

# BYRON R. WHITE—A JUSTICE SHAPED BY THE WEST\*

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After considering the many thoughtful and even profound ideas that have been expressed, I am grateful to be able to present my thoughts, which follow a much more modest agenda. In the few minutes that I have, I would like simply to relate some of my personal observations about Justice White, and perhaps from those observations one can draw some conclusions both about his character and about his judicial performance.

Justice White has, over the years, occasionally remarked that it is important to select people for the Supreme Court who come from diverse backgrounds. Particularly, in his opinion, it is helpful to select some justices who come from a strong background of private practice. Although Justice White would certainly not disparage those who have been selected from a judicial or academic background, he felt that it was important that some justices be drawn from private practice. I suppose he had in mind the likelihood that such a justice might be more keenly aware of the practical implications of the Court's decisions.

The geographic origin of the various justices also plays an important role in bringing diversity to the Court, and it is that factor that I want to focus upon in my brief remarks. The fact is that Justice White came from the Rocky Mountain West, not too far removed from the west portrayed by the B-grade cowboy movies of our youth. Justice White's character has been inevitably molded by that background.<sup>1</sup>

Borrowing from an old adage, you can take a man out of the West, but you can't take the West out of the man. Justice

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\* A significant portion of these remarks were delivered by Judge Ebel in tribute to Justice White on January 10, 2000, upon the occasion of Justice White's receipt of the Citizen of the West award.

\*\* Judge Ebel is a Judge on the United States Court of Appeals for the Tenth Circuit. In 1965–66, he clerked for Justice White at the United States Supreme Court.

1. In response to Professor Dennis Hutchinson, I would emphasize that when I talk of the West, I would include Iowa and Kansas.

White was born and raised in the West. His core values are Western always have been, always will be. Even though he has spent the last 40 years in that den of iniquity, inside the belt-way of Washington, D.C., he has always marched to a Western tune.

What is a Western tune? For one thing, it is a love of sports and vigorous physical activity. Even the hallowed marble halls of the Supreme Court could not repress the Justice's love of a vigorous round of sporting competition. As rumor has it, while he was just a young law clerk to Chief Justice Vinson, oral argument at the Court was interrupted because of a loud noise, described like distant thunder, coming from the gymnasium located above the courtroom. The Justices sent up a marshal to investigate, and it turned out to be the future Justice White playing a typically robust game of badminton with some of his fellow clerks. I think this was the only time that badminton ever stopped a Supreme Court argument.

He played no-holds-barred basketball and paddle tennis with his law clerks throughout most of his career as a Justice, and the many bruises suffered by those law clerks, both to their egos and various body parts, attest that he never lost his love of vigorous physical competition. The point is, from his life-long experiences with competition came an acceptance of the basic premise of competition, often expressed in his judicial opinions, that some win and some lose, and everyone must accept the consequences of their actions and how they play the game.

Another Western theme is self-reliance. If you grew up in Wellington, Colorado, as did Justice White, you had to be self-reliant just to survive. Anyone who knows the Justice knows that he is a paragon of self-reliance. I can attest from personal experience that the Justice always, and I mean always, called the shots in his Chambers. We clerks might have helped with research and we might even have helped from time to time with some preliminary drafting, but the Justice always relied on his own internal compass when it came to deciding the cases and articulating the rationale. I venture to say that there are few, if any, justices over the last thirty years whose opinions more accurately reflect their own indigenous and sometimes idiosyncratic thought processes, and whose opinions were so little influenced by law clerks or fellow justices.

When one thinks of Westerners, one often conjures up thoughts of a taciturn, non-verbal personality—someone who is

not particularly focused upon inner feelings. The practice out in the rural West was toward blunt talk, direct and to the point. This style, viewed in today's climate of political correctness, may be misunderstood by many, and perhaps even considered offensive by some. Some of Justice White's more controversial opinions, such as *Bowers v. Hardwick*,<sup>2</sup> and his dissent in *Roe v. Wade*,<sup>3</sup> are often criticized as much for their tone as for the result reached. However, for better or for worse, style and tone never were matters of very high priority with Justice White.

Westerners work hard—they have to, because there is a lot of work to be done out here. Justice White acquired his Western work ethic early, as he was out in the fields cutting the tops of sugar beets when he was six years old. He spent long hours as a youth unloading lumber in his Dad's lumberyard and working on the local railroad. He was once asked what he learned from those early years, and his response was, Work hard and don't be late for dinner. He gave a whole new meaning to the phrase hitting the books: his style of legal research as a lawyer and justice has been described as almost physical in nature as he attacked the law, devoured the cases, and scribbled notes everywhere. He would typically arrive in Chambers at about 7:30 in the morning and stay until about 6:30 at night. One law clerk once lamented, I tried beating him into work in the morning, but I finally figured it was like trying to open the refrigerator door before the light comes on. It just couldn't be done.<sup>4</sup> And so, the Justice's thoroughness and interest in detail can be laid at the steps of his upbringing in the West, where he was taught that you don't cut corners; you don't skimp on your responsibilities; and any task worth doing is worth the effort to do it well.

