BYRON WHITE, FEDERALISM, AND THE "GREATEST GENERATION(S)"

MARTIN S. FLAHERTY*

INTRODUCTION

An individual's office is often a window into his or her character, and the office of a great person is often more telling than most. Byron White's chambers provided an especially sweeping view. Evident, though not necessarily prominent, were the various sporting trophies: footballs, basketballs, team photographs. Yet the mementoes that struck the visitor's eye were markers of duty and service—especially on behalf of the Federal government. Standing out first in this regard were the photographs and sketches of Jack and Robert Kennedy, a picture of the Department of Justice, and the Justice's commission to sit on the Supreme Court. Perhaps even more compelling were the reminders from the Second World War, including dramatic photographs of the kamikaze attacks on the U.S.S. *Enterprise* and *Bunker Hill*. This nationalist, as opposed to simply patriotic, theme was evident even in family keepsakes. Above Justice White's desk hung an old rifle and saber that belonged to his grandfather, Ephraim, who himself was a volunteer and war hero on the Union side during the Civil War.[1]

Not surprisingly, the opinions that issued from these chambers have long and consistently been labeled "nationalis-

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* Fellow, Program in Law and Public Affairs, The Woodrow Wilson School of Public and International Affairs, Princeton University; Professor of Law; Co-Director, Joseph R. Crowley Program in International Human Rights, Fordham Law School. I had the honor of clerking for Justice White during the October 1990 Term. My thanks to all the participants and organizers of the conference for their assistance in gaining insights to the Justice's character and jurisprudence. I owe a special debt to Curtis Bradley, Dennis Hutchinson, Thomas Lee, William Nelson, Kate Stith, William Michael Treanor, and Jonathan Varat for specific comments and suggestions. Finally, I would like to thank Amy Cayne, Brianna Kenny, and Christine Quinn, for able research assistance.

1. This description is based upon the author's recollections, which so far remain uncontradicted by those with both greater access to the Justice's chambers and better memories.

tic," regardless of continuing debates as to whether the Justice was really a liberal, moderate, conservative, or indeed impossible to categorize at all.[2] Such nationalism might seem particularly surprising in light of political developments during the last generation. Both inside and outside the Supreme Court, the twin ideas that governmental power should be devolved to the states and that the "sovereignty" of the states should be reinvigorated, have become ascendant. To a great extent, this turn back to state power has issued from the South and West. In this context, Justice White's thoroughgoing nationalism is doubly surprising for a man who, as Judge David Ebel rightly points out, in other regards can be so readily regarded as a classic Westerner—a type now considered inveterately suspicious of national power.[3]

Justice White's "nationalistic" jurisprudence has been well documented by former clerks, who are now professors. Their works, among other things, have catalogued the Justice's extensive jurisprudence with regard to nearly all aspects of Federal power and "states' rights." Jonathan Varat did so in truly encyclopedic fashion in an earlier symposium marking the Justice's twenty-fifth anniversary.[4] This scholarly effort identifies, categorizes, and analyzes every area, and virtually every decision, relevant to understanding the Justice's thinking on the proper balance to be struck between state and Federal power. Professor Varat convincingly asserts the thesis that Justice White was best understood as a "Federalist," as that term was understood during the Founding, that is, as a believer in strong democratic self-government at the national level.[5] More recently, Professor William E. Nelson has addressed the Justice's approach to federalism as well as considering his jurisprudence more broadly.[6] Nelson agrees—or at least agreed[7]—with Varat

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2. Jeffrey Rosen, *The Next Justice: How Not to Replace Byron White*, THE NEW REPUBLIC, Apr. 12, 1993, at 21. For a rejoinder to Rosen's charge that Justice White lacked constitutional vision, *see* Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291.

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

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

5. *Id.* at 371.

6. William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 BYU L. REV. 313 (1994).

that White can be understood as a classic "Federalist."[8] To this characterization Nelson additionally notes the more direct influences of the (nationalistic) legal pragmatism of the New Deal and the (nationalistic) egalitarianism of Kennedy liberalism. Kate Stith has concurred, calling the Justice the "last of the New Deal Liberals."[9] Dennis Hutchinson's still recent biography, *The Man Who Once Was Whizzer White*,[10] further integrates the Justice's life with his jurisprudence. Hutchinson, in general, confirms White's nationalism and supplements the insight that both the New Deal and the Kennedy Justice Department contributed to his outlook. By offering detailed accounts of terms at ten-year intervals, Hutchinson also illuminates the context of several landmark White decisions.

This article does not seek to revise the basic framework that these scholars have established so much as attempt to build upon it to view Justice White's nationalism more broadly and deeply.

Part I of this article seeks to provide the additional breadth, which is mainly, though not exclusively, a matter of updating. For various reasons the federalism cases from later in the Justice's career have gone relatively unattended, despite their unique importance. Varat's comprehensive account also took matters to 1987. Nelson and Hutchinson almost necessarily emphasize the often more salient decisions of the Warren, Burger and early Rehnquist Courts. What makes the later cases especially important, however, is that it was only at this stage that Justice White began to lose consistently as the Court began its present, state-oriented course. Among other things, this reorientation prompted Justice White to respond with several important dissents that, even more than his majority opinions, illuminate his thinking on federal power.

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7. In this current symposium, Professor Nelson backed away from the "Federalist" label to emphasize the Justice's anti-elitism. I do not understand this amendment, however, to reflect a change in Professor Nelson's thinking about Justice White as a consistent advocate of national self-government. William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U.COLO. L. REV. 1291, 1292-93 (2003).

8. Nelson, *supra* note 6 at 347.

9. Kate Stith, *Byron R. White, Last of the New Deal Liberals,* 103 YALE L.J. 19 (1993).

10. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE (1998).

The Article then turns to the greater challenge of offering greater depth. Part II considers the potential sources of the Justice's nationalism. This part begins by reiterating the question: what in the Justice's life and history account for his support of federal power, especially since today the presumption would be that a Westerner from his circumstances would likely be suspicious of the federal government. From this, Part II further asks what the various life experiences that led to the Justice's nationalism mean in a larger, historical context. Doing so requires first situating the Justice in his own generation, and then locating that generation in the larger story of American Constitutional development in general.

After having considered the sources and the context of his nationalism, the Article continues its pursuit of additional depth by examining the Justice's articulation of his federal orientation that resulted. Part III, therefore, seeks less to offer a comprehensive account of the decisions that the Justice rendered than to examine the underlying rationales in selected opinions. This part will consider a comparatively small, but representative, sample of cases and consider the Justice's reasoning at greater length.

All told, these inquiries lead to the following conclusions: First, Justice White was an exceptionally accomplished example of a generation—indeed, now popularly called the "greatest generation" [11]—that believed that the Federal government worked and could address important national and local problems; that helped expand the constitutional scope of Federal power in accordance with this belief; and that in a large measure succeeded. In this regard, existing scholarship is right, especially when considered in the aggregate. Justice White grew up during a time of vast support for the New Deal, a transformation of the Constitution that received scholarly support from

11. The popular focus on "great" generations comes from the trilogy by Tom Brokaw: TOM BROKAW, THE GREATEST GENERATION (1998); TOM BROKAW, THE GREATEST GENERATION SPEAKS: LETTERS AND REFLECTIONS (1999); TOM BROKAW, AN ALBUM OF MEMORIES: PERSONAL HISTORIES FROM THE GREATEST GENERATION (2001). Emphasis on outstanding generations for the purposes of constitutional theory has been the hallmark of the trilogy-in-progress by Bruce Ackerman: 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). *See also*, Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1528 (1997) (contrasting generations that legitimately transformed constitutional law with today's "generation of midgets").

the legal realist movement then prevalent at Yale Law School. Perhaps underappreciated, he saw combat service with the Navy during World War II, the type of experience that had an obvious nationalizing effect on constitutional actors from George Washington, Alexander Hamilton, and John Marshall through Oliver Wendell Holmes. He also served on the front lines of the civil rights struggle as Robert Kennedy's right-hand man at the Justice Department. Even the Whites' family history would have contributed to a predilection toward nationalism, most notably the Civil War service of the Justice's grandfather.

Second, the type of nationalism that Justice White espoused was consistent with not just New Deal Democrats (and Kennedy Liberals), but with Reconstruction Republicans and Founding Federalists. Among the features common to all these generations of constitutional transformation were: a) a pragmatic belief in democratic self-government at the national level, especially through Congress; b) a skepticism about reliance on the states; c) a corresponding belief in the role of the Federal judiciary to safeguard Federal power; d) a commitment to the international rule of law that included the United States.

Finally, for Justice White, these principles endured throughout his career and clearly survived the Court's turn to state devolution that began to triumph as he stepped down. Against generally formalist and ostensibly originalist challenges to his nationalist views, the Justice held firm. Though increasingly in dissent, the Justice mounted a powerful defense to the emerging majority's often wooden reasoning with typically rigorous reliance on precedent and pragmatism. Measured in terms of his federalism opinions, in fact, Justice White would perhaps ironically be seen to occupy the far "left" of the Court. Justice White's steadfastness raises a related question about the endurance of his nationalism in a more objective sense: was his constancy simply outmoded stubbornness amidst changing times or should this aspect of his legacy endure? The presumption of course is with the Justice. Yet it may also find support in the idea that the values common in his and previous "great" generations are part of a larger pattern. A common theme in American history is the persistence of localism that erodes commitments to even circumscribed, national power. Time and again, however, devolution leaves the nation incapable of handling great challenges, which in turn

occasions the recommitment to the principles that great generations, and great men such as Justice White, championed.

I. THE REHNQUIST COURT: FEDERALISM AS FORMALIST ACTIVISM

Appreciating Justice White's federalism first requires understanding how far the Court has traveled since he left. Just as the Justice was ending his tenure, the Court commenced a "revival" of federalism jurisprudence that has since become manifest along several fronts. Most notably, decisions have for the first time since the New Deal restricted the reach of Congressional power under Article I and the Fourteenth Amendment. Even more audacious has been the Court's activist reliance on non-textual doctrines such as "state sovereign immunity" and related mechanisms. Likewise, recent case law has continued an earlier retreat from the Federal judiciary's enforcement of Federal law, especially with regard to violations of the Equal Protection Clause. Finally, scholars – though not yet the Court – have attempted to extend a number of these developments to U.S. foreign affairs law. In all of this, moreover, the current Court and its allies have been notably "activist," at least in the classic senses of ignoring text, engaging in "history 'lite,'" and relying on rigidly formalist rather than pragmatic or empirical, structuralist assumptions.

A. The Restriction of Federal Power

Federalism questions, as Justice O'Connor observed while Justice White yet served on the Court, "can be viewed in either of two ways."[12] The more important of these viewpoints considers the division of authority between the Federal government and the states. "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution" or grants located elsewhere in the document.[13] From the time Byron White entered law school until just after he left the Court, Congress prevailed just about every time, as the Commerce Clause in particular became all but a blank check for the assertion of na-

12. New York v. United States, 505 U.S. 144, 155 (1992).
13. *Id.*

tional authority.[14] Three years after Justice White stepped down, the Court signaled a change, and has since confirmed that it really does mean to reimpose meaningful federalism limits on Congressional authority. At the same time, it has also moved to restrict Federal authority under other grants of power, such as section 5 of the Fourteenth Amendment.

