JUSTICE BYRON R. WHITE: HIS LEGACY FOR THE TWENTY-FIRST CENTURY

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The work of the Supreme Court of the United States is simultaneously both political and nonpolitical. It is political in the sense that some of the nation's most inflammatory partisan issues come before the Court.[1] Even in routine cases, divisive issues about the distribution of status, wealth, and power lie just beneath the surface of the justices' opinions;[2] indeed, the Court's ability to limit its own docket encourages it to hear only cases that present conflicting issues of social policy.[3]

At the same time, the Court brings trouble upon itself when it acts in an overtly partisan fashion. Indeed, the Court is questioned whenever it tries openly to address policy questions. The difficulty stems from Americans' foundational assumption that policymaking is legitimate only if it is democratic. According to our simplistic caricature, only the people and their elected representatives can make law; the duty of judges, especially of appointed judges, is merely to interpret and apply that law.[4] Newly appointed justices, perhaps, might have some claim to democratic legitimacy, at least as long as the president who appointed them remained in office. But justices who have sat on the Court for many years typically are out of touch with electoral politics and with the current democratic will: one need think only of the Four Horsemen during the New Deal. Justices like these, it is thought, have no business deciding the contentious policy issues that come before them.

But they must decide them; they have no choice. From where does their authority come? The received wisdom, initially elaborated with clarity and elegance by Chief Justice

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1. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000).

2. *See, e.g.*, Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

3. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 429-37.

4. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333-40 (1998), for a recent survey of the vast literature.

John Marshall, is that judges resolve questions of law, not issues of politics, and that law is distinct and different from politics.[5] This answer, however, only raises the next question—namely, how is law distinct and different?

Law professors have a standard answer for this difficult question, as they do for most questions. Law, the professoriat argues, is different from politics because it demands a level of "reason, coherence, and rationality"[6] that politics lacks. Every judge, many of my colleagues argue, has a duty to identify a core philosophical principle, such as equality, in which he or she believes and then to reason from that principle to elaborate a consistent jurisprudence.[7]

Justice Byron R. White accepted most of these precepts. As a small "d" democrat,[8] he began with the proposition that the American people should govern themselves and should choose the policies under which they want to live. He also appreciated the Supreme Court's lack of democratic legitimacy and thus understood that, if the Court was to do its job, it needed a legal, as distinct from a political basis, for its decisions.

But Justice White was never able to comprehend law in the deeply elitist way that most professors perceive it—as a consistent elaboration of rightly chosen philosophical principle. He could never buy fully into this Federalist tradition, which, through Joseph Story, has come to dominate the legal acad-

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5. *See* WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 59-71 (2000).

6. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, *in* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li, xci (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

7. *See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE (1986).

8. In the oral version of this article I labelled White a Democratic-Republican because of his view, in which Thomas Jefferson, the first Democratic-Republican president, concurred, that the Supreme Court should not play a major role in directing the course of the nation's social change. For background, see NOBLE E. CUNNINGHAM, THE JEFFERSONIAN REPUBLICANS: THE FORMATION OF PARTY ORGANIZATION, 1789-1801 (1957); NOBLE E. CUNNINGHAM, THE JEFFERSONIAN REPUBLICANS IN POWER: PARTY OPERATIONS, 1801-1809 (1963); GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 136-81 (1981). I have been persuaded by Richard Cordray, that the label is not a fully appropriate one. *See generally Justice White and the Democratic-Republicans*, 74 U. Colo. L. Rev. 1319 (2003).

emy.[9] White refused to assume power "to govern the country without express constitutional authority" and found the Court "most vulnerable . . . to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[10] The Justice would never impose his values on the nation at large in order to point it in what he believed the right direction.

Byron White found the imposition of values elitist and pretentious, and he utterly rejected all elitism and pretense. As all his law clerks learned in chambers, the Justice was simply too smart for philosophical principle: his powerful analytic mind found the holes in any argument of theory that anyone advanced. After discussing the Justice's anti-elitism and lack of pretension, I plan to examine how Justice White's behavior suggests a role for the Supreme Court in the American polity on the basis of something other than philosophical principle.

