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Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court Justice White and the Exercise of Judicial Power

Dennis J. Hutchinson

TWO CHEERS FOR JUDICIAL RESTRAINT: JUSTICE WHITE AND THE ROLE OF THE SUPREME COURT

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The death of a Supreme Court Justice prompts an accounting of his legacy. Although Byron R. White was both widely admired and deeply reviled during his thirty-one-year career on the Supreme Court of the United States, his death almost a year ago inspired a remarkable reconciliation among many of his critics, and many sounded an identical theme: Justice White was a model of judicial restraint—the judge who knew his place in the constitutional scheme of things, a jurist who facilitated, and was reluctant to override, the policy judgments made by democratically accountable branches of government. The editorial page of the *Washington Post*, a frequent critic during his lifetime, made peace post-mortem and celebrated his vision of judicial restraint.[1] Stuart Taylor, another frequent critic, celebrated White as the "last true believer in judicial restraint."[2] Judge David M. Ebel, the friendliest of the affiants I wish to present, called White an "apostle of judicial restraint."[3]

Justice White's opinions provide ample rhetorical evidence for the testimonials. A quick sampling:

• In *Miranda v. Arizona*,[4] in which the Court created the now-famous warnings to vindicate the Fifth Amendment rights of criminal suspects undergoing interrogation in police stations, White wrote a furious and sustained dissent. He accused the majority of creating their code of interrogation out of whole

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1. *Justice Byron White*, WASH. POST, Apr. 19, 2002, at A24 (editorial).

2. Stuart Taylor, Jr., *The Last True Believer in Judicial Restraint*, 34 NAT'L J. 1120 (2002), *reprinted in* ATLANTIC MONTHLY, April 23, 2002, at 22.

3. David M. Ebel, *Justice Byron R. White: The Legend and the Man*, 55 STAN. L. REV. 5, 7 (2002).

4. 384 U.S. 436, 536 (1966) (White, J., dissenting).

cloth, contrary to the history of the Amendment and unmoored by text or practical experience. He concluded:

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.[5]

• In the abortion cases in 1973,[6] he condemned the majority for an "improvident and extravagant exercise" of "raw judicial power."[7]

• And finally, in what must be his most controversial opinion for the Court, he labeled the claim that anti-sodomy laws violated the Fourteenth Amendment as, "in a word, facetious." The opinion, in *Bowers v. Hardwick*,[8] contains White's most sustained explanation of his grounds for refusing to employ the doctrine of substantive due process to create new constitutional rights:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clause of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses,

5. *Id.* at 542-543.
6. Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973).
7. *Bolton*, 410 U.S. at 222 (White, J., dissenting).
8. 478 U.S. 186 (1986).

> particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.[9]

In the field of Separation of Powers, Justice White wrote powerful opinions defending the legislative veto and other novel mechanisms created by Congress to discipline the administrative state that had developed under its aegis.[10] Especially in this area, White was haunted by the "face-off" during the New Deal between the Court and Congress, and he refused to be an agent for unlearning the lessons of history. Like Justice Robert H. Jackson, Justice White insisted that the role of the Court was not to view constitutional interpretation as an exercise in parsing the text but instead in reviewing the exercise of Constitutional power in the context of what the nation and the state had become pursuant to the Constitutional architecture.[11]

Now before we fix Byron White in our memory as the second coming of Felix Frankfurter, who is usually thought of as the godfather of the modern school of judicial restraint, a note of caution is in order. Three years ago this month, at another symposium sponsored by the Byron White Center, White's commitment to judicial restraint was sharply challenged by Professor Vince Blasi of Columbia and the University of Vir-

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9. *Id.* at 194-95. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 541 (1977) (White, J., dissenting).

10. Mistretta v. United States, 488 U.S. 361 (1989) (White, J., joining majority); Morrison v. Olson, 487 U.S. 654 (1988) (White, J., joining majority); Bowsher v. Synar, 478 U.S. 714, 759 (1986) (White, J., dissenting); INS v. Chadha, 462 U.S. 919, 967 (1983) (White, J., dissenting). *See also* Buckley v. Valeo, 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part).