United States v. Lopez[15] famously announced the Court's shift. For the first time since the New Deal, the Court struck down a Federal statute as exceeding the Commerce Power. Specifically, the Court invalidated a provision of the 1990 Gun-Free School Zones Act that prohibited possession of a firearm within 200 yards of a primary or secondary school. What Congress had done wrong, however, remained ambiguous. At certain points, the majority appeared to emphasize Congress's almost complete failure to provide adequate findings demonstrating how gun possession in or near local schools affected interstate commerce.[16] At others, however, Chief Justice Rhenquist's opinion indicated that the real problem lay in Congress's attempt to regulate what is categorically "non-economic" activity even under the post-New Deal "affecting commerce" test.[17] To this extent, less ambiguous was the Court's interpretive approach, which signified a parallel shift toward a restricted reading of precedent and highly formal structural arguments. By contrast, Justice Breyer's dissent emphasized in pragmatic fashion how gun possession did affect the national economy.[18]

The Court demonstrated that its new stance would be neither symbolic nor isolated in *United States v. Morrison*.[19] By striking down the Violence Against Women Act of 1994 (VAWA), the Court invalidated a statue that would have had a greater social impact than the prohibition of guns in schools. No less importantly, VAWA also rested on extensive Congres-

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14. The canonical list includes: *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *Perez v. United States*, 402 U.S. 146 (1971); and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

15. 514 U.S. 549 (1995).

16. *Id.* at 562-64.

17. *Id.* at 559-62. In addition, the majority added as a further infirmity, that the relevant provision "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.* at 561.

18. *Id.* at 615-31 (Breyer, J., dissenting).

19. 529 U.S. 598 (2000).

sional findings that "gender-motivated violence affects interstate commerce 'by deterring potential victims'" from engaging in numerous interstate commercial activities.[20] The Court went further than they had in *Lopez* and made clear that what mattered was not simply whether an activity affected interstate commerce but whether the activity was itself "economic" in nature.[21] Moreover, the Court made clear that it, rather than Congress, would be the institution that in the end would make this formal, categorical determination.

While the above focuses on the Commerce Clause, also worth noting are the parallel restrictions of Congressional authority under other texts. In *City of Boerne v. Flores*,[22] the Court famously struck down the Religious Freedom Restoration Act holding that it, not Congress, was the ultimate arbiter of the meaning of the Fourteenth Amendment. The grounds, once more, were a formalist conception of Constitutional text and structure, here with regard to both federalism and separation of powers.

B. The "Vival"[23] of State Sovereignty

The second type of federalism inquiry, which has less practical effect but which has witnessed a far more dramatic shift since Justice White left the Court, determines whether and where there are judicially-enforceable limitations that shield the states against Federal regulation. Such limitations, which are said to be aspects of "state sovereignty," serve to create an immunity from Federal action that can otherwise be exercised upon private entities. Slower to erode than limits on the reach of Federal power *per se*, sovereignty limitations were also quicker to bounce back in other forms, both developments occurring late in Justice White's tenure. The Court announced the apparent end of the most straightforward type of sovereignty safeguards in 1985 with *Garcia v. San Antonio Metropolitan Transit Authority,* [24] a decision that technically remains

20. *Id.* at 615.
21. *Id.* at 613-14.
22. 521 U.S. 507 (1997).
23. Though "vival" is not a word, neither can the Court's introduction of mostly new doctrines guaranteeing state sovereignty count as a *re*vival.
24. 469 U.S. 528 (1985) (overruling Nat'l League of Cities v. Usury, 426 U.S. 833 (1976)).

good law. Starting in 1991, however, a series of cases have rendered *Garcia* all but irrelevant. Among other things, these cases sought to protect the states by constructing various specific hurdles to Federal regulation. In striking down a number of Federal statutes, this line of cases also reflects a species of "judicial activism." As with the Commerce Clause and Fourteenth Amendment cases, the Court's rationale rests upon a formalist reading of general text—especially emanations from penumbras of the Tenth and Eleventh Amendments—as well as formalist structural analysis. Even more than the other cases, this "revival" of sovereignty barriers also draws upon history that proves to be highly contestable. Not surprisingly, these decisions prompted rigorous dissents from Justice White while he still sat on the Court.

The still little noted case of *Gregory v. Ashcroft*[25] in many respects heralded the Court's current turn toward state sovereignty. At issue was whether the 1967 Age Discrimination in Employment Act (ADEA) preempted Missouri's mandatory retirement age for judges set forth in the state constitution. Justice O'Connor, writing for the majority, answered that it did not, though not for the reasons principally briefed by the parties. Instead, the majority imported from Eleventh Amendment jurisprudence a "plain statement" rule requiring Congress to specify that a general Federal requirement also applies to state policymakers.[26] Where *Lopez* and *Morrison* at least harkened back to an earlier era in which a restrictive, categorical approach to the Commerce Clause prevailed,[27] the "plain statement" rule in this context was something new. As best it could, the majority grounded this requirement on text by way of passing references to the Tenth Amendment and Guarantee Clause, on history by speaking of lessons "every schoolchild learns," and on structure with a mainly conclusory analysis extolling the importance of striking a proper balance between the Federal and state governments.[28]

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25. 501 U.S. 452 (1991).

26. *Id.* at 460-61 (citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

27. *See, e.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895) (holding that local manufacturing was beyond the scope of the Commerce Power); Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Baseball Clubs, 259 U.S. 200 (1922) (holding that major league baseball games were local exhibitions rather than interstate commerce).

28. *Gregory*, 501 U.S. at 460-64.

The Court minted a more notable sovereignty doctrine in similar fashion in *New York v. United States.*[29] In *New York,* the Court considered a complex Federal regulatory scheme concerning nuclear waste disposal that, among other things, compelled states to "take title" to nuclear waste generated within their border if they failed to come up with some plan for its disposal. The Court struck down this "take title" provision based upon the novel doctrine that the Constitution included an anti-commandeering principle that prohibits the Federal government from compelling state policymakers from taking certain actions. It was in this context that Justice O'Connor suggested that, at least in certain instances, inquiries about the reach of Federal power and about sovereignty barriers "mirror" one another.[30] In the end, her majority opinion analyzed the "take title provision as failing to provide a power to commandeer rather than as" a sovereignty limitation not to be commandeered, perhaps out of the knowledge that she did not have enough votes to overrule *Garica* and restore sovereignty limits directly. If so, this was purely tactical insofar as an "anti-commandeering" principle can only be viewed in sovereignty terms since the only possible beneficiaries of the safeguard are not private parties but the states.[31] Either way, the Court again rested on general references to the Tenth Amendment, to which it added a version of original understanding that asserts the Constitution's grant of the authority to regulate individuals within the states meant the revocation of the earlier authority to order the states to take certain actions under the Articles of Confederation.

Printz v. United States[32] confirmed and expanded *New York* by striking down a provision in the Brady Act, which amended the Gun Control Act of 1968 that required local law enforcement officials to run background checks on prospective firearms purchasers. This holding, therefore, made clear that the "anti-commandeering" principle would shield not just state policymakers, but all state executive officials. Once more, the Court's highly formalist analysis rested on no clear text, struc-

29. 505 U.S. 144 (1992).

30. *Id.* at 156.

31. For more on the Court's approach, see Martin S. Flaherty, *Are We to Be a Nation?: Federal Power vs. "States' Rights" in Foreign Affairs,* 70 U. COLO. L. REV. 1277, 1283-86 (1999).

32. 521 U.S. 898 (1997).

tural imperative, nor clear historical understanding. Instead, Justice Scalia's majority opinion rested upon several contested premises. With regard to text, the Court drew the negative inference that the Constitution's failure to specify state executive officials in the Supremacy Clause indicated that Congress could not make use of them. In structural terms, the majority simply asserted, without more, that an anti-commandeering principle was implied in the existence of the federal structure. Most of all, the Scalia effort rested on history. First, he focused on the additional negative inference that because Congress hadn't commandeered state executive officials in the early Republic, they must have believed that they could not. Second, he focused on an idiosyncratic reading of the *Federalist* that insisted Founding statements appearing to contemplate Federal commandeering of state executive officials *implicitly* assumed that this could only be done with state consent.[33]

In *Reno v. Condon*,[34] the Court entrenched the "anti-commandeering" principle by rejecting a Federal statute mandating state motor vehicle departments to require certain personal information before obtaining a driver's license. At this point, the precedents just discussed in large measure were sufficient to sustain the holding. Worth noting, however, is that Chief Justice Rehnquist's opinion categorizes this line of cases as what Justice O'Connor said it was not: a lack of Federal power rather than a sovereignty barrier protecting the states from power that the Federal government could otherwise assert.

Given the Court's creation of free-floating "plain statement" and "anti-commandeering" rules, it should come as no surprise that it extended its Eleventh Amendment jurisprudence in a manner that likewise restricts Federal power. Here the Court does have text on which to rely and at least one version of history that in its view underlies the text. The problems, however, are that neither text nor history clearly mandate the erection of state sovereignty barriers against either the assertion of Federal claims against a claimant's own state, or even Federal question assertions in general. To the contrary, the text appears only to speak of the jurisdiction of the Federal judiciary rather than state sovereignty limitations in

33. For a sharp critique of *Printz* see Flaherty, *supra* note 31, at 1286-96.
34. 528 U.S. 141 (2000).

general,[35] and leading studies suggest that the operation of the Amendment was to be confined to diversity cases in which a citizen of one state sued another state.[36] Undaunted, essentially the same Court that discerned state sovereignty limitations in the absence of text all but *a fortiori* inferred them from the Eleventh Amendment. Accordingly, in *Seminole Tribe of Florida v. Florida*,[37] the Court invoked the Eleventh Amendment to declare that the federal judicial power under Article III of the Constitution does not reach a private action against a State, even on a federal question.[38]

With *Alden v. Maine*,[39] the Court created an additional and even more sweeping type of state sovereignty barrier by holding that Congress lacks the power under Article I to abrogate a state's "sovereign immunity" from suit in Federal or state court. Justice Kennedy based this broad limitation on Congressional authority, which analytically renders the Eleventh Amendment nearly redundant, purely on an originalist account of the Founding challenged at length by Justice Souter in dissent.[40] At least in analytic terms, this case represents a culmination of the Court's jurisprudence in this area. It is unsupported by clear or specific constitutional text. It relies on structural inferences that do not necessarily follow from the mere existence of two levels of government. Finally, it rests on history that, at the very least, is open to serious question.

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35. As the original constitution itself, the text makes no mention of "sovereignty": "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

36. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895-1941 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983). *Cf.* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1028 (2002) (author argues that one of the Framer's purposes when formulating the Eleventh Amendment was to invoke "the classical international law rule that only states have rights against other states").

37. 517 U.S. 44 (1996).

38. Also relevant in this regard are the Court's narrow readings of Congressional attempts to abrogate under the Fourteenth Amendment, which remains permissible. *Accord* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

39. 527 U.S. 706 (1999).

40. *Id.* at 760, 762-95.

C. Judicial Power to Enforce Federal Law

In practical terms, the judiciary's readiness to enforce Federal law can be as important as its willingness to either construe, or allow Congress to create, Federal standards in the first place. Nowhere were the stakes higher or more visible during Justice White's career than with regard to the Federal judiciary's exercise of its equitable power to enforce the Equal Protection Clause against racial segregation. Here, and in contrast to the other areas under consideration, the Court's growing solicitude of local government came much earlier, more or less at the midpoint of Justice White's tenure. In one sense, however, this earlier turn to "state's rights" is fortuitous since it provided the Justice with a greater opportunity to articulate his nationalist jurisprudence on a critical federalism battleground.

The main story of the Court's move away from nationalism in this area is well known. For almost twenty years after *Brown (I)*,[41] the Court strongly and unanimously approved a broad exercise of judicial power from *Green v. County School Board*[42] through *Swann v. Charlotte-Mecklenburg Board of Education*,[43] which itself approved bussing. This consensus began to break down in *Keyes v. School District No. 1*,[44] and crumbled in *Milliken v. Bradley (I)*,[45] which rejected interdistrict remedies involving districts which themselves had not violated the Fourteenth Amendment.

