Edward Douglass White

[In April, the Law School sponsored a lecture by Mr. Peter Fitzpatrick, a distinguished member of the Chicago Bar, on Chief Justice Edward Douglass White. Mr. Fitzpatrick’s paper follows.]

When Wilson named Brandeis to the Supreme Court seven past presidents of the American Bar Association testified against his confirmation. Ex-president Taft wrote to his wife: “I hope White will not end his judicial career with an apoplectic fit caused by the nomination.” At about this time Brandeis conferred with White. Perhaps, because the opposition to Brandeis recalled to White’s memory the charge of bribery that once had been leveled against him when he fought the Louisiana Lottery, he immediately accepted Brandeis and insisted that Brandeis should look on him not as the Chief Justice but as a father. Following this meeting, in circulating a draft opinion, Brandeis wrote on the copy to be delivered to White, “Father Chief Justice.” In returning the draft opinion, White showed appreciation of the spirit of the ex-

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soldier, but if the soldier had the patriotism, and yet felt compelled to run away when that was needed, he was not of much use.

Together with honesty you must have the second of the virile virtues, courage; courage to dare, courage to withstand the wrong and to fight aggressively and vigorously for the right.

And if you have only honesty and courage, you may yet be an entirely worthless citizen. An honest and valiant fool has but a small place of usefulness in the body politic. With honesty, with courage, must go common sense: ability to work with your fellows, ability when you go out of the academic halls to work with the men of this nation, the millions of men who have not an academic training, who will accept your leadership on just one consideration, and that is if you show yourself in the rough work of actual life fit and able to lead, and only so.

You need honesty, you need courage, and you need common sense. Above all you need it in the work to be done in the building the corner-stone of which we laid today, the law school out of which is to come the men who at the bar and on the bench make and construe, and in construing, make the laws of this country; the men who must teach by their actions to all our people that this in fact essentially a government of orderly liberty under the law.

Men and women, you the graduates of this university, you the undergraduates, upon you rests a heavy burden of responsibility; much has been given to you; much will be expected from you. A great work lies before you. If you fail in it you discredit yourself, you discredit the whole cause of education. And you can succeed and will succeed if you work in the spirit of the words and the deeds of President Harper and of those men whom I have known so well who are in your faculty today.

I thank you for having given me the chance to speak to you.

White—

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change by addressing his new colleague as "Grandfather Justice Brandeis."2

Another instance of White's playing the father role is revealed in Holmes complaining to Laski, "The C.J., who occasionally speaks to me as if I were unknown to the world at large, said the people thought I didn't work when I fired off decisions soon after they were given to me."3

Umbreit wrote of Edward Douglass White that he looked so much like a Chief Justice that he might have merited the position on appearance alone.4 He refers to him as a monumental man, who gave the impression of massive strength. William Howard Taft, who appointed him Chief Justice and later succeeded him in that office, said of White, "Massive, dignified, impressive as was his physical mould, his mental structure was like it . . . His capacity for work was enormous."5 Indeed, while he was a member of the Louisiana Supreme Court White wrote 80 opinions in 14 months.6 During his 27 years on the Supreme Court of the United States he prepared more than 700 opinions.7 His memory was prodigious. His opinions, which were usually lengthy, he delivered orally.

He showed a strong sense of judicial responsibility. Taft, after pointing out that the study of cases with a view to their decision in conference is a greater task than the preparation of opinions, stated that no one could have been more conscientious in this regard than Chief Justice White.8 In the opinions themselves White's sense of responsibility impelled him to dwell continually on the "consequences" that might follow a particular decision.

A suggestion of his general view in all cases is revealed in Holmes' complaining to Laski, "The A. B. Dick Co. sold a mimeographing machine to which was attached a plate which stated "This machine is sold . . . with the license restriction that it may be used only with the stencil-paper, ink and other supplies made by A. B. Dick Co." The purchaser of the machine bought ink from another manufacturer, and the A. B. Dick Co. sued this manufacturer alleging an infringement of its patent. A majority of the court held with A. B. Dick Co. White's dissent foreshadowed the present majority view of the Supreme Court. His argument in part follows:

"My reluctance to dissent is overcome in this case: First, because the ruling now made has a much wider scope than the mere interest of the parties to this record, since, in my opinion, the effect of that ruling is to destroy, in a very large measure, the judicial authority of the States by unwarrantedly extending the Federal judicial power. Second, because the result just stated, by the inevitable development of the principle announced, may not be confined to sporadic or isolated cases, but will be as broad as society itself, affecting a multitude of people and capable of operation upon every conceivable subject of human contract, interest or activity, however intensely local and exclusively within state authority they otherwise might be. Third, because the gravity of the consequences which would ordinarily arise from such a result is greatly aggravated by the ruling now made, since that ruling not only vastly extends the Federal judicial power, as above stated, but as to all the innumerable subjects to which the ruling may be made to
apply, makes it the duty of the courts of the United States to test the rights and obligations of the parties, not by the general law of the land, in accord with the conformity act, but by the provisions of the patent law, even although the subjects considered may not be within the embrace of that law, thus disregarding the state law, overthrowing, it may be, the settled public policy of the State, and injuriously affecting a multitude of persons.

"I cannot bring my mind to assent to the conclusion referred to, and shall state in the light of reason and authority why I cannot do so. As I have said, the ink was not covered by the patent; ... This curious anomaly then results, that which was not embraced by the patent, which could not have been embraced therein and which if mistakenly allowed and included in an express claim would have been ineffectual, is now by the effect of a contract held to be embraced by the patent and covered by the patent law.

This paper will be concerned with White's contribution to the development of American law, principally in the antitrust field and in the field of administrative law. But, first, it will briefly sketch his family background and his career before he reached the Supreme Court.

He was of the fourth generation of Whites to be prominent in the American scene and the third generation to serve as a judge. His great grandfather, James White, was born in Ireland and came to America as a young man. He became prominent as a merchant in Philadelphia, and his name appears as a signer of the Non-importation Agreement of 1765. That he was of some scholarly bent is shown by his will, in which he left his Latin books to his son, also named James. The second James White, the Chief Justice's grandfather, studied medicine. He moved to Fayetteville, North Carolina, and was elected a member of the Continental Congress from North Carolina in May of 1786, and soon after was appointed the first U.S. Superintendent of Indian Affairs of the Southern Department. His interest in the efforts of the Continental Congress to draft the Constitution is shown by a letter to Governor Richhard Caswell of North Carolina. After a short stay in North Carolina he moved to Davidson County, Tennessee, and was elected a delegate to the Territorial Assembly and by the Assembly was elected a delegate to the Congress of the United States from Tennessee. He was admitted to the bar in 1800. His son, Edward Douglass, the father of the Chief Justice, was born in Nashville in March 1794. In the same year, James White introduced a bill in the Assembly of the Territory of Tennessee to found Grenville College. He moved to Louisiana in 1799, at about the same time Daniel Boone moved into Missouri. After the Louisiana Purchase, in 1803, Jefferson appointed him a judge. He served on the bench until his death six years later.

His son, the first Edward Douglass, became judge of the City Court of New Orleans in 1825, at the age of 31. He was elected to Congress in 1831 and served three terms consecutively. One of his contemporaries in Congress was David Crockett. He voted for the Compromise Tariff in 1833. That caused his defeat, when he ran for his 4th term in Congress, but in the next year he was elected Governor of Louisiana on the Whig ticket. He served with distinction as Governor. Under Louisiana law the Governor was not eligible for a second consecutive term. However, he served two more terms in Congress before he retired to his sugar plantation. There the Chief Justice was born, on November 3, 1845. White's mother was Catharine Sidney Ringgold, a daughter of a pioneer Maryland family, whom the Chief Justice's father had met while serving in Congress. The Chief Justice's uncle is the Ringgold immortalized in the song, "Maryland my Maryland." White's father died in 1847 at the age of 53. His mother married again, to a man named Brousseau.

White was enrolled in the College Preparatory Department of the Jesuit School in New Orleans at the age of 6. Four years later, he attended Mount St. Mary's in Emmitsburg, Maryland. After a year in this school, he transferred to Georgetown College, where he remained until the outbreak of the Civil War in 1860. That ended his formal education at 15 years of age, except for a few months when he is believed to have studied in the Jesuit College in New Orleans during the following year.

At 16, White enlisted to fight for the Confederacy as a private. He was promoted to the staff of Brig. General Beale. He saw active service and was taken prisoner at the Battle of Fort Hudson in 1863.

In 1865, at 20, he commenced the study of law in the office of Edward Bermudez. Louisiana, of course, retained the civil law as enacted in the Code Napoleon, so all White's early training was in Civil Law. But after White was admitted to practice, at age 23, he applied himself to the study of the common law as well as the civil law, so that he might represent clients with litigation in the federal courts. In a short time, he developed a successful practice in both the state and federal courts.