I. THE JUSTICE'S ANTI-ELITISM AND LACK OF PRETENSION

As a young man who had been trained by law professors to be a law professor, I began (and, indeed, ended) my clerkship for Justice White with the assumption that judicial greatness resulted from the articulation of a distinctive jurisprudential perspective that would go down in history with the name and key opinions of the justice who had invented it.[11] Of course, the Justice's apparent lack of a well elaborated perspective puzzled me, and I assumed that one of my tasks as his clerk was to fathom his point of view. With an elitism and pretension of

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9. On the creation of an elitist, antidemocratic, Federalist tradition in American legal education ultimately associated with Harvard, see R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 237-70 (1985); Andrew M. Siegel, *"To Learn and Make Respectable Hereafter": The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978 (1998); R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, *in* THE CONSTITUTION AND AMERICAN LIFE 154 (David Thelen ed., 1988). As a historical matter, I want to make clear that John Marshall, the great Federalist Chief Justice, was a man of modesty who tended to reject the elitism and pretense that I connect with Joseph Story—who for reasons of local Massachusetts politics happened to be a Jeffersonian—and the Harvard Law School that Story did so much to create. *See* R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 462-67 (2001).

10. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

11. *See* ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970).

which only a recent Harvard graduate is capable, I thought I might even help him elaborate it.

But Justice White also scared me. He was the smartest man I had ever met, with a powerful analytic mind, lightning-fast reading skills, and a photographic memory. I will never forget the time the Justice referred me to a specific page of a specific volume of the *United States Reports* for a citation I needed, or the many lunches he had with me and my fellow clerks in which he encouraged us to argue particular legal positions and then destroyed every argument we made. As a result, it took me months to summon up the courage to ask my pretentious question: what was the distinctive judicial philosophy that Justice White was developing that would make him into one of the great justices in the Court's history. It took me years to appreciate the Justice's answer.

His answer came from a different world than my question. Being a Justice of the Supreme Court of the United States, he explained, was "just a job." One's duty in any job, White believed, was to work hard to the best of one's ability and to serve one's employer well. He had no interest in using his job to make himself into a celebrity, either in the present or in the historical future. He wanted only to serve his employers, the American people, as effectively as he could.

As a result of his football play, Byron R. White had first become a celebrity at the age of nineteen, and he did not enjoy the role.[12] It set him off from other people and kept him from being just one of the guys.[13] It also placed him under pressure: he knew that people expected him to perform consistently at the tasks, whether on a football field or off, that had made him into a celebrity, and he was concerned not to disappoint them. He found himself pressing all the time to live up to his reputation.[14] Fame also made it necessary to deal with the press. He knew that, in pestering him, reporters were merely doing their job,[15] but he also knew that he had to answer them in a fashion that would induce them to file stories that would bring fans to the stadium to meet his employers' expenses.[16]

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12. *See* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 39-42 (1998).

13. *See id.* at 40.

14. *See id.* at 110.

15. *See id.* at 40.

16. *See id.* at 120.

Being a celebrity has its compensations, among them, money. As a teenager from an impoverished background, Byron White was willing to live with celebrity status in order to finance the education he wanted.[17] But later in his life he never sought to accumulate a fortune, nor did he crave the other compensations celebrity status brings. As a result, being a celebrity was at best simply a chore.

Byron R. White's legacy thus was not about articulating a philosophically consistent theory of law that others, especially legal academics, would notice. Rather his legacy was about how to be a good citizen, a great leader, and an outstanding lawyer. Byron White, in the words of President John F. Kennedy, was "the ideal New Frontier judge"[18] who took seriously the words of his President, "ask not what your country can do for you—ask what you can do for your country."[19] White never asked how he could use his position as a Justice of the Supreme Court to advance himself, his reputation, or his ideas; his goal was nothing more than unselfish dedication to duty and service. The "ideal New Frontier judge" had the same approach to jurisprudence that the New Frontier had to public service in general, which was not to impose a preordained ideology on the nation, but to respond pragmatically to problems and issues as they arose.[20]

Justice White's philosophy of duty and service on the bench was consistent with his approach to his earlier jobs. One can observe the same philosophy in his professional football play, in his career in private practice, and in his post as Deputy Attorney General. But it manifested itself with special clarity in his military service.

White, who had enlisted and trained as an intelligence officer, found himself in combat on two occasions on the Pacific front during World War II. On both, Japanese kamikaze pilots had attacked a command vessel on which White was stationed. He was never injured, but especially in the attack on the carrier on which he served, the *Bunker Hill*, he took extraordinary risks and displayed great bravery rescuing others, as he per-

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17. *See id.* at 90, 159.