11. White complained in 1982 that "at this point in the history of constitutional law," the Court should not look "only to the constitutional text" to fix Congress' power to "create adjudicative institutions designed to carry out federal policy." N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 94 (1982) (White, J., dissenting). A similar theme runs throughout Jackson's account of the Constitutional Revolution of 1937. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY; A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.").

ginia. During a question and answer session, Professor Blasi chided two of White's former clerks in attendance, Jim Scarboro and Judge Ebel, for overstating White's judicial modesty. I am now quoting from memory, so I may be wrong, but Blasi said something on the order of, "You guys have a very selective memory. Justice White wrote *Retiman v. Mulkey*[12]—that's judicial invention with a vengeance! It would be more accurate to say that Justice White picked his spots. He could be just as activist as anyone on the Court." Professor Blasi was referring to a 5–4 decision in 1967 in which the Court, speaking through Justice White, invalidated a voter-initiated and voter-ratified referendum repealing open-housing laws and re-establishing freedom of choice in sales and rentals of residential property. Justice White concluded that the voters were, in effect, authorizing racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Even scholars who admired the result found the reasoning difficult to defend.[13]

Professor Blasi had a point, even if he chose a poor example.[14] Byron White was not afraid of judicial power, nor did he reflexively defer to the judgments of Congress, state legislatures, city councils, school boards, or other popularly accountable bodies and officials. Seth P. Waxman, who served as Solicitor General from 1997 to 2001, provided a measured corrective at the Memorial Service held last fall at the Supreme Court:

> Justice White is often spoken of as an apostle of judicial restraint. That label is true, but incomplete. Justice White was certainly averse to the courts engaging in what he thought of as second-guessing of legislative policy concerns. That aversion was at its apex when the claim was made that a legislative enactment contravened substantive due process, the First Amendment, or the separation of powers. But Justice White did not shrink from extending constitutional guarantees to new areas. He embraced the effort to give women real protection under the Equal Protection Clause; he fashioned a vigorous standard in *Cleburne*; he

12. 387 U.S. 369 (1968).

13. *See* Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55.

14. White viewed the decision as closely limited to its particular facts, or as he put it privately: "One Indian walking single file." DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 349 (1998).

> authored the extension of *Miranda*—from which he had dissented—in *Edwards v. Arizona*; and he wrote the Court's opinion in *Coker v. Georgia*, striking down capital punishment for rape.
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> The pattern, then, is a nuanced one: judicial restraint, but only from going "too far." Where Justice White thought federal guarantees were at stake, he did not hesitate to act. In his view, the courts were fully empowered to provide a remedy to an injury to a federal right.[15]

Waxman provided several telling examples of Justice White's muscular protection of federal interests, three of which are worth considering here: *Banco Nacional de Cuba v. Sabbatino*,[16] *Nixon v. Fitzgerald*,[17] and *Missouri v. Jenkins*.[18] In *Sabbatino*, White filed a singular and influential dissent when the Court held that comity and deference to the executive precluded determining whether a foreign government's "act of state" violates international law. To White, this was an abdication of judicial responsibility. International law was no less important than federal law, and judges were fully equipped to declare and enforce the law. He conceded that he would have deferred to the executive had there been a formal request from the State Department not to adjudicate the question, but there was none—and absent that, deference was neither necessary nor appropriate.

Nixon v. Fitzgerald held that the President was absolutely immune from private lawsuits for official acts at the "outer perimeter" of his duties, even after he had left office (in this case, retaliating against a "whistle-blower"). Justice White, who was extremely sympathetic to the necessary prerogatives of Presidential power, dissented vigorously. The majority's opinion ambiguously rested on both policy and constitutional grounds, and White objected that nothing in the Constitution required or justified such a sweeping decision—indeed, it was a repudiation of principles laid down in *Marbury v. Madison*,[19] the foun-

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15. Seth P. Waxman, Remarks at Memorial Observances for Justice Byron White, Supreme Court of the United States (Nov. 18, 2002) (manuscript on file with author).