He was also active in politics and took part in the fight of the people of Louisiana against the carpetbag government of the reconstruction era. He is reported to have used a musket in an armed battle on the levee to overthrow the Kellogg Government. He was elected in 1874, at age 29, to the Louisiana Senate where he served one term. Then Governor Nichols appointed him an Associate Justice of the Supreme Court of
Louisiana.

The theme of White's political life in Louisiana was the bitter fight carried on by the Nichols forces against the corrupt state lottery. In the end Nichols and White triumphed and the lottery was abolished, but the struggle had its ups and downs. At about the time of White's appointment to the State Supreme Court, the Nichols administration got the legislature to revoke the charter of the lottery company.

After White began his service on the State Supreme Court the anti-Nichols-White forces succeeded in amending the state constitution to write the lottery into the state's fundamental law and to set up a new Supreme Court. The entire court was out. White was always proud of his service on the State Court, because during the short period of his service the court caught up on its docket, which had been heavily in arrears.

During the next decade White did not hold political office. He devoted himself to the practice of law, forming a partnership, first of Spencer & White and later White, Parlange & Saunders. His practice was successful. White was primarily a student. He spent almost all his time, not taken up in court appearances, in his office. It was said that there the light seldom was extinguished until dawn. To pursue his research in civil law he would consult the original sources in Latin, Italian, Spanish and French. French, indeed, was a second mother tongue to him, and the other languages he spoke and read fluently. He lived in the French Quarter of New Orleans until he moved to Washington, and a great deal of his law practice was from the French community. In fact, some thought that the family name had originally been Le Blanc. Even after his ascent to the Supreme Court he continued his interest in languages and late in life undertook the study of German. By his years of practice in New Orleans, White earned universal regard as a great lawyer with a profound knowledge of both civil and common law.

During the same period, he was one of the moving figures in founding Tulane University. In 1882, when White was 37, Paul Tulane of Princeton, New Jersey, placed a large endowment in the hands of trustees, including White, to found a university. Believing that the cause of education in Louisiana would be strengthened if the proposed university were to be combined with the State University, White devised a plan, implemented by a constitutional amendment, which allowed a transfer of the State University to the Tulane trustees to found what is now known as Tulane University. White remained associated with the administration of the University until 1897.

White was active in Bar Association activities. He became a member of the New Orleans Law Association (the predecessor to the Louisiana State Bar Association), on June 10, 1871, and after leaving the State Supreme bench he took an active part in the affairs of the Association. On November 20, 1880, he was made a member of its committee on membership. This position he retained until after his election as United States Senator. This committee also passed on complaints against lawyers of unprofessional conduct. On November 17, 1883, he moved the appointment of a committee (on which he served) to reorganize the keeping of the records of the District Court of Orleans Parish. The following year he was a member of the committee to persuade the State Legislature to transfer the law books in the State Library to the Law Association. White also served as chairman of the State Board of Bar Examiners

In 1888, then 43 years old, he returned to politics and became campaign manager for Nichols in his bid for another term as governor. The issue was the notorious Louisiana lottery. Nichols won the election and rewarded White by supporting him for the United States Senate. He became Senator on December 7, 1891, and served until he was appointed by Grover Cleveland, in March 1894, an Associate Justice of the Supreme Court of the United States.

Shortly after his appointment to the Supreme Court, White married Mrs. Leita Montgomery Kent, a widow of a Washington lawyer, an old friend of his, and a sister-in-law of the late Senator Gibson of Louisiana. They had no children. The Whites became known as an hospitable couple, famous for good food and good conversation. He was on intimate terms with senators and congressmen and other public figures.

After he joined the Supreme Court all other activities were subordinated to the work of the court. For example, in spite of his continuing interest in Georgetown University, he refused its offer of a chair in the law school, although Harlan and others combined teaching with service on the Supreme Court. He resigned as vice president of the board of Tulane University. He even refused to attend dinners of the Gridiron Club, because of his care for the dignity of the court. When President McKinley offered him a place on the commission to negotiate peace between Spain and the United States in 1898, he declined the appointment.