Somewhat more ambiguous, in part thanks to Justice White, was the Court's readiness to declare that a system previously in violation had achieved compliance or "unitary" status. On one hand, in a series of decisions arising not long after *Milliken I*, the Court generally turned aside more aggressive efforts by district courts to prevent resegregation. The trend began with *Pasadena Board of Education v. Spangler*,[46] in which the Court found that the district court had exceeded its authority by requiring a certain degree of racial balancing through annual readjustment. This stance, moreover, contin-

41. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
42. 391 U.S. 430 (1968).
43. 402 U.S. 1 (1971).
44. 413 U.S. 189 (1973).
45. 418 U.S. 717 (1974).
46. 427 U.S. 424 (1976).

ued through the end of Justice White's tenure with *Board of Education v. Dowell,*[47] which held that a district could be deemed to have achieved unitary status upon a showing that it was in compliance with the Equal Protection Clause and not likely to return to its former ways, and *Freeman v. Pitts,*[48] holding that Federal courts may relinquish oversight even *before* a school district is in complete compliance. Justice White joined all these decisions, as he did *Bazemore v. Friday,*[49] which permitted a freedom of choice plan to suffice with regard to voluntary clubs. Conversely, in *United States v. Fordice*[50] both Justice White and the Court indicated that they would not always push the lower courts toward standards that would result in a finding that the states had complied, in this instance, with regard to Mississippi's state university system. Taken together, the Court's enforcement cases may not have signaled outright retreat, but they did suggest that the Justices would no longer advance.

D. Foreign Affairs

One further area that is relevant to Justice White's federalism jurisprudence is the increasingly important realm of foreign affairs law.[51] As was heralded at an important symposium at the University of Colorado School of Law, the last decade has witnessed at least a scholarly movement that seeks to apply the shift away from national to state power, which the Court has engineered domestically, to foreign relations. This "New Foreign Affairs Law"[52] thus challenges nationalist orthodoxies that appeared rock solid to Justice White's generation. Two sets of challenges are particularly salient. One is the assertion that domestic federalism doctrines are germane to national foreign affairs authority. The traditional view has long been that "in respect of our foreign relations generally, state lines disappear."[53] On this view the Federal government should

47. 498 U.S. 237 (1991).
48. 503 U.S. 467 (1992).
49. 478 U.S. 385, 407-09 (1986).
50. 505 U.S. 717 (1992).
51. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999) (a symposium overview).
52. Id.
53. *See, e.g.,* United States v. Belmont, 301 U.S. 324, 331 (1937).

prevail with even greater force whether the inquiry be the reach of national power or the absence of sovereignty barriers protecting the states. Consider first the reach of Federal power. Under the prevailing understanding of *Missouri v. Holland*, Congress can exercise power pursuant to a treaty that would otherwise exceed its authority under the interstate commerce power.[54] In fact Congress need not even act at all since the Court in *Zschernig v. Miller* held that a type of dormant foreign affairs authority can prohibit state legislation even in the absence of Congressional action.[55] For that matter, the Court has suggested that it will more readily find that a Federal statute preempts state law in foreign affairs.[56] Conversely, with the possible exception of the Eleventh Amendment itself, the Court has yet to limit the application of Federal foreign affairs authority to the states in the name of the sovereignty safeguards that it has recently constructed.[57]

Recently these and other traditional views concerning the place of federalism in foreign affairs have been the subject of

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54. Missouri v. Holland, 252 U.S. 416 (1920).

55. 389 U.S. 429 (1968).

56. Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941). Recently, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), the Court found that a Federal statute setting out sanctions against Burma (Myanmar) preempted a Massachusetts law restricting state contracts with the same nation. Substantial academic debate has ensued as to whether the Court's decision constitutes both a rollback from the dormant foreign affairs principle of *Zschernig* as well as a retreat from automatically less deference to the states in foreign affairs preemption, *see, e.g.,* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, and those who argue that it is consistent with traditional Federal primacy in foreign affairs, *see, e.g.,* Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 1013 (2001).

57. The possible exception is *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), which barred a suit brought by a foreign nation against a state. That suit, however, arose as a matter of diversity rather than Federal question jurisdiction. Despite broad dicta in *Monaco* against any suit against a state going forward, *id.* at 329, to date the Court has yet to hold that the Eleventh Amendment precludes an action brought by a foreigner against a state on a claim based upon a Federal statute or treaty. *See* Thomas H. Lee, The Foreign State in Federal Court, at 1 & n.1 (Sept. 15, 2003) (unpublished manuscript, on file with author); *but cf.* Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam order denying certiorari) (citing *Monaco* for the "'fundamental principle' that 'the States, in the absence of consent, are immune from suits brought against them. . .by a foreign State'"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67-68 (1996) (citing *Monaco* for the same proposition). Moreover, one could argue that even the dicta is consistent with National Government deference in foreign affairs insofar as a principal reason for precluding such suits appears to have been a preference for a suit by the United States and not the foreign state in vindicating, for example, a treaty claim. *See* Lee, *supra*, at 51-53.

intense scholarly criticism, in part precisely because the Court has revived federalism doctrines domestically.[58] This criticism has, moreover, proceeded both with respect to the reach of Federal power and the recognition of sovereignty limitations. Here Professor Curtis Bradley, himself a former White clerk, has taken a lead in both regards, suggesting in several important articles that the Court's novel limitations on Federal power domestically also apply in foreign affairs.[59]

A second type of federalism challenge replicates concerns about sovereignty one level up. Just as the Court has protected the states against perceived Federal intrusion, scholars have revived concerns about protecting the national government from perceived international intrusion. Put another way, the state sovereignty v. nationalist debate in domestic law has replicated as a national sovereignty v. internationalist debate in foreign affairs law. One of the many areas in which this has played out is the use of norms identified and fashioned by the judiciary to facilitate or impede the applicability of international law to domestic law. To take one example, the orthodox position has long held that at least since the Court's ruling in *The Pacquete Habana*,[60] the judiciary can apply customary international law as a type of Federal law.[61] Yet this position has in recent years come under considerable academic fire.[62] While

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58. *See* Bradley, *supra* note 51. One further indication of state-oriented ferment in foreign affairs law appears in CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (2003). Though scrupulously balanced, this work breaks ground in considering various types of federalism constraints in foreign affairs evident in scholarship, and in certain cases lower court opinions, that were simply not on the table as recently as a decade ago. *See id.* at 275-335 & 373-85.

59. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000). For a vigorous defense of broad national foreign affairs power, see David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). *See also* Gerald L. Neuman, *The Global Dimensions of RFRA*, 14 CONST. COMMENT. 33 (1977) (arguing that Congress could enact the Religious Freedom Restoration Act under the International Covenant on Civil and Political Rights as ratified by the United States).

60. 175 U.S. 677 (1900).

61. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

62. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L. L. 1 (1995).

nationalists—or in this context, perhaps more accurately, internationalists—have returned this fire,[63] it remains a real possibility that the same Court that fashioned the current "vival" of domestic states rights will be no less ready to translate these academic challenges into a similar "vival" in foreign affairs law.

II. SOURCES OF JUSTICE WHITE'S NATIONALISM

Given the extended breadth of Justice White's nationalism, it remains to consider the character of that commitment in greater depth. Suspicion of the Federal government, faith in the states, belief that the Federal judiciary should place limitations on Federal power rather than enforce Federal law forcefully, a tendency toward isolationism: none of these are commitments ordinarily associated with Justice White's generation. While no generation is a monolith, the so-called "greatest" one reflected a confidence that the people of the nation could harness the Federal government to solve a range of problems, including those previously seen as local, in a flexible, fair, and pragmatic fashion. No less important, they translated this faith into a record of achievement, which in turn could only confirm the initial faith. What held true for the generation held especially true for Byron White. Talent and circumstance enabled him to contribute to this record of achievement at several prominent points including: the New Deal and the legal thinking designed to provide it with a foundation; the Second World War; and the Civil Rights movement.[64] He was not just

63. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after* Erie, 66 FORDHAM L. REV. 393 (1997); Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REv. 463 (1997). For earlier statements articulating the internationalist position, see Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

64. Here one is tempted to call the Justice among the greatest of "the greatest generation," but there is an element of truth both for him and for the challenges that generation faced and the nationalist means they employed (as is also true of the Founding and Civil War).

a "Kennedy liberal," or a "New Dealer," or a war hero, but all of the above.

In pursuing these ideals and making them work, Justice White and the like-minded men and women of his generation harnessed the constitutional legacy of other "great" generations with similar beliefs, especially those of the Civil War and Reconstruction, as well as of the Founding itself. As noted, one legacy of the Justice's grandfather was the type of voluntary, military service during the Civil War that the Justice himself would later undertake. This correspondence prompts at least two historical claims that go beyond the attempt to identify the sources of the Justice's own nationalism. First, they suggest that in reflecting the commitments of these earlier generations—who among other things generated the original Constitution and the Reconstruction Amendments—the Justice did not merely engage in pragmatism but also displayed a deep fidelity to the nation's fundamental constitutional commitments without necessarily being an originalist. Second, the historic cycles that have resulted in crisis, nationalist transformation, erosion, crisis, nationalist transformation suggest the current Court's rejection of Justice White's brand of nationalism is not only illegitimate but profoundly unwise.

Getting a fix on the sources and tenets of the Justice's nationalism might paradoxically be best achieved by looking from the most recent to most distant influences, as he might have looked back once he had assumed the office of Associate Justice.

A. Civil Rights and Kennedy Justice

As has been well chronicled, Byron White literally played a leading and front-line role in the Kennedy Justice Department, especially in the administration's efforts to enforce Federal civil rights in the South. As an initial matter, White both reflected and enhanced faith in the Federal government through the key role he played in staffing perhaps the most stellar group of attorneys that the "DOJ" has ever had. As Robert F. Kenney's Deputy Attorney General, White undertook a nationwide search that emphasized "ability and trustworthiness"—not to mention the Yale alumni directory—resulting in a team that included Louis Oberdorfer, Herbert J. (Jack) Miller, Nicholas

B. Katzenbach, and Burke Marshall.[65] In this, the Deputy Attorney General, consciously or not, pursued the old Federalist ideal that an expanded national stage would produce a "filtration of talent" that produced public servants of greater ability and perspective.[66] White also attempted this course with judicial appointments, though with more mixed results that reflected greater political constraints. "[A] hard headed, aggressive purist,"[67] White did not welcome compromise appointments of less qualified candidates, and worked hard to fill vacancies with the most able individuals in light of the circumstances.[68]

With the team at Justice in place, Deputy Attorney General White played a significant part in vindicating Federal civil rights law against state interposition. No episode was more dramatic than the complex saga of the Freedom Rides. As the Riders themselves knew, their attempt to take an integrated bus trip from Washington, D.C. to New Orleans, among other things, tested the states' resolve to inhibit—and the Federal government's resolve to enforce—*Boynton v. Virginia,* which held that the Interstate Commerce Act prohibited racially segregated interstate travel facilities.[69] The states did their part, as local mobs, police inaction, and equivocation by Governor John Patterson of Alabama placed the lives of the Freedom Riders in danger. Although the Justice Department was caught off guard, in short order White traveled to Alabama, where he organized over 500 Federal employees as marshals, commandeered postal vehicles for their transportation, and faced down both Governor Patterson and crowds bent on confronting civil rights advocates. Apart from the simple justice of the cause, crucial to White were the bases for his actions, which included 10 U.S.C. sec. 333 and a Federal court injunction that John Doar had secured against factions of the Ku Klux Klan. White's immediate intervention worked. In the end, however, Robert Kennedy worked out a deal with Missis-

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65. HUTHINSON, *supra* note 10, at 260-68. For a more critical account *see* VICTOR S. NAVASKY, KENNEDY JUSTICE (1971).

66. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 506-518 (1969). That said, White's vision was almost purely meritocratic and anti-elitist, *see* Nelson, *supra* note 7, while the Federalists believed that the national stage would also preserve rule by social elites as well, *see* WOOD, *supra*, at 508-14.

67. HUTCHINSON, *supra* note 10, at 300 (quoting Ramsey Clark).

68. *See* HUTCHINSON, *supra* note 10, at 287-309.

69. 364 U.S. 454 (1960).

sippi officials under which the safety of the Riders would be guaranteed at the price of jailing them once they disembarked, a compromise that led to the collapse of the protest. Whatever the wisdom of this ultimate compromise, White's own part confirmed a steadfast commitment to the enforcement of Federal law against an opposition that did not lend honor to the concept of "states' rights."[70]

The frustration of reacting to the Freedom Rides, and then achieving mixed results, further prompted the Justice Department to undertake proactive policies. Foremost here, as Nelson has pointed out, "Robert Kennedy decided early on that the best way he and the Justice Department could help the civil rights cause was to enforce the federally guaranteed right to vote."[71] Not surprisingly, the Deputy Attorney General was fully with this program. In particular, White famously pushed Solicitor General Archibald Cox to take a more aggressive position in support of one-person-one-vote in *Baker v. Carr*.[72]

The commitments of the Kennedy Justice Department thus illustrate many of the larger themes. The support of voting rights shows a faith in the national political process. The Freedom Rides experience would have done little to fuel an abiding faith in state government. Together these and other experiences underlined the need for forceful yet pragmatic enforcement of Federal law and civil rights.

B. World War II

As with many in his generation, Justice White's most compelling tour in national service came in the military during the Second World War. The influence of the Justice's wartime service on his outlook is among the least analyzed aspects of his career. So it will likely remain given a lack of direct evidence linking the two. What is clear, however, is that White often heroically contributed to a great national victory against a dictatorial aggressor. Equally clear is that military experience of this sort has been a frequent marker for a nationalist outlook among leading constitutional figures throughout our history.

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70. *See* HUTCHINSON, *supra* note 10, at 260-86.

71. Nelson, *supra* note 6, at 316.

72. 369 U.S. 186 (1962). *See* HUTCHINSON, *supra* note 10, at 308; Nelson, *supra* note 6, at 316-17. *See also* NAVASKY, *supra* note 65, at 297-322.

As a young navel officer, Byron White performed with both courage and distinction in the Navy's bloody, yet successful Pacific campaign against Japan. Even before Pearl Harbor, White volunteered to be a marine fighter pilot but was turned down because of color-blindness. This initial experience, along with the inevitable "hurry up and wait" frustrations of the military, may not have instilled great faith in Federal operations. The better known highlights of his time in the Navy, however, pointed in the other direction. Arriving in the Solomon Islands as a military intelligence officer, White famously wrote the report that vindicated Lt. John F. Kennedy's actions during the sinking of *PT 109*. Coincidentally, the two later rekindled their pre-war friendship while stationed together working on different aspects of PT boat operations. After this, White secured a transfer to the staff of then Arleigh Burke, whom he followed to various and progressively higher postings. Among other things, White's work during this period earned him a Bronze Star.[73] More importantly, both he and fellow Lt. E. Calvert Cheston played a noteworthy part in securing the Navy's victory at the battle of Cape Engaño through their insistence that a Japanese carrier squadron lay further east than their superiors believed.[74]

After this, as Louis Oberdorfer put it, White had "two aircraft carriers shot from under him."[75] The first time occurred when the U.S.S. *Bunker Hill*, on which White was stationed, was hit by two kamikazes, killing over 300 men. During the four-hour long fire that ensued, White helped pull men from the flames and, as Cheston recalled, "stayed so cool it was almost unnerving. And he never took a rest."[76] The "divine wind" struck again after White had transferred to the U.S.S. *Enterprise*, which was also hit, but suffered fewer casualties thanks to better preparation. These incidents may speak less directly to White's national orientation, apart perhaps from the bonding of comrades under fire. At least one further and more pleasant incident, however, could not have failed to cast national service in a positive light. While later stationed in San Francisco awaiting further orders, White met up with Lt.

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73. HUTCHINSON, *supra* note 10, at 172-87.

74. C. VANN WOODWARD, THE BATTLE FOR LEYTE GULF 138-39 (1947).

75. Judge Louis Oberdorfer, Remarks at Memorial Service for Justice White at the Supreme Court (Nov. 16, 2002).

76. HUTCHINSON, *supra* note 10, at 191.

Marion Lloyd Stearns. The future Mrs. White had been among the first to enlist in the WAVES (Women Accepted for Voluntary Emergency Service), one of the vanguard units in the gender integration of America's armed forces, just as units like the 442nd Nisei, the 24th Infantry, and the Tuskegee airmen were at the forefront of racial integration.[77]

Combat experience in a great national victory for a just cause may not determine a nationalist outlook, but it does point in that direction. In this, parallels can be drawn to a number of significant constitutional and political figures for whom military service confirmed faith in the potential of the national government, including: John F. Kennedy, Oliver Wendell Holmes, Alexander Hamilton, George Washington, and John Marshall. To take perhaps the closest example, an important source of John Marshall's nationalism is commonly said to come from his frontline experience as an officer in the Continental Army, where he worked his way up to Washington's command group with Hamilton.[78] In Nelson's estimation, as Marshall "worked with men from various parts of the new United States, he lost whatever parochialism he may have had and grew in appreciating the common interests of all Americans."[79] Historians have pointed out that time in the Continental Army had a nationalizing effect generally, in part because the Army constituted a far more effective force than local militias.[80]

The Justice's wartime experience offers further clues to his judicial outlook. The first-hand confrontation with a world plunged into anarchy may well have underscored the need for the United States to play a greater role in the promotion of international law and institutions, a conclusion that President Roosevelt himself came to with respect to the United Nations.[81] If so, this effect would have confirmed the likewise natural reaction to White's experience when the European phase of the war began. While still on his Rhodes Scholarship, the Justice

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77. *Id.* at 172-93; Melvin I. Urofsky, *The Court at War and the War at the Court*, J. OF SUP. CT. HIST., 1996, vol. I, at 1, 12, 16.

78. *See* LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 34-56 (1974).

79. WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 41-42 (2000).

80. *See generally* CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783 (1996).

81. *See generally,* TOWNSEND HOOPES & DOUGLAS BRINKLEY, FDR AND THE CREATION OF THE U.N. (1997).

spent the summer of 1939 touring through France and Germany with Jack Kennedy, whom White had met when Kennedy's father was the Ambassador to the Court of St. James. During their travels, the two had a nasty encounter with Nazi youth and had to cut their trip short when the Third Reich invaded Poland.[82] Finally, Nelson has plausibly suggested that World War II confirmed and reflected the Justice's sense of self-effacing duty, which is consistent with judicial deference to Congress in particular.[83]

C. The New Deal

Nelson, along with Stith, also rightly traces the values of the Kennedy Justice Department to "Franklin Delano Roosevelt's New Deal, reviving for the last time the mixture of pragmatism, equality, and democracy that was its hallmark."[84] The New Deal and Byron White came together at several points. As a young man he encountered it from the top down; as a youth his experience was from the bottom up.

Yale Law School had a profound effect on Justice White's views about law, jurisprudence, and the Federal government.[85] When White arrived in New Haven in the fall of 1939, Yale had long established itself as a center of "legal realism," a movement that had lately found a practical outlet in the Roosevelt Administration. Defining "legal realism" is a notoriously thorny endeavor, but at the most general level the approach included several pragmatic tenets, especially the ideas that the law is not a closed system of reason and logic, and that its quality is not measured through internal cogency but ultimately through the desireability of the measurable impact it has upon society.[86] As Hutchinson notes, by White's time, debates over legal realism "had largely run out of steam a few years before White entered Yale Law School, largely because many so-called realists went off to work in the New Deal."[87] Among these in-

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82. HUTCHINSON, *supra* note 10, at 138-39.

83. William E. Nelson, *Byron R. White: The Justice Who "Never Thought About Himself,"* 116 HARV. L. REV. 9, 11 (2002).

84. Nelson, *supra* note 6, at 317. *See also* Stith, *supra* note 9.

85. Judge Louis Oberdorfer, Remarks at Memorial Service for Justice White at the Supreme Court (Nov. 16, 2002); *see also* Stith, *supra* note 9.

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

87. HUTCHINSON, *supra* note 10, at 146.

cluded such prominent figures as William O. Douglas, Thurman Arnold, and Wesley Sturges. Paradoxically, these departures in one way would only have enhanced the stature of the Roosevelt Administration and its values back in New Haven.[88] Yet others remained in the classroom or returned, among them Myers McDougal, Sturges, and probably most influential of all, Arthur Corbin. Corbin in particular, emphasized practical effects in discrete cases.[89]

But the seeds for appreciating the practical potential for Federal action were sown not in Connecticut but Colorado. White's hometown of Wellington, especially its mainstay sugar beet industry, depended upon irrigation projects and sugar beet regulation, both of which were ultimately determined at the Federal level. Though New Dealers in Washington initially were slow to respond, lobbying eventually insured a number of major projects diverting water to the region, including the Colorado-Big Thompson project, first authorized in 1937. Faster response came concerning price relief for small growers with the Jones-Costigan Act of 1934. In addition, a popular exposè of field conditions led Congress to pass the Sugar Act of 1937, which authorized the Secretary of Agriculture to establish minimum wages to prohibit child labor. White's own, now legendary, work in the beet fields while growing up meant that an appreciation of Federal intervention struck home in a direct and lasting fashion.[90] Hutchinson reports that White at Oxford reacted in "fierce" fashion when a fellow American disparaged the WPA as giving handouts to good-for-nothing "shovel leaners." "What do expect those men to do," White declared, "starve to death?"[91]

Much recent debate has centered upon whether the New Deal caused or culminated in a constitutional transformation.[92] General agreement nonetheless prevails about the nature of the transformation. One can all but take the historian's version of judicial notice that the New Deal embodied the nation-

88. *See* KALMAN, *supra* note 86.
89. HUTCHINSON, *supra* note 10, at 149-56.
90. *Id.* at 16-17.
91. *Id.* at 136.
92. The debate is often couched in terms of "externalists" who emphasize that politics pressured the Court into a dramatic shift versus "internalists," who view the change as more incremental and derived from previous case law. *See* Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165-66 (1999).

alist values under consideration—expansion of Federal power applied in pragmatic fashion through the national political process; a corresponding rejection of federalism constraints; and judicial acceptance of this shift combined with robust enforcement of Federal law.[93] In time, the Roosevelt Administration also came to stand for a sustained internationalism that at least to an extent would develop and abide by international law.[94]

D. The Civil War and Reconstruction

Justice White took obvious pride in his grandfather's Civil War service, as witness the rifle and sword above his desk. In this, he apparently followed family tradition.[95] There was much to take pride in. Ephraim White volunteered for service in the Union Army despite the heavy toll it would take on his family. He rose from lieutenant to colonel, saw action at Vicksburg, Winchester, Fisher's Hill, and Cedar Creek, and was commended for his gallantry under fire. After the war he remained active in the Grand Army of the Republic and named one of his children after Charles Sumner, the abolitionist Senator from Massachusetts.[96]

Nationalist themes likewise characterized Ephraim White's earlier career as well. His first military service came as a sixteen-year old volunteer under Zachary Taylor in the Second Seminole War and again in the Mexican-American War under Taylor and Winfield Scott. After this he returned home to Pennsylvania, and then was lured to settle in Iowa due in part to advertisements that circulated along yet another Federal initiative near which he lived—the National Road.[97]

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93. *See* BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS (1998); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

94. *See* HOOPES & BRINKLEY, *supra* note 81; David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 COLO. L. REV. 1491 (1999).