Westerners value modesty. Notwithstanding his Herculean accomplishments, Justice White remained a modest man down to his very core. It is reported that when he was told that President Kennedy was considering appointing him to the Supreme Court, he responded, "Well, I think the President can do much better than that." This turns out to be one of the few oc-

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2. 478 U.S. 186 (1986).

3. 410 U.S. 113 (1973).

4. See Kevin J. Worthen, *Shirt-Tales: Clerking for Justice White*, 1994 B.Y.U. L. REV. 349, 361 (1994).

casions when Justice White's judgment was wrong. One does not need to look far in his judicial opinions to see this modesty, this lack of arrogance, this abiding belief that even Supreme Court Justices do not have all the answers. I suggest that his commitment to judicial restraint may have had its early roots in his modest upbringing.

The main currents of Justice White's judicial philosophy resonate with Western themes. Legal historians, who have tried to articulate his philosophy, come up with several persistent themes in his decisions:<sup>5</sup>

First, and foremost, the job of the Court is to decide controversies between real people, and to decide them fairly and objectively. Ideology can distort the scales of justice, but for Justice White, the job of deciding the case at hand always trumped ideology.

Second, when policy has to be made, look to Congress as the democratic institution of the people to make that policy, rather than to the unelected federal judiciary. I suspect that Justice White was a populist at heart, as Westerners often are, and he preferred to trust the people and their elected representatives, rather than an unelected judiciary, to make the hard political and social choices of the day.

Third, pragmatism is the ultimate litmus test. No matter how fancy the legal theory, Justice White always wanted to know how the rule would work in practice. Could the police continue effectively to fight crime? Could business rationally operate under the proposed rule? Could schools continue to teach young people effectively? If the proposed rule didn't work well in practice, Justice White was unlikely to adopt it, no matter how promising it sounded to academicians. In this regard, he echoes his Western background. Westerners are likely to believe it is more important to get the tractor up and running again than it is to debate the philosophical implications of the industrial revolution.

Fourth, he believed everyone was entitled to equal opportunity and an equal playing field, as it were. Therefore, favoritism to any group, even minority groups, was suspect and had to be justified, if at all, by compelling governmental interests

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5. See Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987); William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 B.Y.U. L. REV. 313 (1994).

and by narrowly tailoring the remedy. Justice White approached showing favoritism to any group with the same skepticism that one would get from an umpire's announcement before the game that he intended to call a different strike zone for one team than the other.

Finally, in the area of criminal law, he believed that the process of criminal trials had to be scrupulously fair. In considering substantive rights of criminals, however, it was important to balance those rights against the right of society to protect itself from crime.

So there you have it Justice White's judicial philosophy in a nutshell: judicial restraint, pragmatism, and confidence in the people and in democratic institutions. Any Westerner would be proud to subscribe to such a judicial philosophy.

Judge Lou Oberdorfer, who has known the Justice ever since their days together in the Kennedy Administration, described the Justice in language that is worth repeating. First, however, I want you to think back to Justice White's hard-scrabble and modest beginnings; think back to his experiences as an All-American football player and rookie of the year in the National Football League; think back to his academic performance where he graduated first in his class at the University of Colorado, first in his class at Yale Law School, and was selected as a Rhode's Scholar to study at Oxford University in England; think back to Justice White's war years, serving under fire in World War II and performing heroically in helping to rescue some of his shipmates after a Kamikaze attack; think back to Justice White's experiences as a dependable and trustworthy transactional lawyer in Denver, which was known in the 1950s as the Queen City of the West; think back to Justice White's experiences as Deputy Attorney General of the United States, confronting the governor of Alabama in a tense confrontation to protect freedom riders. With those recollections in mind, let me now share with you Judge Oberdorfer's summation of Justice White:

Justice White brought to the Court the very best that his generation produced by way of sheer intellectual power, a superb and sophisticated education, battle-tested courage, the ability of a world-class team player to be both competitive and collegial, exquisitely good judgment, indefatigable capacity to work and concentrate, a perfectionist's attention to detail, a habit of successful achievement, and a rich expe-

rience of living and working at the cutting edge of his generation's rendezvous with destiny.<sup>6</sup>

Justice White is many things; complex, difficult to pigeon-hole, impossible to stereotype. But in all that he has done, if one looks back to his background and his Western upbringing, one can see that the acorn hasn't fallen very far from the tree—it rarely does.

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6. Louis F. Oberdorfer, *Justice White and the Yale Legal Realists*, 103 *YALE L.J.* 5 (1993).