His friendship with Theodore Roosevelt began in 1901. At that time Roosevelt sought his advice on the question of beginning legal studies which would occupy his time and fit him to be a better presiding officer in the Senate. White advised him that attending a law school would be derogatory to the office of Vice President. He proposed that Roosevelt read law books from a list prepared by White and that White would give him a quiz every Saturday afternoon. The work was to have started in the Fall, but the plan was abandoned when McKinley's assassina-
Roosevelt in a letter to Henry Cabot Lodge, discussing Lurton's fitness for the Supreme Court, said, "On every question that had come before the bench, he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations where White has been wrong." White's point of view on legal and economic questions was much closer to President Taft's than to Roosevelt's. In 1909 and in 1910, Taft consulted White about appointments to vacancies on the court. As late as the campaign of 1916, Taft sought information from White concerning whether Hughes would accept the Republican nomination for the presidency. White assured Taft that he would. Taft appointed White Chief Justice in December of 1910. The appointment was generally well received.

Before the appointment and after Fuller's death, Holmes wrote to Pollock as follows: "As to the Chief Justiceship I am rather at a loss. I should bet he will appoint Hughes, who has given up a chance of being Republican nominee for the Presidency, but I know nothing. I think White, who is next in Seniority to Harlan (too old, etc.) the ablest man likely to be thought of. I don't know whether his being a Catholic would interfere. I always have assumed absolutely that I should not be regarded as possible—they don't appoint side Judges, as a rule. It would be embarrassing to skip my Seniors, and I am too old. I think I should be a better administrator than White, but he would be more politic. Also the President's inclination so far as I can judge seems to me towards a type for which I have but a limited admiration. I am afraid White has about as little chance as L." Taft's brother, Horace, wrote to the President, December 15, 1910: "The appointment of White was glorious . . . I see nothing but favorable comment." The confirmation of the new appointment by the Senate came within 15 minutes of its reception.

At the time that White joined the Supreme Court administrative law was almost non-existent. It would be difficult to exaggerate the importance of this field of law today. Because White's long service on the bench (27 years) coincided with the need to spell out the role of the Interstate Commerce Commission in regulating the railroad industry and because of White's interest and aptitude in this field, this branch of the law owes more to White than to any other judge. In fact, he might be called the Father of Administrative Law in the "case and controversy" sense, as Ernst Freund is the Father of the academic consideration of administrative law.

The rise of government by administrative body was inevitable. With the passing of the frontier and the
government and by the states to especially control your affairs. It is a question of might and it is to your interest to have it determined where the power resides."  

The American people endured the abuses with extraordinary patience, believing "That government governs best which governs least." However, in the midwestern states there was a growing reaction and the Illinois Constitution of 1870 contained a clause directing the legislature to pass laws to prevent unjust discrimination and exorbitant rates of freight and passenger tariff on the different railroads in the state. The legislature then passed laws prohibiting discrimination and establishing a maximum rate, and created a railway and warehouse commission to regulate railroads, grain elevators and warehouses. This legislation was denounced as socialistic, but when it reached the United States Supreme Court, in *Munn v. Illinois*, in 1876, Chief Justice Waite upheld the Illinois Statute as an extension of the historical right of the state to regulate businesses with a public interest, such as, innkeepers, common carriers and ferries.  

On the same day that the court sustained the validity of the Illinois Statute, it handed down decisions approving the right of a state to establish maximum freight and passenger rates. The period of public regulation of railroads by state governments lasted about ten years. Then the United States Supreme Court nullified an Illinois law attacking the "long and short haul" evil, and three years later the court declared rate regulation by a state legislative commission invalid. These decisions put an end to state regulation of railroads. Congress responded with the Interstate Commerce Act of 1887. It specifically prohibited pooling, rebates, discrimination of any character and higher charges for a short haul than for a long haul. It provided that all charges be "reasonable and just" and it required the roads to post their tariffs. To administer this law Congress established the first permanent administrative board of the American Government, the Interstate Commerce Commission. In 1906, the Hepburn Act authorized the Interstate Commerce Commission to determine and prescribe maximum rates.  

Of course, ideas which are clear to us today were not so at the time that White started to write his famous opinions on the Interstate Commerce Commission. It was White's contribution to the development of law that he integrated the regulatory commission into our private and public common law, and did it in such a way that it appears almost a child of the common law. This was not an easy task because it involved the division of authority between the national government and the states and the delineation of the relationship of these new agencies to the executive branch of the government, to Congress and to the courts. Decisions by White and by the court over which he presided established basic principles, such as, that there had to be a definite grant of governmental function to the commission by Congress, that the commission had to follow procedure consistent with due process of law, that when the commission adopted a procedure, the parties had a right to insist that it be followed—and perhaps most important of all—that when the commission was given a function of government to perform by Congress that the courts would respect its role and not usurp it.  