95. *See* CHARLES SUMNER WHITE, EPHRAIM GODFREY WHITE AND HIS DESCENDENTS (1946).

96. HUTCHINSON, *supra* note 10, at 12-13; *see also* PAMELA STEWARD, THE WHITES: FROM SOLDIERS TO STATESMEN 20-23 (1982).

97. HUTCHINSON, *supra* note 10, at 11-12.

Of all these experiences, the Civil War appears to have left the greatest mark. And here, the constitutional transformation wrought, or at least intended, by the Civil War generation sounded the same nationalist themes later seen during the New Deal, World War II, and the Civil Rights Movement. One—indeed, the key—strategy reflected in the post-war amendments and statutes was empowering Congress to legislate on previously local matters in the name of Federal rights and equality. The other side of this proposition was a corresponding and substantial diminution of "state sovereignty."[98] One further component of Reconstruction constitutionalism entailed aggressive enforcement through the newly-established Department of Justice and an enhanced Federal judiciary (to say nothing of the Union Army),[99] efforts unfortunately undermined by *Slaughter-house Cases*.[100]

E. The Founding

Nothing directly links Justice White to the struggles of the Founding generation. The recorded trail of the White family does go back to Pennsylvania, but not past the early 19th century. The Founding therefore cannot be advanced as even an attenuated source of the Justice's national outlook, at least not through personal experience or family lore. But the achievements of this earlier "greatest generation" remain relevant nonetheless. As noted, scholars who assess his career conventionally label him a "Federalist" in the original sense of the word.[101] If so, it follows that the Federalist commitments that Justice White reflected must be those that are broadly consistent with the overlapping principles evident among the Republicans of the Civil War and Reconstruction and Democrats of the New Deal, World War II, and the Kennedy era. Among

98. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 864 (1986); *see also* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988); James M. McPherson, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 131-52 (1990).

99. *See* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985).

100. 83 U.S. (16 Wall.) 36 (1872). *See* KACZOROWSKI, *supra* note 99, at 140-62.

101. Nelson, *supra* note 6, at 347; Varat, *supra* note 4, at 371.

other things, this commonality suggests that Justice White's nationalism in particular had origins not just in his personal history, or that of his family, but from the nation's history more generally. Beyond decoding the Justice himself, it further follows that his brand of nationalism in a larger context also happens to derive from the achievements of exactly those generations that various theories – originalist and non-originalist alike – privilege as sources of constitutional law.

Going down this road, however, first requires determining at least the major themes that the Federalists generally espoused. Arguing how the Founders settled particular issues as they concern us 200 years later, especially in Federal/state relations, is often a fool's errand, and in no case can be resolved without substantial research. Yet, however much specific destinations may be debated, the shift that the Founding Federalists effected is clear and consistent with the great constitutional generations that followed. Compared to what preceded it under the Articles of Confederation, the Founding represented a sea-change in the idea of national self-government. Among the near revolutionary changes that the Federalists advocated are: the direct election of national representatives; the investment in the national government of the power to apply to individuals; and the expansion of powers that the national government could exercise, not least of all the Commerce Power.[102]

The Constitution also necessarily diminished the prior exercise of state sovereignty and did so in potentially dramatic fashion. One not necessarily symbolic indication of the shift can be seen in the shift from Article II of the Articles of Confederation to the Tenth Amendment. Article II provided that "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[103] By contrast, the Tenth Amendment, the provision to address Antifederalist concerns about the

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102. The literature is vast. To cite the leading works, *see* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 171-80 (1996); WOOD, *supra* note 66, at 524-32; FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 262-68 (1985), EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 270-81 (1988). *See also* Martin S. Flaherty, *More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. KAN. L. REV. 993, 1008-09 (1997).

103. ARTS. OF CONFEDERATION art. II.

diminution, omitted both the modifying "expressly," as well as dropped the preamble reference to sovereignty altogether: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[104]

The Founders also shifted the republic in other, by now familiar, nationalist ways. Among the most important, the Constitution authorized the creation of a standing, independent Federal judiciary that would have the authority to enforce Federal law, anything in state law to the contrary notwithstanding.[105] Finally, by incorporating the concept of self-executing treaties, the Founders also demonstrated a certain commitment to effective adherence to the law of nations, especially where this goal had previously been undermined by the localism of the states themselves.[106]

Once more, the argument for present purposes is not that the Founders didn't retain the states as foundational parts of the system, though such principles as "state sovereign immunity" and the "anti-comandeering" rule should hardly be taken as corollaries. It is, rather, that the Founding generation began, and began dramatically, a nationalist shift in the various areas under consideration, that subsequent generations commonly associated with constitutional transformation continued the process, and that Byron White both directly and indirectly reflected these commitments.

III. JUSTICE WHITE: NATIONALISM AS PRAGMATIC FIDELITY

As the Justice himself might point out, the proof is in the cases. As previous scholars have pointed out, the judgments he signed onto reveal him to have been true to the values not just

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104. U.S. CONST. amend. X.

105. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land;" U.S. CONST. art. VI, cl. 2. On the establishment of the Federal judiciary, *see* Gerhard Casper, *The Judicary Act of 1789 and Judicial Independence, in* MAEVA MARCUS, ORIGINS OF THE FEDERAL JUDICIARY 281-98 (1992).

106. *See* MARCUS, *supra* note 105. For a lively exchange on this point, *see* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (arguing that the Founders intended self-executing treaties) and John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) (disagreeing).

of the generation he influenced, but of that generation's progenitors as well. Yet it is the opinions he wrote that tell us to what extent and why. To be sure, in certain instances and in some areas, such as criminal law, White would balk at extending Federal standards with rhetoric about the utility of local administration. As previous scholars have pointed out, however, when it came to Federal/state relations, the Justice's votes and opinions were overwhelmingly nationalist.[107] Both the judgments and opinions, moreover, reveal that the Justice's beliefs remained constant even as the Court's nationalist commitments began to erode, a shift that ironically gave the Justice the greater opportunity to articulate his views in the way that only dissents can provide.

On the merits, the opinions reveal Justice White as a self-conscious and powerful advocate for nationalism in all its principal aspects: deference to Congressional power broadly conceived; extreme skepticism of "state sovereignty" as a barrier to the exercise of that power; support for aggressive and flexible judicial enforcement of Federal law; and a parallel belief that the courts should also enforce the law of nations against judge-made barriers to defend national sovereignty. In this, the Justice was faithful to the principal commitments of the generations discussed.

With regard to method, the opinions also confirm the Justice's vaunted pragmatism. A notoriously malleable term, pragmatism in Justice White's jurisprudence most obviously meant an abiding concern for how a specific doctrine under consideration actually worked in the real world to further general and generally accepted principles. To roam beyond federalism, in separation of powers, the Justice famously believed that judge-made doctrines prohibiting the legislative veto worked to undermine that more general value of balance among the three branches of government that nearly all agree is a central separation of powers concern.[108] For the same reason, he likewise rejected court-mandated limits on the ability of Congress to place restrictions on presidential removal author-

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107. *See* Allison H. Eid, *Justice White's Federalism: The (Sometimes) Conflicting Forces of Nationalism, Pragmatism and Judicial Restraint*, 74 U. COLO. L. REV. 1629, 1635 (2003).

108. I.N.S. v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting). *See* Martin S. Flaherty, *The Most Dangerous Branch,* 105 YALE L.J. 1725, 1733-35, 1832-39 (1996).

ity.[109] This is not to say he was unconcerned with such standard sources as text, structure, and history. Where Constitutional text did address a matter—for example, the Appointments Clause—the Justice was not about to ignore it in service of the best pragmatic result.[110] For Justice White, it nonetheless remained that even fairly explicit materials need to be interpreted with at least an understanding of how a given interpretation played out on the ground.

The separation of powers examples should also make clear to whom the responsibility of pragmatic decision making should ordinarily fall. For reasons sounding both in institutional competence and democratic legitimacy, the task of fashioning solutions to various social, economic and institutional problems should fall to the legislature or the executive, not the judiciary unless the law fairly clearly commanded otherwise. Pragmatism for a judge like Byron White therefore did not mean that courts should be free to fashion rules in the place of elected representatives.

To return to federalism, it might well be the case that an "anti-comandeering" principle might be a pragmatic solution to the problem of "unfounded mandates," through which Congress can implement Federal policies through state officials, leaving the states to foot the bill and face the ire of their taxpayers.[111] Absent some evident basis in standard constitutional materials, however, this was the type of pragmatic solution that judges had no basis to implement As far as Justice White was concerned, pragmatism really meant preserving the space for the political branches themselves to fashion pragmatic rules that would yield realistic results.

Complementing this "legal realism," however, is a similar concern for precedent. In this context, precedent might be conceived best as reliance on how previous decisions had developed doctrine as applied to specific sets of facts in an incremental fashion. This concern held true both in areas in which the Constitution did delegate to the courts decision making authority, as in fashioning equitable remedies, and in areas in which it did not, where the question might be how much free space to

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109. *See* Metro. Wash. Airports Auth. v. CAAN, 501 U.S. 252, 290 (1991) (White, J., dissenting).

110. To stay in the realm of separation of powers, *see* Buckley v. Valeo, 424 U.S. 1, 268-74 (1976) (White, J., dissenting).

111. *See* Eid, *supra* note 107 at 1636.

accord the political branches consistent with more general principles. Yet, however forward-looking, these types of pragmatism were also forms of fidelity. This follows because, as respected historians commonly accept, earlier generations expected that specific meanings of the Constitution would be worked out over time to solve real problems as they emerged.[112]

A. The Scope of Federal Power

Few, if any, Justices supported a broader conception of Federal authority than Byron White, though it mainly fell to others to justify such breadth. Not long after White joined, the Supreme Court extended the reach of the Constitution's most far-reaching grant of power in its landmark Commerce Clause decisions, *Heart of Atlanta Motel v. United States*[113] and *Katzenbach v. McClung*.[114] So far reaching were these holdings, that the Court only occasionally saw the need to address the scope of the Commerce Power thereafter. When it did, it backed Congress in such decisions as *Hodel v. Indiana*,[115] *Perez v. United States*,[116] and *Maryland v. Wirtz*.[117] Justice White joined the majority in all these decisions. For him, however, the effect of so few cases was few opportunities for opinions. Only after he stepped down did the Court again, for the first time since the New Deal, get back into the business of employing the Commerce Clause as a limit to Federal authority rather than a license.

Justice White nonetheless did get at least one chance to opine about the extent of the Commerce Power, albeit indirectly. The opportunity arose in the otherwise obscure *Federal Power Commission v. Union Electric Co.*[118] The case involved a provision of the Federal Power Act—first enacted as the Federal Water Power Act in 1920—that required anyone seeking to construct a dam or other project on a non-navigable stream to file a declaration of intent with the Federal Power Commission so long as the stream was one over which Congress had juris-

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112. *See, e.g.*, RAKOVE, *supra* note 102, at 339-65.
113. 379 U.S. 241 (1964).
114. 379 U.S. 294 (1964).
115. 452 U.S. 314 (1981).
116. 402 U.S. 146 (1971).
117. 392 U.S. 183 (1968).
118. 381 U.S. 90 (1965).

diction under its authority to regulate interstate commerce. In what would become typical fashion, Justice White first made clear, "what is not involved in this case."[119] There was "no question" as to whether the interstate transmission of energy was subject to the Commerce Power nor, citing *McClung,* as to whether projects generating such transmission sufficiently affect interstate commerce to come under Congress's purview. The only challenge to the Commerce Power was therefore an indirect matter of statutory construction. Specifically, the argument against applying the requirement to file a declaration for a project on a non-navigable stream came down to whether the pre-New Deal Congress did not intend the requirement to extend that far. Congress may have stopped short of attempting to reach non-navigable waters, the argument ran, because in those pre-New Deal days it may well have thought that its authority under the Commerce Power applied only to navigable waterways that more clearly implicated interstate commercial traffic.

