

REVIEWS

The Athlete as Judge

The Man Who Once Was Whizzer White. Dennis J. Hutchinson.
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Judicial biographers face a daunting challenge. Usually, their subjects warrant biographies because they are judges. There are exceptions—Thurgood Marshall would have commanded the attention of scholars and the gratitude of the nation even if he had never served on the Supreme Court¹—but for most judges, it is the wielding of power that draws our interest and the relationship between private individual and public act that preoccupies the biographer.

The trouble is that no exercise of power is so nearly devoid of narrative excitement as the business of judging. Once judges don the robes of office, dramatic activity all but stops. Judges do not campaign over vast terrain, have eyeball-to-eyeball confrontations with opponents, or hobnob with the great and powerful. They work mostly in writing, in comparative isolation, and behind closed doors. The public's only glimpse of the decisional process is oral argument, a sedate affair where the advocates take center stage. Judicial deliberations are private, and decisions, once reached, are published to the world in heavily referenced,

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¹ See, for example, Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (Oxford 1994); Juan Williams, *Thurgood Marshall: American Revolutionary* (Times Books 1998).

highly stylized opinions that rarely yield a clear window into the personality of the author. As material for a good story, the judicial life is singularly unpromising.

One solution to this problem is judicial biography as intellectual history. This approach has been practiced with brilliant success by recent biographers of Oliver Wendell Holmes and Learned Hand,² but is suitable only for works on intellectual luminaries. Another solution is to present the judge's life story as the central theme, around which are weaved political and legal histories of issues faced and controversies resolved.³ This "life and judicial times" approach broadens the focus from the cloistered life of a sitting judge to the rough and tumble world beyond, but, unless expertly done, it runs the risk of reducing the biographical subject to a bit player in his own drama. The reader may begin to wonder whether biography is the right vehicle for political history and just how much traction the author is able to gain by returning to the theme of the subject's life. A third strategy is more or less to disregard the problem. If the pre-judicial history is sufficiently interesting and its influence on decisions sufficiently plain, the biographer may concentrate on the subject's life before appointment without worrying too much about the business of judging.⁴

Dennis Hutchinson's *The Man Who Once Was Whizzer White* illustrates the last approach. Of the book's 457 pages (excluding appendices and endnotes), barely one-quarter are devoted to White's thirty-one years on the Supreme Court. Instead, Hutchinson concentrates on White's early life in Colorado; on the mental rigor, physical toughness, and boundless capacity for effort developed on the family beet farm; on his spectacular success as an all-American athlete and Rhodes Scholar from the University of Colorado; on the press hysteria over his decision whether to accept the Rhodes or to play in the National Football League ("NFL"); and on his eventual ability to do both by postponing Oxford until January 1939 and spending the fall of 1938 running, passing, and punting the football for the Pittsburgh Pirates (predecessor of the present-day Steelers). This is an exciting tale, and Hutchinson tells it superbly. White emerges as a man of action rather than words, interested in results rather than reasons, a man dedicated to achievement, intolerant of weakness, and

² G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford 1993); Gerald Gunther, *Learned Hand: The Man and the Judge* (Alfred A. Knopf 1994).

³ This is the approach I attempted in John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (Charles Scribner's Sons 1994).

⁴ See, for example, Laura Kalman, *Abe Fortas: A Biography* (Yale 1990).

scornful of excuse. Hutchinson also shows how White was scalded by the hot glare of publicity and fought back against unwelcome intrusions with a sometimes prickly reserve.⁵ All these traits surface in White's later life and in his career on the Supreme Court.

The European war brought Americans home from Oxford in the fall of 1939, and White enrolled in Yale Law School, where he led his class after the first year. White left Yale in the fall of 1940 to play for the Detroit Lions (leading the NFL in rushing for a second time), then returned to law school in the spring of 1941. By the end of the fall football season, the United States was at war, and White headed to the U.S. Navy, eventually serving in the South Pacific with a young Jack Kennedy. Late in the war, kamikaze pilots struck the carrier *Bunker Hill*, on which White served as a staff officer. For four hours, White fought gasoline fires and exploding ammunition, "pull[ing] asphyxiating men from smoke-engulfed positions" with perfect composure and no thought for his own safety (p 191). After the war, White finished law school in the spring semester of 1946, then went to Washington as law clerk to Chief Justice Fred Vinson. Hutchinson fully captures the movement and drama of these years. The narrative is taut, the characterization convincing, and the result an eminently readable account of a life in action. Along the way, Hutchinson lays the groundwork for his later depiction of White as a Justice. At Yale, White's natural inclinations were reinforced by Wesley Sturges and Arthur Corbin, professors who brought a healthy skepticism to theoretical debate and taught their students to focus on the "practical reality" behind legal doctrines (p 155). Later, as law clerk to Vinson, White demonstrated impatience with the "Hugo Black technique" of "simple convictions in the service of predictable results" (p 210).