16. 376 U.S. 398 (1964).

17. 457 U.S. 731 (1982).

18. 495 U.S. 33 (1990).

19. 5 U.S. (1 Cranch) 137 (1803).

tainhead of judicial power as well as presidential responsibility under law.

Both *Sabbatino* and *Nixon v. Fitzgerald* sound themes that recur throughout White's jurisprudence: absolute rules and sweeping decisions, decided in a vacuum without the instructive advantage of a full range of issues and factual contingencies, are contrary to the essence of the judicial function. The final case in Seth Waxman's trilogy, *Missouri v. Jenkins*, is one of White's "most remarkable"[20] opinions for the Court. *Jenkins* held that a state law imposing a ceiling on property taxes could be disregarded by a lower federal court implementing a school desegregation decree. The decision was popularly criticized as judicial taxation, but White's opinion for the Court cast the decision as a function of the broad equitable powers of federal courts to protect federal rights. He pointed out that those powers included rejecting numerous techniques of evasion—from nineteenth century cases requiring states to "levy taxes adequate to satisfy their debt obligations"[21] to modern cases forbidding local schools districts from evading their responsibilities under *Brown v. Board of Education*[22] by closing the public schools.[23]

The upshot of the three examples, as Justice White liked to put it, is that "all three branches of the national government should be invested with fully adequate powers to accomplish their constitutionally delegated tasks. For Justice White, as for earlier nationalists like Chief Justice John Marshall and Justice Joseph Story, the fundamental issue of constitutional law was the task of constituting a national government competent to meet the challenges of a changing society. Included within that government power is the authority of the federal courts to get the job done."[24]

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20. Waxman, *supra* note 15, at 2.

21. *Jenkins*, 495 U.S. at 55.

22. 347 U.S. 484 (1954). Departing from his prepared text, Mr. Waxman also pointed out that Justice White aggressively supported strong remedies to address racial segregation in public schools. Waxman, *supra* note 15 (citing Milliken v. Bradley, 418 U.S. 717, 762 (1974) (White, J., dissenting)). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (White, J., dissenting); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (*Dayton II*). For an equally unremitting stance in a different area of racial discrimination, see Palmer v. Thompson, 403 U.S. 217, 240 (1971) (White, J., dissenting).

23. Griffin v. Prince Edward County Sch. Bd., 377 U.S. 218 (1964).

24. Waxman, *supra* note 15, at 2-3.

That did not mean for Justice White that the Supreme Court was a roving commission with freewheeling authority to superintend the branches and levels of the federal system. First and foremost, the Supreme Court was a court. Asked at the time of his confirmation hearings to define the role of the Supreme Court, he replied simply: "To decide cases."[25] Later, in private conversations with friends in Denver, he would add that the most significant feature of the Supreme Court was that it resolved discrete disputes between parties and simultaneously developed national legal policy on an incremental basis. For White, the focus on the discrete case imposed a discipline that deterred loose or expansive exercise of the judicial power. "My guess," according to former Solicitor General Charles Fried, "is that he came closer than most Justices to trying to make sense out of each case, one at a time."[26] By focusing exclusively on the particulars of each case, Justice White avoided deciding issues not presented by the record, hypothetical developments uninformed by future litigation, and rights or responsibilities of those not appropriately represented in litigation under review.

The techniques of self-discipline began with a meticulous insistence that the jurisdiction of the Court had been properly invoked. He tended to be a bear on questions of standing and frequently wrote for the Court rejecting sweeping institutional litigation when he concluded that the plaintiffs had not in fact suffered the harms, especially constitutional harms, alleged in the complaint.[27] A past record of even unconstitutional behavior did not in his view support a current case or controversy, much less sweeping relief.[28] The point is not the function of hypertechnical fastidiousness about the law of standing. Rather, without a live case or controversy, turning on provable risks and ongoing behavior, Article III of the Constitution—the source of the Court's power—expressly precluded relief. His

25. HUTCHINSON, *supra* note 14, at 331.

26. Charles Fried, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 22 (1993).

27. *See, e.g.*, Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976) (White, J., joining majority); O'Shea v. Littleton, 414 U.S. 488 (1974). *See generally* Mary C. Hutton, *The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases*, 40 ADMIN. L. REV. 377 (1988).