Writing for the majority, Justice White rejected this challenge. Though the Justice acknowledged significant legislative history supporting this assertion, neither this history nor related history underlying later amendments was unambiguous. More to the point, the statute's text and purpose permitted a broad, nationalist reading, and the Justice saw no reason to choose another. "[T]he Act which emerged from these debates," he wrote, "was couched in terms which reached beyond the control of navigation and forms no support for the proposition that Congress intended to equate the 'interests of commerce' with those of navigation."[120] White, in short, privileged a broad post-New Deal reading of the statute rather than a carry over of a pre-New Deal understanding limiting the statute even when that understanding may have been Congress's own. The *Federal Power Commission* opinion may not shed as much light on the nature of the Justice's nationalism as do opinions in other areas, but it suggests that it would take more than legislative history for him to abandon it.

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119. *Id.* at 94.
120. *Id.* at 105-06.

B. The Rejection of State Sovereignty

In contrast to its recent decisions halting, even rolling back, the reach of Federal authority, the Court's embrace of sovereignty barriers occurred while Justice White remained on the bench.[121] This resulted in several of his more powerful dissents. These opinions indicated that the Justice was not about to abandon his life-long nationalism in the face of novel assertions to the contrary. They also clearly set forth his reasons for staying the course.

Consider first the now landmark *New York v. United States*.[122] Here the Justice rejected the Court's creation of the "anti-commandeering" principle that it first applied to invalidate the "take title" provision in the Low-Level Radioactive Waste Policy Act of 1985. His opinion, concurring in part and dissenting in part, leaves no doubt that in his view the ordinary sources of constitutional interpretation do not sustain such a principle, however sensible or not it may be. The lack of a clear constitutional basis therefore mandates that the courts bow to those departments better placed and democratically authorized to determine what would be sensible: "it would be far more sensible to defer to a coordinate branch of government . . . to devise a solution to a national problem of this kind."[123] The opinion further leaves no doubt that the Justice's skepticism about sovereignty claims is hardly restricted to the newly-minted "anti-comandeering" idea.[124] As he goes on to point out, "in other contexts, principles of federalism have not insulated the States from mandates by the National Government," among them: the Extradition Clause, Federal statutes that

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121. *See supra* Part II.B.

122. 505 U.S. 144, 188 (1992) (White, J., concurring and dissenting in part).

123. *Id.* at 207 n.3.

124. Once again, Professor Eid is correct to point out that the Justice in certain contexts spoke of his hesitancy to impose constitutional rules that would trump state and local decision-making. *See* Eid, *supra* note 107 at 1633-34. Yet this stance is fully consistent with the Justice's overall nationalism. When the Justice felt that classic sources such as text, structure, history and precedent did not support a constitutional rule, he was disinclined to impose one even on the states, especially their own democratically elected branches. Moreover, that he felt compelled to take this position in certain areas, such as criminal law, should not overshadow his consistent nationalist approach in all the areas here considered, whether the reach of Federal power in general, the imposition of sovereignty barriers, the imposition of judicial remedies for constitutional violations that the Justice did deem clear, or fidelity to international law.

compel state courts to hear certain actions; the Spending Clause, and even the Commerce Clause to the extent Congress could still target private parties who produced nuclear waste even after the majority's decision.[125]

The grounds for the Justice's position first of all reflect his usual pragmatism, not in the sense of free-ranging judicial problem-solving, but in terms of respecting the space of the political actors—Federal and state—to do their jobs. The Justice could simply have argued that neither constitutional text, structure, nor history supports an "anti-commandeering" rule. Instead, he prefaces the dissent with a detailed account showing that the Act had been passed in close consultation with the states, thus undermining the idea that all Federal statutes operating on the states are necessarily coercive, and further indicates how the "take title" provision was an essential component of what had been worked out.[126] Nor, whether it initially had a sound constitutional basis or not, has the judiciary assumed the role of problem-solving to the point of generating a carefully worked out line of precedent. Among other things, the opinion points out that case law does not support the Court's distinction between general regulatory statutes and those that regulate just the states; it has been misread by the majority; and if anything supports the process-based inquiry of *Garcia*, the case that largely rejected sovereignty barriers.[127]

More unusually, Justice White's *New York* opinion offers a window to his attitudes concerning fidelity to the nationalist legacy that previous generations have left. "I do not," it states, "read the majority's many invocations of history to be anything other than elaborate window dressing." To the contrary:

> Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here.

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125. 505 U.S. at 207 n.3.

126. *Id.* at 189-200. Accordingly, it was another matter when Congress itself decided to include the states in a cooperative process to handle national problems. For an exceptionally insightful study of such an arrangement, *see* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act,* 76 N.Y.U. L. REV. 1692 (2001).

127. 505 U.S. at 201-06. Not surprisingly, Justice White had joined the decisions that anticipated *Garcia* by narrowly construing the state sovereignty barrier enunciated in *National League of Cities*. Among these were: EEOC v. Wyoming, 460 U.S. 226 (1983); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1982) and United Transp. Union v. L.I.R.R. 455 U.S. 678 (1982).

> Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations was changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal government's law-making authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause.[128]

The Justice's opinion in *Gregory v. Ashcroft* [129] anticipated his dissent in *New York* by likewise rejecting a novel, judicially-created barrier interposed to insulate the states from Federal regulation. In this case the doctrine was a "plain statement" requirement, borrowed from Eleventh Amendment case law, that required Congress to make unmistakably clear in the text of the statute that it intended a Federal regulation to apply to state officials such as judges. Once again the Justice sounded the judicial need to err on the side of Congress rather than state sovereignty. Distinguishing precedents confining the application of judicial scrutiny of state restrictions on aliens, the dissent declared that, "it is one thing to limit judicially created scrutiny, and it is quite another to fashion a restraint on Congress' legislative authority . . . the latter is both countermajoritarian and an intrusion on a coequal branch of the Federal government."[130]

In *Ashcroft* as well, Justice White could simply have attacked the plain statement rule as unsupported by text, structure, or history and have been done with it. While he does refer to these weaknesses, again his main sources of disagreement center on how the Court has acted or how Congress is likely to act. He notes first that the Court previously has not attempted to get in between the Federal government and the states on this point. Eleventh Amendment precedents

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128. 505 U.S. at 207 n.3 (emphasis added) (citations to several historians omitted.)

129. 501 U.S. 452, 474 (1991) (White, J., concurring in part, dissenting in part, and concurring in the judgment).

130. *Id.* at 477.

that the majority imports are not inapposite, for example, because there the question was whether Congress had intended to reach the states at all. In *Ashcroft*, by contrast, Congress had defined the general term "employer" as including a State elsewhere in the statute. Again, it is *Garcia* that is most obviously on point. Secondly, the Justice points out that the new rule "will only serve to confuse the law," with the result that the states will "assert that various federal statutes no longer apply to a wide variety of state activities," and "Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate."[131] Again referring to *Garcia*, the opinion suggests that the only federalism concern the Court should have is if the national political process breaks down in a given instance, not in a free-floating, formal rule to be imposed on Congress by the judiciary.[132]

Amidst this pragmatism, this opinion reflects a concern for remaining true to the nationalist achievements of particular generations. In this regard Justice White found especially troubling the majority's extension of the plain statement rule to statutes enacted under §5 of the Fourteenth Amendment. On this point he states that "[t]he majority's failure to recognize the special status of legislation enacted pursuant to §5 ignores," among other things, that the Civil War Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[133]

Placing Justice White's nationalism in larger context may help explain a curiosity from his own Eleventh Amendment jurisprudence. That jurisprudence, not to mention the Court's general case law, is sufficiently labyrinthine as to merit an article in its own right. Suffice it to say that, as one might expect, the Justice fully subscribed to the nationalist doctrine that Congress could abrogate "state sovereign immunity."[134] That doctrine had itself emerged as a corrective to the nineteenth-century Court's non-textual and ahistorical interpretation of the Eleventh Amendment as recognizing residual state

131. *Id.* at 478.

132. *See id.* at 479.

133. *Id.* at 480 (citations omitted).

134. This Court set forth this requirement in *Quern v. Jordan*, 440 U.S. 332, 342 (1979), and elaborated it in such cases as *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242-46 (1985) and *Pennhurst State Sch. & Hosp. v. Halderman* (II), 465 U.S. 89, 99 (1984).

sovereignty.[135] Less expected was the Justice's repeated agreement with the Court's insistence that Congress can abrogate only in clear, unmistakable terms in the text of the statute.[136] The Justice's position becomes even more puzzling given that this "plain statement" rule is precisely what he objected exporting beyond the Eleventh Amendment in *Gregory v. Ashcroft.*[137]

This position is less a retreat from the Justice's nationalism than a reflection of his respect for *stare decisis*, first in the sense of the Court's settled views on the Constitution itself and second, as a matter of the Court's attempts to work out pragmatic solutions in areas where it has deemed the Constitution to constrain the political branches. Writing on a clean slate, the Justice might well have rejected the strong state sovereignty interpretation of the Eleventh Amendment much as he opposed the state sovereignty barriers considered so far. But the slate was not clean. For better or for worse he agreed that the nineteenth-century Court had consistently read the Eleventh Amendment as a state sovereignty provision starting at least as far back as *Prigg v. Pennsylvania*[138] and extending through *Hans v. Louisiana,* which famously (or infamously) had extended this interpretation to bar suits by a citizen of a state against his or her own state.[139] Against this settled base-

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135. The textual objection to this reading arises since the Eleventh Amendment's language does no more than limit the jurisdiction of the Federal courts – and then only for suits in which a citizen of one state sues another state – and at no point employs the term "sovereignty": "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Leading historical accounts go even further and argue that the Eleventh Amendment was intended only to limit Federal court jurisdiction in diversity actions, not Federal question suits. *See* Gibbons, *supra* note 36; Fletcher, *supra* note 36.

136. Not only did Justice White join *Quern, Pennhurt II, and Atascadero,* he consistently read the requirement that Congress had to abrogate in express terms strictly. *See* Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989); Welch v. Texas Dept. of Highways & Public Transp. 483 U.S. 468, 495 (1987) (White, J., concurring).

137. *See supra* text accompanying notes 129-35.

138. 41 U.S. (16 Pet.) 539 (1842). In *Quern v. Jordan*, then Justice Rehnquist, however dubiously, relied on cases going back to *Prigg* to argue that the "sovereign immunity" view of the Eleventh Amendment had prevailed both before and through Reconstruction, thereby indicating that the general language of the Civil Rights Act of 1871 could not have been intended to abrogate that immunity. *Quern*, 440 U.S. at 343-44 & n. 14.

139. 134 U.S. 1 (1890).

line, the Court had developed certain mitigating doctrines that allowed citizens to hold their own state accountable in Federal court at least to some extent. One older example was *Ex parte Young,*[140] which allowed citizens to sue state officials for prospective injunctive relief.

The more recent mitigating doctrine was to allow Congress to abrogate state sovereign immunity. Abrogation, however, came at the price of the "plain statement" rule, imposing upon Congress the requirement that it "pierce" the states' sovereign immunity from suit expressly in the text of a statute. This was a price that Justice White, in contrast to Justices Brennan and Marshall, was willing to pay as he consistently joined and wrote opinions that enunciated the clear statement test.[141] The Justice's own opinions do not reveal why he supported this test beyond his reliance on a citation of the precedents that developed it.[142] This reliance, however, itself suggests an explanation. First, it reflects the Justice's understanding that the Court had long since settled upon an interpretation of a specific text in a way that limited the space that Congress could otherwise claim for addressing national problems. By contrast, neither the "plain statement" rule outside the Eleventh Amendment context, nor the "anti-commandeering" principle could claim a comparable textual pedigree or age. Second, allowing abrogation but with a "plain statement" proviso further respected the Court's own balancing of the "state sovereign immunity" that it recognized with the larger principles of national power and state accountability. *Ex parte Young* represented one pragmatic way in which the Court stuck the balance; plain statement abrogation was another.

