMETIMES) CONFLICTING FORCES OF NATIONALISM, PRAGMATISM AND JUDICIAL RESTRAINT

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It is a privilege to have the opportunity to explore the jurisprudence of Justice White, a man who has had so much influence on the state of Colorado and the nation as a whole. To me, as a Westerner and a Coloradan, Justice White has always been larger than life. The fact that he achieved so much—and talked so little about those achievements—truly defines him as a man of the West.[1]

Justice White's jurisprudence confounds conservatives and liberals alike.[2] He was neither one nor the other, but somehow both. From what I know of Justice White,[3] he would have found it quite entertaining to see literally dozens of law professors struggling to explain and harmonize his seemingly inconsistent and conflicting opinions.[4] And as a law professor

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1. *See* David M. Ebel, *Byron R. White—A Justice Shaped by the West*, 71 U. COLO. L. REV. 1421, 1421-23 (2000).

2. *See, e.g.*, Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291 (noting that "It has been difficult to identify Byron White with any particular policy or viewpoint.").

3. I began clerking for Justice Thomas during the 1993 term, just as Justice White stepped down from the bench. Although I did have the great privilege of meeting and talking with him on a several occasions, I did not know him well. My comments are therefore not shaped by my personal knowledge of Justice White, but rather by my perceptions of him as a public figure and as a jurist.

4. In addition to this symposium, law reviews at Yale, Harvard, Kansas and Stanford have recently devoted special attention to the life and jurisprudence of Justice White. *See* John Paul Stevens, *A Tribute to Justice Byron R. White,* 112 YALE L. J. 969 (2003); Andrew G. Schultz & David M. Ebel, *Tribute to Supreme Court Justice Byron R. White,* 51 U. KAN. L. REV. 213 (2003); John Paul Stevens, *In Memoriam: Byron R. White,* 116 HARV. L. REV. 1 (2002); William H. Rehnquist, *Tribute to Justice Byron R. White,* 55 STAN. L. REV. 1 (2002).

myself, I, of course, have to take my crack at this harmonization process as well.

Justice White's federalism opinions provide an interesting case study to explore the complex nature of both the man and his jurisprudence. Indeed, one might ask how a Justice from the West—a region of the country known for its suspicion of government in general and the federal government in particular—ended up on the dissenting side of *New York v. United States*,[5] which marked the beginning of the Rehnquist Court's "New Federalism."[6] One might expect him to join his fellow Westerner Justice O'Connor, who wrote for the majority in that opinion.[7] In his thoughtful paper, Professor Flaherty suggests that Justice White's dissent in *New York* is a natural manifestation of his distinctive nationalist impulses.[8] Professor Flaherty makes a significant contribution to the debate over Justice White's federalism jurisprudence by tracing the roots of his nationalism and exploring its manifestation in his opinions.[9]

I part company with Professor Flaherty, however, with respect to the unspoken premise of his article—namely, that nationalism can explain, *in toto,* the complexities of Justice White's federalism jurisprudence. In my view, nationalism is

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5. 505 U.S. 144 (1992).

6. I use the term "New Federalism" to denote the Court's recent revival of federalism principles. *See generally* Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191 (2003). Many commentators suggest that the New Federalism started with *New York*. *See, e.g.*, Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L. J. 477, 504 (2001); ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 35 (2001).

7. Justice O'Connor is a former Arizona legislator, district judge, and intermediate appellate court judge. *See Judicial Profile: Hon. Sandra Day O'Connor, Associate Justice, U.S. Supreme Court*, FED. LAWYER, Sept. 2001, at 18-20. Some commentators have suggested that Justice O'Connor's interest in federalism stems from her Western roots. *See, e.g.*, Whittington, *supra* note 6, at 508.

8. Martin S. Flaherty, *Byron White, Federalism, and the "Greatest Generation(s),"* 74 U. COLO. L. REV. 1573, 1605-06 (2003). I use the term "nationalist" in the same sense that Professor Flaherty does: to describe a tendency to side with the federal, rather than the state, interest in cases involving federalism. *Id.* at 1572.

9. Rick Collins has made a similar study of Justice White's opinions in the areas of water law, public lands, and tribal sovereignty. He concludes that when considering "federal versus state authority over Western public land or water, Justice White always came down on the federal side of contested issues." Richard B. Collins, *Western Justice*, 112 YALE L. J. 975, 977 (2003).

only one thread in Justice White's jurisprudential tapestry. It is an important one, to be sure. In fact, in cases such as *New York,* it is the brightest one. But in others, it is simply lost in the overall pattern.