White then returned to Denver (because Washington, D.C. firms would not agree to consider him for partner in two years (p 219)), where he devoted himself to civic service and the practice of law until his involvement in the Kennedy campaign brought him back to Washington as Deputy Attorney General in 1961. Hutchinson provides a highly detailed account of White's time in the Department of Justice, where "Robert Kennedy and Byron White headed a corps of physically tough men . . . who enjoyed the square-jawed challenging decisiveness of the new leadership style" (p 270). In May 1961, when the Freedom Rides

⁵ The anecdote that begins the book and explains its ironic title comes from White's days as Deputy Attorney General, when he was asked by a waitress, "Say, aren't you Whizzer White?" and replied softly, "I was" (p 1).

tested the South's commitment to segregation, White went to Alabama as the Administration's point man, charged with organizing a force of U.S. Marshals to protect the Freedom Riders against the local authorities. The account of White's life prior to his time on the Court closes with a detailed retelling of this dramatic episode (pp 272-86) and an extensive account of White's role in Kennedy's judicial appointments (pp 287-309).

The most important of the Kennedy judicial appointments was White himself, who in April 1962 took the oath of office as Associate Justice of the Supreme Court. For the next thirty-one years, White baffled friends and confounded critics as he compiled a record that defies easy generalization. Hutchinson's depiction of Justice Byron R. White is in some sense the payoff for the detailed account of White's earlier life, as many aspects of a personality sketched in other contexts reappear on the Supreme Court. Faced with the need to account for more than three decades of judicial service, Hutchinson adopts an innovative strategy: one brief chapter on the Warren Court years, followed by in-depth treatment of the 1971, 1981, and 1991 October Terms. While this episodic chronology may sacrifice something in continuity, it allows a close look at the essential character of White's judging in a variety of contexts.

As Hutchinson points out, White's reputation as an enigmatic, unpredictable, "swing" vote⁶ stemmed partly from liberal chagrin that a Democratic appointee had not proved politically reliable. Yet as Hutchinson correctly notes, White "never was the kind of liberal that the Kennedy name has come to stand for" (p 445).⁷ As Hutchinson says, "Byron White and John Kennedy were tough on crime, tough on communists, friendly to organized labor, and shared a growing conviction that federal intervention was necessary if racial equality was to be more than a pious objective" (p 445). On these matters, White remained constant. In the words of Kate Stith, civil rights and federal power were the "salient issues" at the time of White's appointment: "Eventually, the Court changed, society changed, the issues changed. Byron White didn't change" (p 445).⁸

⁶ See, for example, the *New York Times* article at the end of the Court's October 1971 term, saying that White had "suddenly become the unpredictable 'swing' member of the Supreme Court" (p 380), quoting B. Drummond Ayres Jr., *The 'Swing' Justice: Byron Raymond White*, *NY Times* 16 (June 30, 1972).

⁷ Quoting Stuart Taylor, *Justice Byron White: The Consistent Curmudgeon*, *Legal Times of Wash* 1 (Mar 22, 1993).

⁸ Quoting Kate Stith (Cabranes), in Linda Greenhouse, *White Announces He'll Step Down from High Court*, *NY Times* 9 (Mar 20, 1993).

Hutchinson identifies other consistencies in White's judicial philosophy as well. From first to last, White supported congressional power to create innovative governmental structures, despite separation of powers concerns. He voted to sustain non-Article III bankruptcy courts; legislative veto schemes; the comptroller general's power to reduce budget deficits; independent counsels appointed by courts rather than by the President; and federal sentencing guidelines promulgated by a committee of presidential appointees (pp 396-97).⁹ In fact, White almost always supported federal legislative power, even under circumstances where analogous state and local laws would be struck down.¹⁰

Notwithstanding these themes and continuities, there is also discord and contradiction in White's career, and they are more pronounced, it seems to me, than Hutchinson's reader might infer. Take *Miranda v Arizona*,¹¹ for example. When the Supreme Court required the famous warnings prior to any custodial interrogation, White filed an angry dissent, including the following lines from a paragraph quoted by Hutchinson:

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. . . . There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case (p 344).¹²

Given the vehemence of this dissent, it is surprising to find White later extending *Miranda* beyond its necessary scope. Of

⁹ *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50, 76 (1982) (holding that the Bankruptcy Act of 1978, which assigned jurisdiction granted under 28 USC § 1471 to bankruptcy judges, violated Article III); *INS v Chadha*, 462 US 919, 954-55 (1983) (striking down the one-House veto provision of the Immigration and Nationality Act); *Bowsher v Synar*, 478 US 714, 734 (1986) (holding that the assignment to the Comptroller General of certain functions under the Balanced Budget and Emergency Deficit Control Act of 1985 violated the doctrine of separation of powers); *Morrison v Olson*, 487 US 654, 677 (1988) (upholding judicial appointment of independent counsel); *Mistretta v United States*, 488 US 361, 396-97 (1989) (upholding Congress's delegation of powers to promulgate sentencing guidelines for federal criminal offenses to an independent Sentencing Commission).

¹⁰ Compare White's votes in *Metro Broadcasting, Inc v FCC*, 497 US 547, 563 (1990) (joining majority to sustain minority preferences by the FCC under a standard of intermediate scrutiny and identifying various sources of congressional remedial power), with *City of Richmond v J.A. Croson Co*, 488 US 469, 490-91 (1989) (joining majority to strike down minority preferences by the city of Richmond under a standard of strict scrutiny and specifically joining the portion of the opinion reiterating the Congress's expansive remedial powers under Section Five of the Fourteenth Amendment).

¹¹ 384 US 436 (1966).

¹² Quoting *id* at 542-43 (White dissenting).

course, there are good reasons for White to have changed his mind about *Miranda*, and perhaps he did. From all that appears, however, he continued to think *Miranda* wrong, even as he applied it with a vengeance in doubtful cases. In *Edwards v Arizona*¹³ (discussed at p 390), a prisoner was given *Miranda* warnings, asked for a lawyer, and was then returned to his cell. The next morning he was questioned by different officers, given new *Miranda* warnings, and agreed to talk. The question was whether the confession given in the second interrogation could be used against him. On its facts, the case was easy. The prisoner initially had said that he did not want to talk to the officers but was told by a guard that he “had to.” This exchange rendered the confession involuntary (or at least not validated by a knowing and intelligent waiver of the right not to talk), and on that ground every Justice agreed.¹⁴ White went farther. His opinion for the Court extended the prophylactic rule of *Miranda* by adopting the additional prophylactic rule that an accused who has requested counsel cannot be questioned again (regardless of additional *Miranda* warnings or knowing and intelligent waiver) “unless the accused himself initiates further communication, exchanges, or conversations with the police.”¹⁵ Five years later, White joined in adapting and extending *Edwards* to Sixth Amendment claims.¹⁶

Hutchinson explains these votes as respect for precedent: “Those who recalled his stinging dissents from [the Warren Court era] failed to understand that he accepted decisions—even those in which he dissented—as time passed, all the more so when the precedent became a decade old” (p 390). Undoubtedly Hutchinson is right to identify *stare decisis* as an important theme in White’s work, but surely there is something more going on here. A judge who feels bound by an unfortunate precedent usually reads it narrowly. *Stare decisis* does not require that prior mistakes be extended to new ground. Perhaps White’s vote in *Edwards* reflects an unacknowledged conversion to *Miranda*’s prophylactic approach. More likely, he was driving home to his colleagues, several of whom disliked *Miranda* but refused to overrule it, the magnitude of their mistake. It was almost as if White was rebuking his fellow Justices by rubbing their noses in the mess they

¹³ 451 US 477 (1981).

¹⁴ For factual background, see *id* at 492; for unanimous agreement of the Court, see *id* at 487 (while there was no dissent in *Edwards*, Justice Burger concurred only in the judgment, while Justices Powell and Rehnquist concurred in the result).

¹⁵ *Id* at 485. See also *Minnick v Mississippi*, 498 US 146, 153 (1990) (reaffirming *Edwards*).

¹⁶ *Michigan v Jackson*, 475 US 625, 636 (1986).

had made. Whatever the explanation, it seems more complicated than straightforward respect for precedent.