One of the important administrative law cases decided by White was *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, Justice Frankfurter explained the significance of this decision: "In order to avoid mischievous opportunities for the assertion of individual claims by shippers as against the common interest of uniformity in construing railroad tariffs, this Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case as to withdraw from the shipper the historic common law right to sue in the courts for charging unreasonable rates. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act. It did so because even though theoretically this Court could ultimately review such adjudications imbedded in the various judicial judgments—if a shipper could go to a court in the first instance—there would be considerations of fact which this Court could not possibly disentangle so as to secure the necessary uniformity. The beneficial rule in the *Abilene Cotton Oil* case was evolved by reading the Interstate Commerce Act not as though it were a collection of abstract words, but by treating it as an instrument of government growing out of long experience with certain evils and addressed to their correction. Chief Justice White's opinion in that case was characterized by his successor, Chief Justice Taft, as a 'conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law.' Finally, Justice Frankfurter epitomizes his evaluation of White's opinion as "A creative act of adjudication unanimously accomplished."  

Another of White's precedents in administrative law is *Oceanic Steam Navigation Co. v. Stranahan*. This case involved the validity of a congressional act empowering a custom's official to impose penalties. The statute was attacked on the ground that the imposition and enforcement of penalties was primarily a judicial function. White rejected the contention because it magnified the judicial to the detriment of all other departments of the government. The effect of this case was to give greater scope to the action of administrative agencies, and, like Marshall's decision in *Marbury v. Madison*, to define the power of the
In the case of East Tennessee, Virginia & Georgia Ry. Co. v. Interstate Commerce Commission,24 White held that substantial findings of fact of the commission made after hearings were not subject to review if they had not been questioned in the lower court. In another case he further developed the law with regard to findings of fact made by an administrative body to support its determination to the effect that if the findings by the commission were not of sufficiently substantial character to sustain the order then the court did not have the duty to undertake an independent investigation of the facts in order to substantiate the order.25

Another decision of White was U. S. ex rel Kansas City Southern Railway v. Interstate Commerce Commission.26 An amendment to the Interstate Commerce Act empowered the Commission to evaluate property owned by a common carrier. The commission failed to do this even at the request of the railway, claiming that it was impossible to arrive at an evaluation. White held that the Commission had erred in refusing to exercise the authority granted to it, and that in so doing, it was actually assuming authority it did not possess.

A landmark decision of White in this field was U. S. v. Sante Fe,27 wherein speaking of the commissioner of the general land office and his subordinates, White held that the function of government sought to be exercised by the administrative body must be one which comes under the role assigned to the body by Congress. White, in another case, stated the basis of judicial review of administrative rulings as follows:28

"Beyond controversy, in determining whether an order of the commission shall be suspended or set Continued on page 40
aside, we must consider, a, all relevant questions of constitutional power, or right; b, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, c, a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised."

Speaking of this case and of two others handed down by White on the same day, Edward H. Moseley, Secretary of the Commission, wrote to F. W. Carpenter, then Taft’s secretary, explaining, "I am sending three opinions of the Supreme Court of the United States, speaking through Mr. Justice White, which were rendered last Monday and which so strongly strengthen the power of the Commission."20

In a letter to Laski, Holmes said " . . . I think the credit is wholly his (White’s) about making the relations between the Interstate Commerce Commission and our court clear and putting the whole important business on a sound and workable footing."21

Chief Justice Taft in speaking of White’s opinions in this field said: "(They) are models of clear and satisfactory reasoning which give to the people, to state legislatures, to Congress, and the courts a much needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing government machinery . . . They are conspicuous instances of his unusual and remarkable power for facts and statesmanlike interpretation of statute law."22

Somewhat similar to the need to control and regulate the railroad industry was the need to control the great combinations of wealth that grew up in America toward the end of the 19th century. Laws to regulate trusts and monopolies were motivated by the desire to end corrupt and dishonest practices and by the fear that the natural resources of the country were being ruthlessly exhausted and that small businessmen were being faced with ruin. In 1890, the Sherman Act was passed by Congress. Every contract, combination, in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations was declared to be illegal, and every person who should monopolize or attempt to monopolize any part of trade or commerce among the several states was made guilty of a misdemeanor.