18. *Id.* at 322.

19. John F. Kennedy, *Text of Kennedy's Inaugural Outlining Policies on World Peace and Freedom*, N.Y. TIMES, Jan. 21, 1961, at 8.

20. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974, at 458-485 (1996).

formed what he would have seen as merely the duty of an officer to serve his men.

A fellow officer, E. Calvert Cheston, wrote how, during the four hours after the attack on the *Bunker Hill*, White fought fires and pulled men from smoke-engulfed positions:

> He was absolutely focused on the fires and on the men. A shell would go off or an explosion would occur, but there was Byron—locked in on the man who needed help or on the hose that needed to be manned. I don't think he ever thought about himself. We were all working frantically, but he stayed so cool it was almost unnerving. And he never took a rest.[21]

Less than twenty years later, the man who "[n]ever thought about himself"[22] took his seat as the ninety-third Justice of the Supreme Court of the United States.

One final incident, from the time when White already was on the bench, merits note. It transpired after a near record snow storm had occurred in Washington, D.C. As told by a former law clerk, he and his co-clerk

> had finally arrived at the Court about three hours late, but the Justice was nowhere to be seen. We called his house, only to discover that he had left early that morning. After much stewing about whether we should send out an all points bulletin for a missing Justice of the Supreme Court, he finally showed up, totally oblivious to our concerns. He had simply been busy shoveling people out of snowdrifts and pushing stuck cars—just like anyone would do for another person in need.[23]

Justice White simply was not into self-aggrandizement. The Justice never forgot his roots in Wellington, Colorado, his service in the navy, his own modest home on the edge of the woods in Northern Virginia, or his walks in the woods with his golden retriever, Josh.[24] He knew that millions of Americans led personal lives such as his, and he wanted to live as they did

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21. HUTCHINSON, *supra* note 12, at 191.

22. *Id.*

23. David M. Ebel, Law Clerk Recollections of Justice Byron R. White—The Man Behind the Legend, Remarks at Memorial Service for Justice White at the Supreme Court (Nov. 16, 2002).

24. *See* HUTCHINSON, *supra* note 12, at 14-24, 336-37.

and to do what little he could to help them continue to live that way as well.

Byron White was not interested in crafting his historical reputation in the fashion that Justice Felix Frankfurter had crafted the reputation of Justice Oliver Wendell Holmes and had tried to craft his own.[25] Of course, he would have cared that those who had known him—family and friends, colleagues and protégés—remember him; such is a common human urge. But I wonder what he would have thought about this conference? I suspect he might have found it amusing[26] and a bit "exaggerated"[27] and might have wondered why we are trying so hard to record his jurisprudential legacy for posterity, when he had labored quite consciously to leave us little in the way of a distinctive legal philosophy. As I write this article, it occurs to me that perhaps the Justice did not successfully teach me his lesson about how one should do a job or wipe out all my professorial pretension. Alternatively, it may be that the legal academy is so irrevocably tied into the model of Federalist elitism that Justice Story brought to Harvard in 1829 that we academics cannot do anything without calling elitism and pretension into play.

II. JUSTICE WHITE'S JURISPRUDENTIAL LEGACY

In any event, I cannot escape the effort to articulate the legacy that Justice White left us. The legacy is a multifaceted one that the Justice himself never brought together into a single, coherent point of view. As we have seen, the Justice never articulated an explicit jurisprudence of constitutionalism. But his refusal to speak does not mean that we cannot find a legacy secreted in the interstices of his actions.

Of course, it is not absurd for people like Felix Frankfurter, who attain an office in which it is possible to achieve fame, to think about themselves and strive to advance their reputations. Nor ought we condemn those who use power, as did several justices of the Warren Court, to try to control the course of history so that those who live after them will lead bet-

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25. *See* I. Scott Messinger, *Legitimating Liberalism: The New Deal Image-Makers and Oliver Wendell Holmes, Jr.*, 1995 J. SUP. CT. HIST. 57.

26. White was, after all, a graduate of Yale Law School and had never had a close relationship with Harvard.

27. HUTCHINSON, *supra* note 12, at 40.

ter lives[28] and, as a by-product, will have good thoughts of them. Good leadership surely can be about pointing society in one of several possible directions.