28. *See* Los Angeles v. Lyons, 461 U.S. 95 (1983); O'Shea v. Littleton, 414 U.S. 488 (1974).

opinions in this area are not cast in majestic terms or lapidary homilies, but rest on matter-of-fact statements of basic principles and established case law.

Even where jurisdiction and standing were satisfied, Justice White did not rush to judgment, especially in novel allegations of constitutional protection. My favorite example is the litigation over a public school board's decision to remove several books from the junior and senior high school libraries, including *The Fixer* by Bernard Malamud, *Slaughterhouse Five* by Kurt Vonnegut, *The Naked Ape* by Desmond Morris, *Soul on Ice* by Eldridge Cleaver, and *A Hero Ain't Nothing But a Sandwich* by Alice Childress.[29] The plaintiff students invoked what they called a "right to read"[30] under the First Amendment. Four members of the Court agreed, four emphatically disagreed, and White cast the fifth and deciding vote. While he agreed that the case presented a substantial constitutional issue, he disagreed that the Court should reach the merits:

> The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar." 474 F.Supp. 387, 397 (EDNY 1979). Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.
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> The plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no necessity for doing so at this point. When findings of fact and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment,

29. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 883 (1982) (White, J., concurring in the judgment).

30. *See* HUTCHINSON, *supra* note 14, at 391.

> and if certiorari is sought and granted, there will be time enough to address the First Amendment issues that may then be presented.[31]

Both Justice William J. Brennan's plurality opinion and the dissenting opinions chided White for spoiling the fun and preventing a decision on the merits, but the spare, precise opinion White filed exemplified his caution in exercising the power of the Court. For him, the case turned on the school board's motivation for removing the books, but the factual record was too ambiguous to resolve the issue and thus to determine the constitutional question with comfort. By declining to reach the merits prematurely, Justice White exercised what might classically be viewed as "judicial restraint," although he characteristically avoided an essay on the topic and instead referred matter-of-factly to a well-established precedent similarly declining to reach the merits in a Fair Labor Standards Act case decided thirty five years earlier.[32] Almost seventy pages of opinions in the United States Reports were thus rendered advisory by a three-paragraph statement, and the result was a non-precedent.

The doctrine of stare decisis was no less important to Justice White than the perquisites to exercising Article III power. Kate Stith has described Justice White's adherence to precedent as "adamant,"[33] and across the board surely it was. Respect for precedent was a hallmark of White's jurisprudence, even, to paraphrase Justice Oliver Wendell Holmes, Jr., for the precedent he hated.[34] Although White famously dissented in *Miranda v. Arizona*,[35] and disagreed with initial efforts to extend its scope, he was publicly proud of the fact that he wrote the opinion for the Court in *Edwards v. Arizona*[36] extending its protection. Notwithstanding his sustained dissent in *Payton v. New York*[37] disagreeing from the Court's ruling that a warrant

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31. *Pico*, 457 U.S. at 883.

32. *Id.* (citing Kennedy v. Silas Mason Co., 334 U.S. 249 (1948)).

33. Kate Stith, *Byron R. White, Last of the New Deal Liberals*, 103 YALE L. J. 19, 32 n.104 (1993).

34. *See* United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

35. 384 U.S. at 526.

36. 451 U.S. 477 (1981). *Edwards* held that once a suspect requests a lawyer, not only must all interrogation stop but it cannot resume "until counsel has been made available" to the suspect. *Id.* at 484-85.