Taken literally the Sherman Act would have forbidden almost every contract or combination. White would not accept such an indiscriminate application of the law. In his famous dissent in United States v. Trans-Missouri Freight Ass’n,22 166 U. S. 200, 351, (1897) he argued, “To define the words ‘in restraint of trade’ as embracing every contract which in any degree produced that effect would be violative of reason because it would include all those contracts which are the very essence of trade and would be equivalent to saying that there should be no trade, therefore, nothing to restrain.” The dilemma which would necessarily arise from defining the words (contracts in restraint of trade) so as to destroy by rendering illegal the contracts upon which trade depends, and yet pre-supposing that trade would continue and should not be restrained, is shown by the argument advanced, and which has been compelled by the exigency of the premise upon which it is based.”

The following year the Addyston Pipe case appeared on appeal before the 6th Circuit Court of Appeals.23 William Howard Taft wrote the opinion for the court. In sustaining the government’s contention, that the combine in question was illegal, Judge Taft began by stating that the (majority) opinion in the Trans-Missouri case would be a sufficient answer to the defendants, since the majority opinion held every restraint of trade to be forbidden by the Sherman Act. However, he then proceeded, by an analysis of the authorities, to show that the practices of the defendants could not be considered reasonable in the common law sense. Five years later suit was brought by the government to dissolve the holding company set up by Hill, Morgan and Harriman, the Northern Securities case.24a The majority held that there was a violation of the Sherman Act. There were four dissenters: White, Fuller, Peckham and Holmes, on the ground that the Sherman Act did not apply to contracts concerning the ownership of stock. It was in the Standard Oil24 and American Tobacco cases24b that White, then Chief Justice, speaking for the court, with only Harlan dissenting, defined and explained the rule of reason, distinguishing between
those economic combinations that were harmful and those that were useful in modern society.

Two criticisms have been made of the rule of reason: first, that it was obiter dictum because the Standard Oil Company and American Tobacco Company were violative of the Sherman Anti-trust Act under any interpretation. Therefore there was no need of a distinction between reasonable and unreasonable restraints of trade. Secondly, that in basing the rule of reason on common law principles White erred in that the common law only made the distinction between reasonable and unreasonable restraints of trade in the matter of contracts that were ancillary to a main contract of sale and reasonably adapted and limited to the contract's lawful purpose. The charge that the "rule of reason" concept does not comport with the common law is well answered by quotations from Justice Stone and from Justice Holmes.

Justice, later Chief Justice, Harlan F. Stone, said:

"In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

"That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in United States v. Addyston Pipe & Steel Co. (CCA 6th) 85 F 271, affirmed in 175 U. S. 211, written by Judge, later Chief Justice Taft, and concurred in by Justice Harlan and Judge, later Justice Lurton of this court. This court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

"In Standard Oil Co. v. United States, 221 U. S. 1, 54, 55, 58, decided in 1911, this court, speaking through Chief Justice White, pointed out that the restraint of trade contemplated by section 1 of the Act took its origin from the common law, and that the Sherman Act was adapted to the prevention, in modern conditions, of conduct or dealing effecting the wrong, at which the common law doctrine was aimed. This, it was said, is 'the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations . . .' The court declared, page 59, that 'the statute was drawn in the light of the existing practical conception of the law of restraint of trade,' and drew the conclusion that the restraints which were condemned by the statute are those which, following the common law analogy are 'unreasonable or undue.' This view was followed and more explicitly stated in United States v. American Tobacco Co., 221 U. S. 106, 169, where it was said: ' . . . it was held in the Standard Oil Co. Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.' In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose."

Justice Holmes said in one of his letters to Mr. Wu, "In Nash v. United States, 229 U. S. 373, 376, 377, a man was indicted under the Sherman Antitrust Act for a conspiracy in restraint of trade and to monopolize trade. It was objected that as a criminal statute the law was bad, because it had been construed to prohibit only such contracts and combinations as unduly restricted competition or unduly obstructed the course of trade, and so construed it was too indefinite for a criminal law. But in the opinion 1 pointed out, p. 377, that 'the law is full of instances where a man's fate depends on his estimating right, that is, as the jury subsequently estimates it, some matter of degree,' that an act might be murder, manslaughter or misadventure according to the degree of danger attending it according to common experience in the circumstances known to the actor. As 1 put it in a later case . . . 'The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe.'"
That White's construction of the Sherman Act was beneficial is generally conceded by his critics. Professor Dishman in his article on "Mr. Justice White and the Rule of Reason," although rejecting the common law historical basis of the rule of reason, states: "This is not to say, as some critics have said, that the rule has seriously hampered the Department of Justice in enforcing the antitrust law. We have it on the authority of Thurman Arnold that without the rule the Sherman Act would have been unworkable because every combination between two men in business is in some measure a restraint of trade. The rule, he has said, has the effect of preventing the antitrust law from destroying the efficiency of those combinations which are actually serving, instead of exploiting, the consumer."