But I cannot emphasize enough the determination of Justice White to reject any such approach to constitutional adjudication. He was sufficiently satisfied with where the nation was that he had no wish to use the judiciary's power to point it in any one of several possibly different directions. He had no agenda: he was a constitutional conservative who saw no major role for the Court in directing the course of the nation's social change.

It is essential to be precise in identifying the sense in which the Justice was conservative. He was not an originalist on the model of Justice Clarence Thomas.[29] Justice White never grounded the opinions he wrote in original intent, and he would have found absurd Justice Thomas's efforts to restore American government to what it had been in 1789. It is equally unimaginable to think that he would have joined the current Court's majority in its march to a vision of federalism that restores the independence and power of the states.[30]

Nor did the Justice feel bound either by the Court's precedents or by his own votes in earlier cases. He was not bound by *Roe v. Wade*,[31] for example, when he wrote his dissenting opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*.[32] On the other hand, he also did not adhere to his dissent in *Miranda v. Arizona*[33] when he wrote the opinion of the Court upholding *Miranda* in *Edwards v. Arizona*[34] and joined a similar opinion in *Minnick v. Mississippi*.[35] I remember his comment one day in chambers that "everything is up for grabs" once the Court grants certiorari on an issue. Once a case was on the Court's docket for plenary consideration, he approached it with an open mind, poured over the briefs, lis-

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28. *See* BICKEL, *supra* note 11, at 11-14, 19-20.

29. For an illustration of Justice Thomas's originalism, *see* United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring).

30. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

31. 410 U.S. 113 (1973).

32. 476 U.S. 747, 785 (1986).

33. 384 U.S. 436, 526 (1966).

34. 451 U.S. 477 (1981).

35. 498 U.S. 146 (1990).

tened intently to arguments from all sides, and strove to reach the best possible decision.

At the same time he was a constitutional conservative, Justice White was a political liberal who understood that the Constitution was a living document[36] and that the nation changed over time. He never expressed a view that the United States had reached its prime during his youth, during the Kennedy years, or during the years when his was the swing vote on the Court, let alone at some earlier time. Justice White was not the sort of conservative who tried to keep the law from changing or to stop it in its tracks; he was comfortable in letting the future pursue a different path, whatever that path might be. He looked to a better and more just America, in which the people would advance their well-being through democratic governance.

President Kennedy's New Frontier constituted a moment of hope for a finer world,[37] and Byron White was a committed participant in that moment of hope. He had no expectation, however, that the Supreme Court would take a leading part in the unfolding of change. Justice White trusted the people and the representatives they elected to office. He believed that the people would choose what was right and that those they elected would faithfully execute their choices.[38] In the end, as Justice White told me, he merely wanted to do his job well. But what did he understand that job to be?

Never a man of excessive words, he stated his conception of the job of Supreme Court justice immediately after his confirmation hearing—"to decide cases."[39] The job of the Court, as White saw it, was to administer justice under existing law, to repair minor flaws in the edifice of the law and thereby make the law more just, and to follow the leadership of the political branches should they decide to change the law or Constitution more fundamentally. He saw the task of the Supreme Court as

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36. Justice Brandeis appears to have been the first member of the Court to articulate the concept of a living Constitution. *See* BICKEL, *supra* note 11, at 20-21.

37. *See* ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 206-15 (Greenwich House 1983) (1965).

38. *See* Justice Byron R. White, *Resolutions of the Bar of the Supreme Court of the United States: In Appreciation of the Man and of the Public Servant* (Nov. 18, 2002), *at* http://www.medaloffreedom.com/ByronRaymondWhite.htm.

39. HUTCHINSON, *supra* note 12, at 331.

one of conserving the existing legal/constitutional order—of preserving the rule of law.

Justice White understood the rule of law in quite traditional ways. He was a "'Justice's Justice,"[40] who insisted that the Supreme Court behave as a court. He was a stickler about matters of jurisdiction and procedure and regularly brought jurisdictional and procedural irregularities to the attention of his colleagues. He also took seriously the notion that litigants have a right to be heard. He read with care papers submitted by parties, and he took oral argument seriously. He did not make up his mind before he heard a case; he approached the job of deciding cases impartially and without prejudgment. His openness to persuasion on a case-by-case basis was reflected in the nonideological, superficially random pattern of his decisions.[41] Above all, Justice White was fiercely independent: he understood that "once a judge gets on the bench, he is free to make honest decisions about cases in accordance with the law of the land and without feeling obligated to or under the thumb of anybody."[42]

There is a profound connection between Justice White's commitment to law, on the one hand, and his lack of pretension, on the other. Both, in turn, rested on a foundational assumption that life in America was good and not in need of radical change of a sort that a few individuals could produce. Individuals, and even some groups, might need help to facilitate their participation in the nation's life, and the Justice always stood ready altruistically to help them. It always was right to help dig people out of the snow or to keep them from being burned in ship fires.