All that said, Justice White's Eleventh Amendment opinion in *Pennsylvania v. Union Gas Co.*[143] has remained a mystery, even an embarrassment. In that case the Court considered whether the Comprehensive Environmental Response,

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140. 209 U.S. 123 (1908).

141. *See, e.g.,* Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989); Will v. Mich. Dep't. of State Police, 491 U.S. 58 (1989); Welch v. Tex. Dep't of Highways & Public Transp., 483 U.S. 468 (1987).

142. *See, e.g., Hoffman,* 492 U.S. at 101 (relying on precedent that to abrogate the States' Eleventh Amendment immunity, Congress must state its intent in clear and express terms); *Will,* 491 U.S. at 65 (same).

143. 491 U.S. 1, 45-57 (1989) (White, J. concurring in the judgment and dissenting in part).

Compensation, and Liability Act (CERCLA)[144] abrogated the states' "sovereign immunity," and if so, whether Congress had the power to do so under Article I. A fractured majority held that Congress had intended to abrogate and further that Congress did have such a power under Article I. Justice White wrote separately, devoting most of his opinion to demonstrating that Congress had not intended to abrogate. Having lost on that point, he added a lone, cryptic paragraph on the constitutional issue, stating that he agreed that Congress did in fact have Article I authority to abrogate. He did not, however, provide a rationale, other than to indicate that he disagreed with "much" of the reasoning in Justice Brennan's plurality opinion supporting Article I abrogation, adding that he did not believe that *Hans v. Louisiana*[145]—which was among the cases that created the need for abrogation in the first place—should be overruled as Brennan urged.[146] In short, the Justice rendered a nationalist judgment in upholding Article I abrogation, yet stopped short of deciding that the Eleventh Amendment did not in fact bar Federal question suits by a citizen against her state to begin with. Moreover, the opinion gave little guidance on why he went this far, but no further.

Why did the Justice uphold Article I abrogation but also confirm *Hans,* the Court's most thoroughgoing extension of the state sovereign immunity interpretation? The answer is likely that in this instance the Justice's commitment to precedent cut against, but did not trump, his more obviously pragmatic preference for the national legislature to address national problems. On one hand, the *Hans* line of cases—however problematic—had nonetheless stood the test of time for nearly a century. Indeed, Justice White provided a clue to his position on *Hans* with a citation to Justice Powell's opinion in *Welch v. Texas Department of Highways and Public Transportation*,[147] which he had joined. There, Powell defended *Hans* first on the grounds of *stare decisis*. While the middle of the opinion then attempts to make as strong an originalist case as it can, it concludes with a survey of precedents relevant to the case.[148] That Justice Brennan in *Union Gas* made an even stronger original-

144. 42 U.S.C. §§ 9601-9675 (1986)
145. 134 U.S. 1 (1890).
146. *Union Gas Co.*, 491 U.S. at 57 & n. 8.
147. 483 U.S. 468 (1987).
148. *See id.* at 478-94.

ist case apparently did not suffice. Instead, as far as Justice White was concerned, Brennan's account merely served to show that narrow applications of originalist history afforded more heat than light, even when employed toward nationalist ends. On the other hand, a later, well-settled, line of precedent also clearly supported the idea of abrogation.[149] The abrogation line of cases also had the additional virtue of re-empowering Congress subject to the distinctive Eleventh Amendment "plain statement" rule that they enunciated.[150] Upholding both *Hans* and abrogation, then, respected *stare decisis* yet still allowed for Federal question suits where Congress so desired.

C. Judicial Power

To this point Justice White's nationalism entailed deference to Congress against claims on behalf of the states with respect both to the reach of Federal power and restrictions based upon "state sovereignty" (the Eleventh Amendment aside, and then only partially). Judicial deference to Congress, however, did not mean judicial deference in general. To the contrary, in certain areas the Justice championed aggressive, and pragmatic, judicial enforcement of Federal authority. Nowhere was this tendency more apparent than the enforcement of the Equal Protection Clause. As with the Eleventh Amendment, the Justice believed that longstanding precedent had fixed constitutional meaning in a way that compelled judicial intervention. There, however, the parallel ended. For Justice White, the consequence of the Court's Equal Protection jurisprudence was to clear space for judicial problem-solving that, by contrast, complemented Congressional power and curtailed state authority. Moreover, the Justice's zeal for marshalling judicial power in this area did not rest simply on *stare decisis*. In addition, it was fully consistent with the faith in national lawmaking that marked his and previous generations. This faith, together with a corollary skepticism about state government, suggested robust judicial enforcement of Federal rights.

For these reasons the Justice famously stood firm even against challenges to the controversial remedy of bussing, an

149. *See Union Gas Co.*, 491 U.S. at 45-46.

150. By contrast, the plain statement rule in *Gregory v. Ashcroft*, 501 U.S. 452 (1991) is distinguishable precisely because it is inconsistent with the most relevant case law.

issue that prefigured the Court's eventual turn toward state concerns. *Milliken v. Bradley*, of course, was the watershed case in which the Court refused to uphold interdistrict bussing as a remedy for segregation.[151] This decision prompted Justice White to file a long and powerful dissent[152] that typifies both his suspicion of state government and his pragmatic interpretive approach. The key aspect of the Justice's position was his rejection of the proposition that the relevant actors were local school districts rather than the state that created them. In consequence, it was the state that bore the ultimate burden of remedying previous Equal Protection violations. It followed, therefore, that a state's formal division of schooling into local districts was not a barrier to a feasible remedy even when actual de jure discrimination had been undertaken by certain districts and not others. As Justice White put it:

> The core of my disagreement [with the majority] is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts. If this is the case in Michigan, it will be the case in most States.[153]

Justice's White's interpretive method in supporting his conclusion is a textbook example of his practical style both in terms of real world results and reliance on previous cases that grappled with the specific problem. As for practical effects, the dissent, in vintage White fashion, recounts in detail the near impossibility of ending segregation by means of an interdistrict remedy within the confines of Detroit. In addition, he sounds the theme of judicial deference to those best situated to solve the problem—not deference of the judiciary to the other branches, but of the Supreme Court to the District and Circuit

151. 418 U.S. 717 (1974).
152. *Id.* at 762 (White, J., dissenting).
153. *Id.* at 763 (emphasis added).

Courts, who were "on the scene and familiar with local conditions."[154] As for precedent, the Justice notes that the majority has none, but instead "fashions . . . an arbitrary rule that remedies for constitutional violations occurring in a single Michigan school district must stop at the school district line."[155] Precedent, moreover, cuts against the majority in at least two important ways. First, it supports the idea of deference to the exercise of equitable power by the local Federal courts.[156] Second, it supports the argument that the relevant actor for Fourteenth Amendment violations and thus remedies is the state, not the subdivisions that it controls.[157]

Finally, it is worth noting what the Justice does not do. In once sense, his focus on the state is itself a formalist claim. That is, against the claim that the formal subdivisions are the relevant players, he could have argued simply that the state is another formal actor that, moreover, is the one expressly mentioned in the text of the Fourteenth Amendment. Instead, he makes this argument in practical terms emphasizing that state's plenary power over the districts and relying on the case law that singles out the states.

Late in his tenure, Justice White took a similarly aggressive stance with regard to taxation. This issue arose in *Missouri v. Jenkins,* a case in which a Federal district court had directly ordered an increase in local property taxes in order to bring the Kansas City, Missouri, School District in compliance with the Equal Protection Clause notwithstanding a state law that would have prevented such an increase.[158] Writing in relevant part for a 5-4 majority, the Justice declared that while the district court abused its discretion in ordering the tax hike directly, nothing prevented it from ordering "a local government with taxing authority . . . to levy taxes in excess of the limit set

154. *Id.* at 768. As he elsewhere put it, "I am surprised that the Court, sitting at this distance from the State of Michigan, claims better insight than the Court of Appeals and the District Court as to whether an interdistrict remedy for equal protection violations practiced by the State of Michigan would involve undue difficulties for the State in the management of its public schools." *Id.* at 769.

155. *Id.* at 768.

156. *Id.* at 769 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971)).

157. *Id.* at 770-74 (citing, *inter alia*, Cooper v. Aaron, 358 U.S. 1, 16 (1958)).

158. 495 U.S. 33 (1990).

by state statute where there is reason based in the Constitution for not observing the statutory limitation."[159]

Once again, Justice White defended his position with an eye to its actual consequences and earlier judicial experience with the matter at hand. Among other things, the opinion makes clear that it matters whether a court requires a local entity to raise taxes at a rate appropriate to effect a desgregation remedy and whether it orders a specific tax increase itself. As the Justice put it, "[t]he difference between the two approaches is far more than a matter of form."[160] In practical terms: "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."[161]

The thrust of the opinion, however, remained its ruling that the Constitution authorized rather than prevented the Federal judiciary to order localities to raise taxes to comply with constitutional requirements even in the face of contrary state laws. And on this point the Justice, in classic fashion, hews close to precedent. Quoting *Pennsylvania v. Union Gas Co.* he rejects any Tenth Amendment bar on the ground that the Fourteenth Amendment "'was avowedly directed against the power of the States.'"[162] Relying on "a long and venerable line of cases,"[163] the opinion further rejects the objection that a judicial order directing a locality to levy taxes exceeds Article III. In addition, he likewise dispenses with the argument that state law can prevent such orders pointing to precedent dating from Reconstruction.[164]

Perhaps because the majority makes no originalist claims or historical flourishes, the *Milliken* dissent makes no histori-

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159. *Id.* at 57.

160. *Id.* at 51.

161. *Id.*

162. *Id.* at 55 (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., concurring in part and dissenting in part)).

163. *Id.* at 55. The list, which is long, begins with *Board of Commissioners of Knox County v. Aspinwall*, 65 U.S. (24 How.) 376 (1860); *Missouri v. Jenkins* also erroneously cites this case to the year 1861, but gets the right page number and goes through *Louisiana ex rel. Hubert v. Mayor and Council of New Orleans*, 215 U.S. 170 (1909) and up to *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218 (1964).

164. U.S. ex rel. Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866).

cal allusions either. Nor does his *Jenkins* opinion, perhaps because it is the majority. Worth pointing out, however, is that Justice White's conception of the remedial power of the local Federal courts to enforce Equal Protection is entirely consistent with the actions of the lower Federal courts themselves during Reconstruction.[165] As such, Justice White's performance in *Milliken, Jenkins*, and his stance on the remedial powers of the Federal courts, presumably are also consistent with the views of Ephraim White, to say nothing of his son, Charles Sumner.[166]

D. Foreign Affairs

Justice White's lone dissent in *Sabbatino* is among his most brilliant opinions. This fact alone might merit considering the Justice's outlook on foreign affairs law in its own right. Foreign affairs law, moreover, can only become more important as globalization—not to mention U.S. interventionism—continues to expand.[167] Yet as it happens, foreign affairs analysis replicates federalism concerns in several respects. It generates similar sorts of sovereignty claims and counterclaims. Likewise, it also raises comparable questions about the proper judicial role for resolving them.