There is no space to discuss White's contribution to other fields of law. However, someone is bound to raise the question, where did White stand on the great social issues of his day? Was he a liberal?—like Holmes? It is impossible to squeeze the massive White into a pigeonhole however labelled. There is always a demand to put Supreme Court Judges into categories. It eliminates the need to examine what they decided or to read what they said—we know all about them from the label.

First and foremost White was a lawyer. To him the law was a discipline in the academic sense with its own goals and methodology. When he decided cases before him, he decided them according to legal standards, that is, the law he found in the constitution, the statutes and the case precedents, with a permissible leeway allowed judges, as it is expressed by Cardozo, "as new problems arise, equity and justice will direct the mind to solutions which will be found, when they are scrutinized, to be consistent with symmetry and order or even to be a starting point of a symmetry and order theretofore unknown." That White had a classical notion of "facts" as well as law is shown by his remark to counsel during the oral arguments of Stetler v. O'Hara, "Mr. Frankfurter, I could gather twice as much material to show that private property is wrong and should be abolished," manifesting a reluctance to regard sociological data gathered upon a hypothesis as the equivalent of evidence emerging from direct and cross-examination.

His rule of reason in the antitrust cases and his persistent interest in the new field of administrative law—defined by Dean Pound as "that branch of modern law under which the executive department of government . . . interferes with the conduct of the individual for the purpose of promoting the well-being of the community . . . " is evidence that White had a feeling for the unity of society. Freedom is seen by him as not freedom from the obligations of association with others but as freedom to associate. Judge Hershey of the Illinois Supreme Court expressed the same idea when he regarded the criminal law as if it was the expression of the minimal social duty exacted of the individual by the government. White sensed that the danger to be avoided in social reform was that it might destroy society by fragmenting it. He knew society only existed by reason of people combining together formally and informally in countless ways. The search for a balance—the compromise that would leave men free to associate and yet guide their associating so that it would serve the well-being of the community—may explain his dissent in the Trans-Missouri Freight Association case where White said "the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which working men seek to peaceably better their condition."

It may explain his adherence to the majority in the Coppage and Adair cases which struck down legislation forbidding employers to discriminate against a workman because he belonged to a union if his action is judged wrong in those instances.

During White's time in the court, with White voting with the majority, the following legislation was upheld:
- A state law limiting the hours of work in mines;
- A state law limiting the hours of work for women;
- The Illinois Child Labor law;
- State workmen's compensation laws;
- A state law setting up safety regulations for coal mines;
- A state law requiring that script used to pay miners be redeemed in cash;
- A state law requiring that coal be weighed before it was screened in computing the wages of miners;
- A state law forbidding contracts to limit the liability of an employer for injuries sustained by his workmen;
- A state law prohibiting pool rooms;
- A state law requiring that private employment agencies be licensed was upheld but one abolishing private employment agencies was overturned;
- The Federal Employers Liability Act was upheld;
- The Adamson Act limiting hours of railroad workers and for the duration of a specific emergency fixing their wages was upheld;
- The state right to fix intra state rates was upheld;
- The grandfather's test of eligibility for voting was held bad;
- A city ordinance forbidding negroes to live in a particular area if more than half the householders were white was held invalid; The power of a congressional committee to punish for contempt was limited.
However, an act of Congress forbidding the interstate transportation of goods manufactured by child labor was held unconstitutional, and White silently dissented in the case upholding war time rent control during World War I.

White's last judicial act was his dissent in the Newberry Case. There White insisted, against the majority, that the Federal Government did have jurisdiction over primary contests.

In conclusion, I think to understand the greatness of White, we have to see it apart from the subject matter of his decisions. He is a great man because he typifies the Judge in society. You recall the famous controversy between Sir Edward Coke and James the First. James the First had given judgment in a case that arose concerning the ownership of land. Coke, on behalf of the court, set the King's judgment aside. Then the King said that he thought the law was founded upon reason and that he and others had reason as well as judges, to which it was answered by Coke, as he reports it, that no doubt His Majesty had great endowments of nature but His Majesty was not learned in the laws of his realm and cases are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience. At another time, Coke remarked that the law was "an artificial perfection of reason gotten by long study, observation and experience and not of every man's natural reason; for nemo nascitur artifex." This might be translated "No one is a born Judge."