37. 445 U.S. 573, 603 (1980) (White, J., dissenting).

was necessary to effect an arrest in the home, he spoke for the Court a decade later applying *Payton* to the arrest of someone hiding overnight in a friend's home.[38] Although he hated the exclusionary rule—about which I will have more to say in a moment—he dissented in *INS v. Lopez-Mendoza*[39] when the Court refused to extend its applicability to civil deportation proceedings conducted by the Immigration and Naturalization Service. He also provided the critical fifth vote in *James v. Illinois*,[40] declining to undermine the exclusionary rule when prosecutors tried to use illegally seized evidence to impeach a defense witness. Once the Court had spoken, even when he disagreed vehemently, White saw his duty to enforce the law. The only exceptions came in those rare circumstances where he thought precedent was unstable, due to novel restrictions on Congressional power,[41] or to changes in the Court's composition that deprived recent, dubious decisions of their reliability.[42]

Precedents are not stone tablets, forever immutable, however, and Justice White never felt boxed into a precedential corner when he concluded that experience dictated re-auditing the doctrinal books.[43] The best case in point is the exclusionary rule, which requires courts to exclude evidence that has been illegally obtained from criminal and some non-criminal proceedings. The rule was a bugbear for Justice White through much of his career. Although he agreed that such evidence should be excluded when police and other officials deliberately violated the law, he believed that the rule had been extended much too far, encompassing situations where—to use Benjamin N. Cardozo's famous phrase—the well-meaning "constable [had] blundered."[44] Because he thought the exclusionary rule had an important but limited role, he did not try to convince the Court to abandon it; instead, he embarked on a patient

38. Minnesota v. Olson, 495 U.S. 91 (1990).

39. 468 U.S. 1032, 1052 (1984) (White, J., dissenting).

40. 493 U.S. 307 (1990) (White, J., joining majority).

41. See the Separation of Powers cases collected by Stith, *supra* note 33, at 22 nn.17-20.

42. *Compare* South Carolina v. Gathers, 490 U.S. 805, 812 (1989) (White, J., concurring), *with* Payne v. Tennessee, 501 U.S. 808 (1991) (White, J., joining majority).

43. "Doctrinal consistency just did not weigh very heavily with him if it led to a conclusion that did not make sense. With no other Justice would you get so little mileage from quoting his own words back to him." Fried, *supra* note 26, at 22-23.

44. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

campaign to circumscribe it. His position is neatly stated in the deliberations on *Stone v. Powell*[45] and its companion case, *Wolff v. Rice*,[46] as recorded by Justice Brennan's conference notes: "The exclusionary rule should be modified but not discarded. It should be sort of an immunity rule, with a good faith, objective standard."[47] He explained his reasons for creating a good-faith exception to the rule in a brief dissent when the majority held that Fourth Amendment claims by state prisoners could not be relitigated in most circumstances during federal habeas corpus proceedings:

> [A]s time went on after coming to this bench, I became convinced that both *Weeks v. United States* and *Mapp v. Ohio* had overshot their mark insofar as they aimed to deter lawless action by law enforcement personnel and that in many of its applications the exclusionary rule was not advancing that aim in the slightest, and that in this respect it was a senseless obstacle to arriving at the truth in many criminal trials.[48]

White unsuccessfully pressed his argument a few years later in *Illinois v. Gates* (1983),[49] and the Court finally adopted his proposed modification to the rule when White spoke for the six-person majority in *United States v. Leon*.[50]

The campaign to modify the exclusionary rule was not isolated. In several other areas, Justice White worked hard to reign in doctrines or lines of precedent that he came to believe had "overshot their mark" or expanded more by force of logic than from appreciation of the practical imperatives underlying their initial creation. Two examples will suffice for the moment. Since *Stromberg v. California*,[51] the Supreme Court had held that laws that could be applied to both protected and unprotected speech under the First Amendment were invalid, regardless of the character of the particular speech in question.

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45. 428 U.S. 465, 536 (1976) (White, J., dissenting).

46. *Id.*

47. Conference notes of Brennan, J., *in* THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 489 (Del Dickson ed., 2001) [hereinafter THE SUPREME COURT IN CONFERENCE].

48. 428 U.S. at 537-538 (White, J., dissenting) (citations omitted).

49. 462 U.S. 213, 246 (1983) (White, J., concurring in the judgment).