Not surprisingly, the *Sabbatino* dissent[168] parallels, on the international plane, the Justice's orientation and method that is evident in his domestic jurisprudence. Briefly stated, the Court enunciated a broad version of the "act of state" doctrine, under which courts of the United States are both precluded from inquiring into public acts of a recognized foreign sovereign committed within its own territory and must further uphold those acts when challenged. As applied to *Sabbatino* itself, the Court upheld an uncompensated expropriation of American assets by Cuba in violation of customary international law. This stance Justice White rejected in unusually strong language, commencing his opinion with the declaration that, "I am dismayed that the Court has, with one broad stroke, declared the

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165. *See* KACZOROWSKI, JUDICIAL INTERPRETATION, *supra* note 99.

166. Justice White remained consistent in terms of doctrine and method throughout his tenure. *See* Bazemore v. Friday, 478 U.S. 385 (1986); Missouri v. Jenkins, 495 U.S. 33 (1990); United States v. Fordice, 505 U.S. 717 (1992).

167. *See* Martin S. Flaherty, *Aim Globally*, 17 CONST. COMMENT. 205 (Summer 2000).

168. 376 U.S. 398, 439 (1964) (White, J., dissenting).

ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases."[169]

In rejecting the blanket application of the "act of state" doctrine, the Justice replicated his federalism jurisprudence in a number of key respects. As in the "state sovereignty" cases, the *Sabbatino* dissent first of all recalls White's dislike for abstract, judge-made sovereignty barriers that prevented holding accountable state actors, which in this case happened to be nation states. As he put it, the majority's extension of the "backward-looking doctrine" had been "never before declared in this Court."[170] That said, the parallel is not perfect. In the domestic federalism cases, the current Court has deployed judge-made doctrines to impede Federal measures that clearly have a democratic grounding, whether Acts of Congress or provisions in the Constitution. By contrast, while customary international law may reflect a transnational consensus, it does so through processes without the same type of institutional democratic mandate.[171] But as the dissent itself suggests, several factors inclined the Justice to take international law seriously nonetheless. One was the Justice's strong belief that the Constitution, in part through the Founders, incorporates the law of nations into Federal law. The other was his evident respect for courts worldwide fashioning rules incrementally in discrete cases, esteem that possibly went back as far as his time at Oxford. Still one more was the informal democratic pedigree of international law norms as representing a "consensus among civilized nations."[172]

Beyond sovereignty barriers, the *Sabbatino* dissent also dovetails with Justice White's commitment to robust use of judicial power when legitimate. As in the judicial power cases, the opinion powerfully makes the case that where states—here nation states—are bound by a superior law—here the interna-

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169. *Id.*

170. *Id.*

171. Under the classic definition, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986). Typically actors that are either not directly elected, or elected as all – for example, courts, academics, and non-governmental organizations – determine whether norms have met the basic requirements of "general practice" and "sense of legal obligation" (*opinio juris*).

172. *Sabbatino*, 376 U.S. at 453 (White, J., dissenting).

tional law—the judiciary has a duty to enforce that law and provide meaningful remedies. After rejecting the majority's reasons for applying the act of state rule, the dissent leaves no doubt that judicial duty is not just the countervailing value but the baseline. "I start," the Justice declares, "with what I thought to be unassailable propositions: that our courts are obliged to determine controversies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law."[173] The Justice's conception of judicial responsibility therefore made the majority's position a double dereliction. Bad enough that the act of state doctrine prevented courts from settling controversies under the applicable law. But as noted, the majority's application of the doctrine forced the courts to validate "lawless acts."[174]

In this context, the Justice's own exception to the baseline of judicial duty is informative and ultimately consistent. Justice White did famously conclude the *Sabbatino* dissent by allowing the application of the act of state doctrine, at least in effect, if the Executive Branch requested that the courts abstain from deciding the controlling issue of a particular case. This limited concession, however, expressly rests upon a practical separation of powers concern unique to foreign affairs—the possibility that a U.S. court finding that a foreign sovereign has violated international law will frustrate foreign policy initiatives that the Executive is uniquely equipped to undertake.[175] Even then, it remains that judicial deference in this context is to a branch of government that is both national and democratically accountable.

In terms of method, the *Sabbatino* dissent remains a *tour de force* in its review of both precedent and practical consequences. As for precedent, the dissent first offers an exhaustive examination on the point that the courts of other nations have examined expropriations in light of international law claims. What follows are extensive citations from the United Kingdom, the Netherlands, Germany, Japan, Italy, and France, along with the observation that the majority had failed to offer any foreign case law to the contrary.[176] The opinion displays

173. *Id.* at 450-51.
174. *Id.* at 439.
175. *Id.* at 461-72.
176. *Id.* at 440 n.1.

similar rigor in demonstrating that the Court had never applied the act of state doctrine in cases involving the violation of international law, surveying cases from the twentieth century through the Civil War to the Marshall Court.[177]

The dissent likewise provides a vintage example of Justice White's concern for the real world consequences of abstract constructs. This focus first comes into view as the opinion notes the "sound policy reasons"[178] that underlie the usual application of the act of state rule to foreign laws affecting tangible property located within the borders of a nation that the United States has recognized. Among these reasons are: stability in transnational transactions; harmony between nations; encouragement of diplomatic dispute resolution; and respect for executive initiative in foreign relations. Yet, White continues, in classic pragmatic fashion, "Contrary to the assumption underlying the Court's opinion, these considerations are relative, their strength varies from case to case, and they are by no means controlling in all litigation involving the public acts of a foreign government."[179] Beyond this, the Justice becomes downright scathing in his critique of the majority's blanket "speculations" about how a judicial determination that a foreign sovereign has violated international law would undermine U.S. foreign policy in general and/or the Executive's pursuit of foreign policy in particular.[180] To take one example, the dissent notes that while directing a litigant to seek diplomatic or domestic legal remedies may be sensible, "the possibility of alternative remedies, without more, is frail support for a rule of automatic deference to the foreign act in all cases."[181] Such a rule, moreover, is "peculiarly inappropriate in the instant case,"[182] given that Castro's Cuba would be one of the less promising forums to seek remedies for state confiscation of capitalist assets.

The *Sabbatino* dissent's dedication to international law also reflects the Justice's generational commitments – both his own and predecessor's—that go beyond concern for precedent and consequences. The most immediate, though less immedi-

177. *Id.* at 441-45.
178. *Id.* at 444.
179. *Id.* at 447.
180. *Id.* at 457-72.
181. *Id.* at 460.
182. *Id.*

ately apparent, influences arguably result from World War II and Yale. As noted, the Justice had twice come face to face with a breakdown in world order, first in Europe during the Nazi invasion of Poland, then in the Pacific during the Navy's campaign against Japan. These experiences likely drove home the need for global stability and rule of law that figures prominently throughout the opinion.[183] Yale almost certainly had a less dramatic but more tangible influence through the person of Myers McDougal.[184] One of the Justice's former professors, McDougal had long been an architect of the "New Haven" school of international law, which broadly sought to apply legal realist concerns for context and outcomes to foreign affairs in the service of transnational legal order.[185] In the event, McDougal had co-authored an *amicus* brief in *Sabbatino* arguing against wholesale application of the act of state rule.[186] Not surprisingly, McDougal harshly criticized the Court's decision both in the academy[187] and before Congress.[188]

Finally, the *Sabbatino* dissent looks past the Justice's own era to the Founding. Here the opinion unusually includes an all but originalist case for the proposition that "[t]he doctrine

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183. *See., e.g., id.* at 453 ("Principles of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof.").

184. I am indebted to Kate Stith for pointing out this connection.

185. *See The New Haven School* in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS, 110-112 (Robert J. Clark, et al. eds., 1996). For an overview by McDougal himself, *see* Myres S. McDougal and Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L. L. 1 (1959).

186. *See* Brief Amicus Curiae of the Executive Committee of the American Branch of the International Law Association at 7-22, 26-48, 52-56, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16). The brief was co-authored by Lee Albert, who clerked for Justice White in 1963. In Harold Hoh's view, "Justice White's dissent, which repeatedly emphasized the judicial duty to decide cases in accordance with international law, bears striking parallels to the amicus curiae brief." Harold Hongju Hoh, *Transnational Public Litigation*, 100 YALE L. J. 2347, 2363 n. 89.

187. Myres S. McDougal & Robin-Eve Jasper, *The Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments* in PRIVATE INVESTORS ABROAD – PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1981, 1, 67-68 (Martha L. Landwehr ed., 1981); Myres S. McDougal, *Comments*, 58 PROC AM. SOC'Y INT'L L.. 48, 48-50 (1964).

188. *Foreign Assistance Act of 1961: Hearings on H.R. 7750 Before the House Comm. on Foreign Affairs*, 89th Cong., 1st Sess. 1037 (1965) (testimony of Myers S. McDougal).

that the law of nations is a part of the law of the land, originally formulated in England and brought to America as part of our legal heritage, is reflected in the debates during the Constitutional Convention and in the Constitution itself."[189] To support this view of the "clear understanding of the Framers,"[190] the Justice cites not just the Convention debates, but several essays in the *Federalist*, Secretary of State Thomas Jefferson, Attorney General Edmund Randolph, as well as secondary works.[191] This he augments with the Constitution's text and early Court opinions.[192] In this regard, his own generation merely relearned lessons that had been present at the creation.

CONCLUSION

Like his chambers, Byron White's federalism jurisprudence reflects the man, his generation, and like-minded generations that came before. Though a classical Westerner, he approached the Constitution, above all, as an American. Throughout his career, the Justice held fast to an expansive view of national power, an abiding suspicion of "state's rights," a firm belief in the robust enforcement of federal rights where federal rights were clear, and a commitment to the role of the United States as good citizen under the international rule of law. He defended these positions, moreover, based upon his conviction that the legitimacy—indeed, the superiority—of the national government that the Constitution established, rested upon nationwide democracy. Congress and the President, rather than the courts or the states, represented the best means for addressing society's pressing problems both because they were best positioned to grapple with them in an informed, pragmatic fashion and because in this lies the definition of national, self-government. Courts, including the Supreme Court, had an important role to play in the solution of national problems, especially where Constitutional law was called upon for firm and creative enforcement of principles that had been set forth through democratic means. But as the Justice's opinions make clear, the judiciary had little or no basis to place limits on national self-rule through the invention of formalist rules on

189. *Sabbatino*, 376 U.S. at 451 (White, J., dissenting) (citations omitted).
190. *Id. at* 452.
191. *Id.* at 451 n.12.
192. *Id.* at 451-52 nn.13 & 14.

behalf of local government. As the Justice's later opinions show, the challenges that the Court presented to the Justice in the name of federalism, merely served to confirm his nationalist stance.

In both substance and method, the Justice's approach was faithful to the Constitutional achievements of his generation, and further reflected the values of earlier generations that had left complementary legacies. Justice White's federalism jurisprudence loudly echoed his own, direct experiences in the Kennedy Justice Department, in World War II, and during the New Deal, both in the high altitudes of New Haven and rural Colorado. Yet, it also echoes similarly nationalist commitments evident among the generation that fought to preserve the Union during the Civil War and render that victory meaningful through Reconstruction, including his grandfather. And though no family connection can be traced, Justice White's nationalist opinions also echo, at times self-consciously, the bases on which power shifted to the national government during the Founding.

From an even larger perspective, it may be that the wisdom of Justice's White's views are merely in temporary eclipse rather than in permanent decline. On a larger view, one pattern that has repeated itself in American Constitutional history has been long periods during which history has devolved to the states and localities, after which the resulting regime proves unequal to coping with great national crisis. At these points, certain generations of Americans have been called upon to revive and remake the national government, often in ways that place a premium on the pragmatic use of national legislative power backed up by a judiciary mindful of its role. Such a pattern was evident in the Founding generation, the Civil War generation, and the generation of which Justice White was such a conspicuous exemplar. If, and indeed when, this pattern repeats, it will be to his legacy, among others, that future Justices and citizens will turn.