Justice White's dissent in *Gertz v. Robert Welch, Inc.*,[10] for example, does not fit comfortably into Professor Flaherty's thesis. The Court considered *Gertz* a decade after *New York Times Co. v. Sullivan,*[11] which held that the First Amendment displaced much of state libel law with regard to "public figure" plaintiffs. Justice White had signed on to *New York Times*, but felt that *Gertz*, which involved "private figure" plaintiffs, was a very different case. A "private figure" like the lawyer-plaintiff in *Gertz* does not, according to Justice White, "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome,"[12] as was the case with the government official-plaintiff in *New York Times.* The *Gertz* majority attempted to accommodate the public-private distinction by imposing a negligence standard in private figure cases instead of the more burdensome "actual malice" standard articulated in *New York Times.*[13] But Justice White would have preserved the state common law rules that permitted recovery upon proof that a defamatory statement was made—in essence, a strict liability standard.[14]

With regard to the federalism implications of the majority's decision, Justice White lamented that the Court:

> in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. . . . I assume these sweeping changes will be popular with the

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10. 418 U.S. 323 (1974).

11. 376 U.S. 254 (1964).

12. 418 U.S. at 399 (White, J., dissenting) (quoting the majority opinion) (alteration in original).

13. *Id.* at 347 (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual").

14. *Id.* at 375-76. While Justice White reconfirmed his commitment to *New York Times* in *Gertz*, 418 U.S. at 398 (White, J., dissenting), a decade later he called for its reexamination in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (White, J., concurring in the judgment). According to Professor Hutchinson, one of Justice White's "major regret[s]" about his work on the Court was his joining of *New York Times*. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE 422 (1998).

> press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion . . . .[15]

Indeed, Justice White closed his dissent with a tribute to federalism:

> In our federal system, there must be room for allowing the States to take diverse approaches to . . . vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems. . . ." Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution.[16]

Justice White's closing words could easily be mistaken for an excerpt from a New Federalism opinion.

Others have pointed to additional examples of Justice White's opposition to federalizing state law.[17] *Gertz* and these other decisions are not viewed as "federalism" decisions by the academy because they do not involve the exercise of congressional power. But in a very real sense they are—namely, because they wipe away state authority to make law on particular topics.

So, was Justice White a nationalist? Well, yes, . . . and no. Justice White was a nationalist when his nationalist impulses were not outweighed by other principles in his judicial repertoire. As Professor Flaherty notes in passing,[18] and as others have suggested,[19] at least two other principles of judicial decision making are prominent in Justice White's jurisprudence.

The first is Justice White's pragmatism. The term pragmatism means different things to different people, so let

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15. 418 U.S. at 370.

16. *Id.* at 403-04 (White, J., dissenting) (citations omitted).

17. *See, e.g.*, Philip J. Weiser, *Justice White and Judicial Review*, 74 U. COLO. L. REV. 1315 (2003).

18. Flaherty, *supra* note 8, at 1575.

19. On Justice White's pragmatism and commitment to judicial restraint see, for example, Ebel, *supra* note 1, at 1424; Lee & Wilkins, *supra* note 2, at 295-306.

me start by defining what I mean by the term.[20] I believe Justice White was a pragmatist in both substance and methodology. With regard to substantive pragmatism, Justice White was concerned about the real world effects of the Court's decision making. He would consider, for example, whether a police officer's job would be made harder or easier under the regime adopted by the Court.[21]

Justice White was a methodological pragmatist as well. He did not like rules. Instead, he preferred to decide cases on a case-by-case, incremental basis. That way, he could ensure that the substantively pragmatic outcome—i.e., the one that worked the best—was arrived at in each case. As Professor Collins has observed, Justice White's pragmatic streak "caused him to pay careful attention to the facts of each case, to the consequences of the Court's decisions, and to achieving workable legal rules . . . ."[22]

The second thread of Justice White's jurisprudence that comes to everyone's mind is, of course, judicial restraint. Like pragmatism, judicial restraint can be broken down into two elements: the first is an adherence to precedent; and the second is a deference to the elected branches. As Professor Weiser has noted, Justice White had a keen sense of what the Court could and could not accomplish. He knew when to push and when to pull back.[23]

What made Justice White's position in *New York* entirely predictable is that all three strains of his jurisprudence—nationalism, pragmatism, and judicial restraint—pointed in the same direction. In other words, they all pointed toward sustaining the Low-Level Radioactive Waste Policy Act against a Tenth Amendment attack.[24]

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20. On the difficulty of using legal theory terminology in connection with Justice White's jurisprudence, see Philip Soper, *Why Theories of Law Have Little or Nothing to Do With Judicial Restraint*, 74 U. COLO. L. REV. 1379 (2003).

21. Justice White dissented in *Miranda v. Arizona*, 384 U.S. 436 (1966), based in part on his doubts that the rule would work in practice. *See, e.g., id.* at 541-42 (White, J., dissenting). Years later, convinced that the *Miranda* rule did indeed work, Justice White wrote an opinion extending its protections. Edwards v. Arizona, 451 U.S. 477 (1981). *See generally* Weiser, *supra* note 17, at 1315.

22. Collins, *supra* note 9, at 976.

23. *See* Weiser, *supra* note 17, at 1315.