The most notable example of White's refusal to acquiesce to precedent is abortion. White dissented in *Roe v Wade*¹⁷—many will recall his reference to women who want abortions for any reason “or for no reason at all”¹⁸—and thereafter held fast to that position, voting against abortion rights at every opportunity (p 369). Hutchinson examines White's refusal to accept *Roe*—saying that White thought that “[a]n illegitimate decision was entitled to no respect” (p 369)—but treats that case as highly exceptional. Indeed, after noting White's subsequent history on *Miranda*, Hutchinson describes *Roe* as the “only decision immune from precedential protection in White's jurisprudence” (p 390).

Of course, there is nothing unusual or discreditable in a Justice's refusal to accept unwelcome precedent. Other Justices have taken that position in abortion, obscenity, and death penalty cases, among others. But *stare decisis* is such a large theme in Hutchinson's analysis of White's judging that the matter assumes some importance. In fact, White's willingness to reject precedent on abortion was not all that exceptional. In other areas, as well, he demonstrated a free and easy attitude toward unwelcome prior decisions, including those he had joined. Two prominent examples are habeas corpus and defamation.

In 1963, White joined Brennan's opinion in *Fay v Noia*,¹⁹ which held (contrary to precedent²⁰) that a federal habeas petitioner could raise claims that had been lost because they were not timely raised in state court.²¹ In *Wainwright v Sykes*,²² a conservative majority overruled *Fay* and adopted a (then ill-defined) new standard that foreclosed federal habeas review of omitted claims unless the petitioner could show “cause” for the failure to raise the claim in state court and “prejudice” from the omission.²³ White concurred in the judgment in *Sykes*, but on grounds that brought him close to Brennan's dissent.²⁴ Yes, the petitioner had to show “cause” and “prejudice,” but “cause” would exist unless the defendant or his lawyer had “deliberately by-passed” state procedures as specified in *Fay*, and prejudice existed whenever

¹⁷ 410 US 113 (1973).

¹⁸ *Id.* at 221 (White dissenting).

¹⁹ 372 US 391 (1963).

²⁰ See, for example, *Brown v Allen*, 344 US 443, 485-87 (1953) (refusing to allow prisoners whose appeals were untimely to pursue federal habeas relief).

²¹ 372 US at 398-99.

²² 433 US 72 (1977).

²³ *Id.* at 87-88.

²⁴ *Id.* at 97 (White concurring).

the error was not harmless beyond a reasonable doubt.²⁵ Had these views prevailed, habeas would have remained largely intact. Instead, the Court (over the objections of two other members of the *Sykes* majority) later defined "cause" quite narrowly to require a showing of ineffective assistance of counsel²⁶ and extended that restrictive standard to capital cases.²⁷ "Prejudice" was also defined stringently to require that trial errors work to the petitioner's "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."²⁸ White joined these opinions without explanation. Most likely, he simply changed his mind on the desirability of expansive habeas review. If so, these cases chart the kind of conservative drift in White's views that Hutchinson downplays.²⁹ At no stage in this progression did White seem especially concerned with precedent.

Defamation also illustrates White's selectivity regarding precedent. In *New York Times Co v Sullivan*,³⁰ a unanimous Court (including White) began the constitutionalization of the law of defamation, holding that a public official could recover only on convincing proof of knowing or reckless falsity.³¹ Three years later, in *Curtis Publishing Co v Butts*³² and *Associated Press v Walker*,³³ the Court extended the knowing-or-reckless-falsity requirement to defamation actions by public figures.³⁴ White also supported that position.³⁵ In *Rosenbloom v Metromedia, Inc.*,³⁶ the Court applied the knowing-or-reckless-falsity standard to a defamation action brought by a private individual.³⁷ Speaking for himself and two others, Brennan urged that the *New York Times* rule be applied to all such cases.³⁸ Black reiterated his insistence on absolute press immunity.³⁹ (Douglas, who agreed with that po-

²⁵ *Id* at 98-99 (White concurring).

²⁶ *Murray v Carrier*, 477 US 478, 488 (1986).

²⁷ *Smith v Murray*, 477 US 527, 535 (1986).

²⁸ *United States v Frady*, 456 US 152, 170 (1982).

²⁹ See, for example, p 445, quoting Taylor, *Consistent Curmudgeon*, *Legal Times* at 1 (cited in note 7) (White "is not really a full-dress Rehnquistian conservative now, except on a bunch of high-profile issues that have come to dominate the headlines.").

³⁰ 376 US 254 (1964).

³¹ *Id* at 280.

³² 388 US 130 (1967).

³³ 388 US 130 (1967).

³⁴ *Id* at 155.