But Justice White's humility taught him that he could do nothing to eliminate either fire or snow. His humility made it plain that there was no need for a theory justifying a radical judicial restructuring of American life because the judiciary lacked the capacity to transform the nation into something vastly superior to what it already was. His trust that the peo-

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40. Pierce O'Donnell, *Common Sense and the Constitution: Justice White and the Egalitarian Ideal*, 58 U. COLO. L. REV. 433, 435 (1987).

41. *See* White, *supra* note 38, at 4-5; HUTCHINSON, *supra* note 12, at 341, 355, 364-65, 391-92; Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471, 471-72 (1987); O'Donnell, *supra* note 40, at 435 nn.9-10.

42. HUTCHINSON, *supra* note 12, at 469 (interview with Byron R. White by Clifford May, June 30, 1996).

ple knew what was best for themselves combined with his humble understanding that he had no right to make choices for others. Taken together, Justice White's humility and confidence in the judgment of the people made him into the sort of conservative who wants merely to muddle along, tinker with problems as they arise, and try to improve society at the margins. Conservatives of this sort have little use for theory; only radicals, whether they be of the left or of the right, crave it. And Justice White was no radical.

III. CONCLUSION

Perhaps my depiction of Justice White's jurisprudence is wrong, and surely it is overdrawn. The Justice, with some frequency, joined Justice Brennan and others in recognizing new constitutional rights,[43] especially in race relations cases,[44] and he never made a fetish out of his hesitancy about imposing his values to determine the nation's future direction. Yet he did hesitate. The Justice never expressed a view that the nation required drastic and fundamental social reform, and he surely did declare that the Supreme Court of the United States had no business imposing such reform. Thus, I feel comfortable in depicting Justice White as a judicial conservative who understood the job of the Court mostly to apply the law as it was, to make adjustments in matters of detail, and to leave it to the people and their elected representatives to set policy and make fundamental changes.

Assuming I have understood the Justice's jurisprudence correctly, how should we evaluate it? How should we compare Justice White to other justices, in particular to Justice Brennan?

For many, Justice Brennan remains a heroic figure who held an "eminent, if not preeminent, position in the annals of

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43. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bur. Of Narcotics, 403 U.S. 388 (1971); Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring); Gideon v. Wainwright, 372 U.S. 335 (1963).

44. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324, 379 (1978) (White, J., concurring in part and dissenting in part); Milliken v. Bradley, 418 U.S. 717, 762 (1974) (White, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 240 (1971) (White, J., dissenting); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

the Warren Court."[45] His jurisprudence was mainly about pragmatically promoting racial and gender equality and individual rights. He sought to remedy the injustices he saw, such as racism and the denial of rights to women, not only in legal theory but in the real world in which victims of injustice lived.[46]

It seems unlikely, however, that Justice Brennan's efforts will succeed. They were not successful while he was on the Supreme Court, and they have not yet succeeded today. No less a personage than President George W. Bush concedes that "[r]acial prejudice is a reality in America" and that "our society has not fully achieved th[e] ideal" that "people of all races must be treated equally under the law."[47] Similarly, women do not fully enjoy their rights: in much of the nation, for example, the availability of abortions to women who do not want to bear a child remains somewhat limited.[48] Perhaps Brennan's efforts will inspire future lawyers, citizens, and justices to keep up the fight for individual rights and racial and gender justice,[49] and perhaps the people of the future will succeed where Brennan failed. If so, he will deserve some of the credit for their success.

Against whatever success Brennan has achieved, we must balance the costs of achieving it. Constitutional theorists of the legal process school always worried that an activist Court would injure its standing and prestige if it tried to impose on the public values that the public rejected.[50] This worry has not materialized. The Supreme Court has emerged from the Warren years and the era of *Roe v. Wade*[51] stronger than ever. Indeed, it seems so strong at the outset of the twenty-first century that its determination of a presidential election[52] and

45. Robert C. Post, *William J. Brennan and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123 (Mark Tushnet ed., 1993).