50. 468 U.S. 897 (1984).

51. 283 U.S. 359 (1931).

To White, this was nonsense. The result was that statutes were invalidated on their face, even if the defendant's speech was not protected, and thus could not be applied even to cases where the speech was unprotected. Moreover, the defendant enjoyed constitutional protection not because of his own speech but because the speech of others—unknown and hypothetical—was thought to be at risk. After more than one complaint about the doctrine, and its fraternal twin, the vagueness doctrine, White was able to muster a bare majority in *Broadrick v. Oklahoma*[52] to limit invalidations to laws that were "substantially" overbroad. The new learning has had a shaky history, in part because of the teacher,[53] but the worst excesses of the old doctrine have been cabined. The other example of White's efforts to tame unruly doctrine is *Perry Education Association v. Perry Local Educators' Association*.[54] The public forum doctrine of *Hague v. CIO*[55] had essentially guaranteed public access to streets and parks for speech and assembly, but the doctrine had expanded to other types of public property with fewer or no historical associations with First Amendment activity. White's opinion in *Perry* established different categories with different levels of constitutional protection, and thus provided a new framework for evaluating claims of access to public property for First Amendment purposes.

The episodes I have just surveyed should suggest a judge constantly questioning the soundness and utility of the Supreme Court's work product, someone not afraid of embarking on judicial law reform projects if he thought the circumstances warranted. The corollary is that Byron White was not afraid to reverse himself entirely on a point of law if he had second thoughts, and over a period of thirty-one years it should not be surprising that he entertained second thoughts in several important areas. I will confine myself to three, although others could be cited:[56] the constitutionality of peremptory challenges in criminal cases, affirmative action, and libel. Coinciden-

52. 413 U.S. 601 (1973).

53. Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

54. 460 U.S. 37 (1983).

55. 307 U.S. 496 (1939).

56. The most prominent examples would be the trio of cases in which he rethought the constitutionality of the death penalty. Furman v. Georgia, 408 U.S. 238, 310 (1972) (White, J., concurring); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (White, J., concurring in the judgment); Coker v. Georgia, 433 U.S. 585 (1977).

tally—or perhaps not coincidentally—White's conversion on all three trips to Damascus came as he neared his twenty-fifth anniversary on the Court.

1. *Peremptory challenges.*

In *Swain v. Alabama*,[57] Justice White's opinion for the Court found insufficient evidence of intentional racial discrimination in prosecutorial use of peremptory challenges during criminal trials. Two decades later, White joined Justice Lewis Powell's opinion for the Court in *Batson v. Kentucky*,[58] which held: "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[59]

2. *Affirmative action.*

White began as a hesitant supporter of affirmative action by state bodies in *Regents of the University of California v. Bakke*,[60] but by 1986 the impact of programs on what he viewed to be innocent whites caused him to reverse field. "Whatever the legitimacy of hiring goals or quotas may be," he wrote, "the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of any racial discrimination, is quite a different matter."[61] White later provided the fifth vote to the minority ownership program approved in *Metro Broadcasting v. FCC*,[62] but that probably was out of deference to Congress, which had established the program.

3. *Libel.*

Half-way through his career, White admitted privately that he regretted joining *New York Times v. Sullivan*,[63] in which the Court interpreted the First Amendment to require "actual malice" for liability in libel cases involving public figures. The trigger for that reassessment was apparently *Gertz v. Robert Welch*,[64] which created a constitutional standard for non-public figures and which provoked one of White's most sus-

57. 380 U.S. 202 (1965).
58. 476 U.S. 79 (1986).
59. *Id.* at 89.
60. 438 U.S. 265 (1978).
61. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (White, J., concurring in the judgment).
62. 497 U.S. 547 (1990) (White, J., joining majority).
63. 376 U.S. 254 (1964). *See also* HUTCHINSON, *supra* note 14, at 421.
64. 418 U.S. 323, 369 (1974) (White, J., dissenting).