White is the type of the professional judge. This is shown by his expertness in procedure. In a sense procedure is the beginning of competence in the art of being a lawyer or a judge, because procedural law is the means by which litigants obtain the benefits of other laws. When White went on the Supreme Court a great number of cases involving questions of procedure were turned over to him. The same thing is true of his service on the state court. This is unusual. Ordinarily, questions of procedure and jurisdiction are decided by the chief justice of an appellate court or are assigned by him to one of the senior associates. It is one of the noteworthy things of White's judicial service that 54 of the 80 cases decided by him on the Louisiana Supreme Court were concerned with procedure, and about one-third of all the cases decided by White in the United States Supreme Court were concerned with procedural questions.

From the lawyer's standpoint procedure is the adventure of the law, and from a judge's standpoint, procedure pertains to the due process according to which he decides controversies. In the field of administrative law, for example, reviewing courts insist that administrative agencies act consistently with their own procedures. To a degree, the acceptance of the belief that procedure is of little importance is a yielding on the ideal of government by law and not by personalities.

James the First was not the last legal primitive. The simplistic notion of law is the cause of a great deal of misunderstanding, and of unfair criticism of the courts. When Chief Justice Oliver Ellsworth was a young man in New England it was expressed as follows: The common law was only "adapted to a people grown old in the habits of vice" while the law which the courts of Connecticut administered "was derived from the law of nature and of revelation." The voice of this tradition is sometimes heard today in criticisms of decisions of the Supreme Court.

The law is the dividing of the big truths which, to quote Arthur Miller, "define humanity and the right way to live, so that the world is a home and not a battlefield, or a fog in which disembodied spirits pass each other without recognition" into the little truths by which everyday life may be regulated. What the law is trying to do in the field of action is a little like Morris Cohen's search for concepts with a smaller twilight zone in the field of reasoning. This is not done in any free hand style. White's opinions, like the judgments and opinions of other competent judges, are a painstaking practice of an ancient art according to its own tested methods.

White's opinions are also an answer to the sophistics, who would require such certainty of legal definition that the law would be straight jacketed and alike unable to serve the community, or do justice between individuals.

By honoring White our faith and pride in our tradition of justice by means of the law is renewed. We may hold our heads a little higher because Edward Douglass White lived.

FOOTNOTES
1. Klinkhammer, O.P., Sister Marie Carolyn, Edward Douglass White, Chief Justice of the United States, Catholic University of America Press, 1943. This scholarly work is not only a biography of White, but it contains a discussion of his opinions classified according to general subject matter.
5. Proceedings in Memory of Edward Douglass White, 275 U. S. XXVII.
6. January, 1879, to March, 1880. 31 and 32 Louisiana Reports.
8. Proceedings in Memory of Edward Douglass White, 257 U. S. XXVII.
10. Umbrecht, cited to Note 4 above, p. 399.
"Quoted in Mason, Alpheus T., Brandes: Lawyer and Judge in the Modern State, Princeton University Press, 1933.


"Compare: Nisbet, The Quest for Community, p. 227. Free society, according to the social reformers of the 19th and 19th Centuries would be composed of socially and morally separated individuals.

"People v. Shields, 6 Ill. 2d 200, 206.


"Second Employers Liability Cases, 232 (1912) U. S. 1, White wrote the opinion invalidating the first enactment in this field, 207 U. S. (1908) 463.


"Minnesota Rate Cases, 230 U. S. (1913) 352.

"Guinn v. United States, 238 U. S. (1915) 347.


"Quoted in Wu, cited above, Note 67, p. 30.

"Klinkhamer, cited above Note 1, p. 108.

"Umbricht, cited above Note 4, p. 88. This is not a criticism of the tradition of natural law which offers reasonableness, rather than force, as the sanction of law. Natural law answers more the question "why is something law?" rather than "what is law?" Since it lacks particularity and certainty it cannot be a substitute for a system of positive law anymore than the precept "love thy neighbor" can do away with the need for the many customs, habits and actions which might assist one in being a good neighbor. See D'Enlèvres, A. P., Natural Law, Hutchinson House, London, 1951, p. 118. (This is a printing of a series of lectures given at the University of Chicago in 1948).