24. *See* 505 U.S. 144, 188 (1992) (White, J., concurring in part and dissenting in part).

First, consider Justice White's pragmatism. As to substantive pragmatism, the country was, in Justice White's terms, facing "a crisis of national proportions in the disposal of low-level radioactive waste."[25] The key issue according to Justice White was the fact that the states had worked together with Congress to reach a solution to the problem—a process he described in detail.[26] The Court was, in his view, "upset[ting] the delicate compromise" based on a "formalistically rigid obeisance to 'federalism.'"[27]

This statement leads me to Justice White's methodological pragmatism. The Court majority said that its result—that the statute's "take title" provision essentially "commandeered" the state legislative apparatus to regulate according to Congress' wishes—was compelled by federalism norms in general and the Tenth Amendment in particular. According to the Court, the ability to "commandeer" state legislatures was not part of the original design—a design that could not bend even when pressing problems such as radioactive waste disposal faced the nation. As Justice O'Connor stated in her now-famous admonition:

> The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions . . . . The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.[28]

Justice White found this formalism to be a waste of time, since Congress could achieve the same objective through, for example, the Commerce Clause or the Spending Clause.[29]

Elsewhere I have taken issue with the methodological pragmatism exhibited by Justice White and others on the Court who have dissented in the New Federalism decisions.[30]

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25. *Id.* at 206.
26. *Id.* at 189-94.
27. *Id.* at 210.
28. *Id.* at 187-88.
29. *Id.* at 208.
30. *See* Eid, *supra* note 6.

A good dose of formalism is necessary to counteract the Justices' inherent tendency toward nationalism—a tendency so well chronicled in Professor Flaherty's paper. Justice White's opinion in *New York* helps prove this point—the importance of the national interest will, in a nationalist's eyes, tend to outweigh the incursion into state sovereignty. The national interest, in other words, will almost always win. Setting my dispute with Justice White on this point aside for a moment, it is clear that his pragmatism unquestionably supported upholding the challenged provision in *New York*.

A second principle at play in Justice White's dissent is judicial restraint. First, as noted above, Justice White clearly wanted to sustain the cooperative congressional and state efforts toward solving the disposal problem. Likewise, he pointed out that the Court's result was not compelled by past precedent.[31] Federalism was, prior to the Court's recent federalism revival, a virtual judge-free zone.[32] Thus, the absence of modern precedent supporting the Court's ruling was not surprising. The Court had exited the federalism stage, and Justice White was entirely comfortable with that.

Finally, there was Justice White's nationalism. Obviously, Justice White perceived the disposal problem to be a national problem that required a national solution—one that only Congress, in cooperation with the states, could provide.

So, I ask the question again, was Justice White a nationalist? In *New York*, the answer is yes, because the Justice's notions of nationalism were reinforced by his tendencies toward pragmatism and judicial restraint. The more difficult cases arise when the principles of pragmatism, judicial restraint, and nationalism conflict, such as in *Gertz*. There, nationalism gave way to restraint and pragmatism. Justice White did not like the fact that the Court was displacing so much state law (thus violating his notions of judicial restraint) and making it more difficult for private individuals to bring defamation claims (thus violating his notions of substantive pragmatism—that is, his desire to permit private figures to lead private lives). It is not that he was not a nationalist, but rather that nationalism was simply one stick in his jurisprudential bundle—sometimes the

31. 505 U.S. at 201-05.
32. *See* Eid, *supra* note 6.

strongest and heaviest one to be sure, but in certain cases outweighed by the others.

The reason that Justice White's jurisprudence confounds liberals and conservatives alike is that in many cases it was difficult to predict how Justice White's balance of the three principles would come out. Would a strong showing in one outweigh weak showings in the other two? Or would you have to satisfy two out of three? To Justice White, this balancing process was the essence of judicial decision making.

Indeed, much has been made of the statement he made to a journalist after his confirmation hearing. When asked to define the role of the Supreme Court, Justice White answered "[t]o decide cases."[33] At the time, according to Professor Hutchinson's account, a lawyer standing next to White characterized the answer both as a "brush-off and [as] a statement of philosophy."[34] What philosophy? That he was going to decide cases. In other words, he was going to balance the competing principles against one another and come to the best decision he could.

The question has been raised as to whether Justice White will have a legacy. This question is raised of Justice White's tenure on the Court, I believe, not because it is truly in doubt whether he will have a legacy—of course he will. Rather, the question is raised because it might be difficult—given his unique blend of nationalism, pragmatism and judicial restraint—to determine what that legacy consists of. If he were a unidimensional justice—for example, one that was driven to reach uniformly liberal or conservative outcomes—the question would not even be raised, for his legacy would be easy to define in conventional liberal versus conservative terms. Justice White's jurisprudence does not lend itself to such easy categorization. Rather, to me, his legacy is much larger than categorization permits—that is, unless your category consists of careful and conscientious judging.

33. HUTCHINSON, *supra* note 14, at 331.
34. *Id.*