tained and caustic dissents. In 1985, he urged replacing the *New York Times* test with a less stringent standard that would not require public figures to prove actual malice in cases where they sought not damages but only to clear their names.[65]

What unites the cases I have just rehearsed and the previous cases endeavoring to circumscribe doctrines that had "overshot the mark" is a common principle: that judges who fail to superintend their own work product have failed in one of their basic duties. White certainly agreed, and was attentive to the law that judges most fear, the law of unintended consequences. Judge Benjamin N. Cardozo identified the "tendency of a principle to expand itself to the limit of its logic."[66] In either case, especially when the underlying factual or legal foundations of a rule had been overwhelmed by supervening events, White was not afraid to act, even if it meant eating some precedential crow.

My final set of cases are offered for two reasons: because they are seldom studied in connection with Justice White's jurisprudence, despite their importance, and because they should send a chill of horror down the spine of any true apostle of what is conventionally thought of as judicial restraint. The cases involve the procedural requirements of the Due Process Clause of the Fourteenth Amendment. Beginning with *Goldberg v. Kelly*,[67] the Supreme Court began what has since been called the "due process revolution," enforcing the requirements of notice and of "some kind of hearing"[68] in institutions and with respect to decisions that had historically been left to the unreviewed discretion of state officials. Justice White joined *Goldberg v. Kelly*, and after a patient ten-year campaign, wrote the leading decision establishing that the Constitution—not state law—fixes the quantum of procedure due when liberty or property interests established by state law are threatened.[69] He also wrote opinions for the Court requiring hearings before

65. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (1985) (White, J., concurring in the judgment).

66. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

67. 397 U.S. 254 (1970).

68. The phrase was popularized by many, including Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

69. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (which adopted the view expressed in his dissenting opinion in Bishop v. Wood, 426 U.S. 341, 355 (1976) (White, J., dissenting)).

prisoners could be deprived of "good-time credits"[70] or transferred from prison to a mental institution.[71] Justice White was not eager to second-guess prison officials at every turn—"they have a tough enough job as it is"[72]—but he insisted that minimal due process was required in cases where state law created substantial expectations with respect to the duration or terms of confinement.

Justice White extended the reach of the Due Process Clause to public schools as well as to prisons. Although he was generally deferential to school authorities on other questions of discipline,[73] his opinion for the Court in *Goss v. Lopez*[74] required that students facing ten-day suspensions be afforded notice of the charges against them, an explanation of the evidence, and an opportunity to explain themselves. He also argued sternly but unsuccessfully that similar procedures should be necessary before public school officials imposed substantial corporal punishment.[75]

Finally, in a series of opinions spanning almost twenty years, he argued that parents enjoyed procedural rights under the Due Process Clause in matters involving illegitimacy and custody.[76]

The decisions I have recounted pinpoint what Byron White regarded as a fundamental promise of the Constitution: once the state creates a substantial, non-discretionary expectation with respect to liberty or property, that expectation cannot be taken away until—as he once put it to one of his law clerks—"until the fella has at least a chance to tell his side of the story." To White, that was the irreducible core of fairness.

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70. Wolff v. McDonnell, 418 U.S. 539 (1974).

71. Vitek v. Jones, 445 U.S. 480 (1980).

72. Remark attributed to Justice White by Justice Brennan's conference notes for *Bell v. Wolfish*, 441 U.S. 520 (1979), quoted in THE SUPREME COURT IN CONFERENCE, *supra* note 47, at 601. White sharply distinguished prisoner expectations that were subjective, in situations where prison officials enjoyed unlimited discretion. *See* Meachum v. Fano, 427 U.S. 215 (1976).

73. The best example is Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

74. 419 U.S. 565 (1975).

75. Ingraham v. Wright, 430 U.S. 651, 683 (1977) (White, J., dissenting).

76. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 157 (1989) (White, J., dissenting); Lehr v. Robertson, 463 U.S. 248, 268 (1983) (White, J., dissenting); Parham v. Hughes, 441 U.S. 347, 361 (1979) (White, J., dissenting); Stanley v. Illinois, 405 U.S. 645 (1972).