46. *See generally id.*

47. *Bush's Remarks on Michigan Admissions Policies*, N.Y. TIMES, Jan. 16, 2003, at A26.

48. *See* N.E.H. HULL & PETER CHARLES HOFFER, *ROE V. WADE*: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 260-70 (2001).

49. *See* Post, *supra* note 45, at 136 (arguing that Brennan's ultimate significance will rest on the challenge of his vision, "a challenge we cannot escape").

50. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 247-54 (2d ed. 1986) (1962).

51. 410 U.S. 113 (1973).

52. Bush v. Gore, 531 U.S. 98 (2000).

invalidation of important Congressional legislation[53] has met with little protest beyond that from the liberal legal academy.[54]

But there is yet a further problem. Perhaps, the Court's protection of minorities created a political backlash that induced voters to elect closet racists and sexists who, once in office, turned back the Court's progressive reforms.[55] These racists and sexists, believing that the liberals who legitimated Brennan's use of the Court's power to promote his agenda would also have to accept similar use of judicial power by future justices wedded to different agendas, did not attack the Court itself or do anything to undermine the Court's prestige. Instead, they appointed new justices who shared their agendas to the Court. As a result, the principles of equality and individual liberty for which Brennan stood are being gravely undermined by the conservatives whom they placed on the Court and who are likely to control the Court into the distant future.[56]

All of which brings us back to Justice Byron R. White. While Justice Brennan in his three-plus decades on the bench heroically tilted at windmills, Justice White in almost the same three-plus decades humbly bent in the direction of the wind. Since neither had full control of the Court, we will never know how far each could have gotten if they had had control. But it is quite conceivable that Justice White's humble muddling through would have gotten him to approximately the same place as Justice Brennan's grandiloquent declarations of right and justice, met as they were with popular resistance and backlash.

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53. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000).

54. *See, e.g.*, Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

55. *See* HERBERT S. PARMET, GEORGE BUSH: THE LIFE OF A LONE STAR YANKEE 335-37, 350-52 (1997); THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980 at 388-89 (1982); THEODORE H. WHITE, THE MAKING OF THE PRESIDENT, 1968 at 219-60, 400-10, 430-32 (1969).

56. Professor Robert Post ten years ago explained how Brennan's emphasis on individualism was at odds with what he called the "communitarianism" and "statism" of the Rehnquist Court, as well as with classical concepts of states' rights that Brennan rejected—concepts that have underlain much of the Rehnquist Court's jurisprudence during the past decade. Post, *supra* note 45, at 126-30, 135. Professor Post's analysis, which I find compelling, points to why the jurisprudence of the Rehnquist Court is so threatening to the jurisprudence of Justice Brennan.

If so, scholars need to take Byron White's jurisprudence far more seriously than they have to date. There is little doubt that because of his resplendent judicial philosophy, Justice Brennan will be revered as one of the great jurists of the twentieth century, even though he failed to attain many of his objectives and even though he created a backlash that could return us to a time of even greater injustice than that of the mid-twentieth century. If Justice White by muddling along, heeding the people's voice, and humbly understanding his own limitations achieved as much as Brennan or nearly as much, without creating a backlash that puts at risk all he gained, shouldn't we honor him and his jurisprudence just as much or more?

There is another way of asking this same question. Some recent scholarship, authored by liberals troubled by the reactionary activism of the Rehnquist Court, suggests that the Congress and the people, rather than the Court, should possess ultimate power to elaborate constitutional law.[57] Justice White, more than any other member of the Court over the last four decades, agreed with them. Perhaps, he should be their hero.[58]

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57. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Kramer, *supra* note 54, at 5.

58. I appreciate the difficulty that liberal scholars will have accepting some of Justice White's opinions, such as Bowers v. Hardwick, 478 U.S. 186 (1986). I have suggested elsewhere, however, why that opinion should be read more narrowly than it typically is read. *See* William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347, 360-61 (1987). Moreover, *Bowers* arguably demonstrates what Justice White so deeply believed—that the Court has never possessed the final word in determining how the American people will live: lesbians and gay men have made enormous strides since *Bowers* in gaining popular and legislative acceptance of their rights.