³⁵ The effective majority consisted of Warren, Brennan, and White, who supported extension of the *New York Times* standard to defamation of public figures, plus Black and Douglas, who endorsed absolute press immunity from liability for defamation.

³⁶ 403 US 29 (1971).

³⁷ *Id* at 52.

³⁸ *Id* at 43-44.

³⁹ *Id* at 57 (Black concurring).

sition,⁴⁰ did not participate.) The fifth vote was provided by White, who concurred in the judgment on the narrow ground that the *New York Times* rule applied at least to defamation of a private individual whose reputation was caught up in criticism of public officials.⁴¹

In *Gertz v Robert Welch, Inc.*,⁴² the Court returned to the question of whether the knowing-or-reckless-falsity requirement should apply to other defamation actions by private individuals.⁴³ By a vote of five to four, the Court said no, holding that private individuals could recover actual damages on proof of mere negligence.⁴⁴ Brennan dissented in reliance on *Rosenbloom*.⁴⁵ White also dissented, but from the opposite direction, arguing that a no fault standard should be constitutionally required. In a bitter, often caustic opinion, White flayed the majority for riding roughshod over the traditional state law of libel: "[T]he Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States."⁴⁶ And later: "[Y]ielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court disregards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices."⁴⁷ The violence done to the law of defamation was described chiefly by reference to the first Restatement of Torts, which summarized the law as it had been *before* the Supreme Court got into the act.⁴⁸ White's treatment of the Court's own precedents was cursory and opaque. *New York Times* itself could plausibly be distinguished as a branch of seditious libel, but *Butts* and *Walker* could not. Of his vote to extend the *New York Times* rule in those cases and his support for the outcome in *Rosenbloom*, White said nothing at all.

⁴⁰ See, for example, *Gertz v Robert Welch, Inc.*, 418 US 323, 355 (1974) (Douglas dissenting).

⁴¹ *Rosenbloom*, 403 US at 57, 62 (White concurring).

⁴² 418 US 323 (1974).

⁴³ *Id.* at 332.

⁴⁴ *Id.* at 345-47.

⁴⁵ *Id.* at 361 (Brennan dissenting). Douglas also dissented in continuing support of absolute press immunity. *Id.* at 355 (Douglas dissenting). Chief Justice Burger dissented on grounds that resist characterization. *Id.* (Burger dissenting) (noting that "I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens").

⁴⁶ *Id.* at 370 (White dissenting).

⁴⁷ *Id.* at 380 (White dissenting).

⁴⁸ *Id.* at 371-73 (White dissenting).

The *Gertz* dissent reveals White at his best and worst. He is confirmed as an independent thinker, ready to look beyond the debates that preoccupy his colleagues and strike out on his own. On the merits of the case, his arguments have undeniable force. His research was prodigious, detailed, and, in the account of what the lower courts had done after *Rosenbloom*, very informative. As always, White's views were grounded in practical reality ("[t]he press today is vigorous and robust"⁴⁹), rather than in breezy theorizing about press self-censorship and the chilling effect.

Notwithstanding these strengths, there is something unsettling about White's refusal to address his abrupt departure from prior decisions. The arguments advanced with skill and vehemence in *Gertz* applied with equal force to *Butts* and *Walker*. One might have expected an attempt to distinguish those cases if White thought they were different, or a confession of error if he thought they were not, or at least some sympathy for the views he had so recently shared; but White neither renounced his prior votes nor tried to explain them. Instead, he castigated his colleagues for walking a road that he himself had helped lay out. Later, White clarified his position by saying openly that he regretted *New York Times* and the doctrine it spawned (pp 421-22), but, at the time of *Gertz*, White's votes in these cases could only confirm his public reputation as irascible, unpredictable, and increasingly conservative.

Hutchinson takes a long step toward unlocking the mystery of Byron White when he examines White's style of opinion: "White's strength, which he barely muted as a judge, was adversarial: his opinions marshaled all of the arguments and all of the historical data and marched relentlessly forward" (pp 347-48). The Justice once told a clerk, "An opinion is just another argument" (p 364), and he often wrote in that vein, "having his say" in "rhetorically personalized statements" that sometimes lacked modulation and balance (p 374). While other Justices "weighed" opposing arguments, "White destroyed them" (p 348). The results were "relentless tours de force," impressive as argumentation but not as "enticing" or persuasive as more "evenly toned" opinions (p 348). Moreover, the fact that White used every available argument to make his case often left the reader unsure which ones mattered. Some contentions reflected concerns that had actually moved White toward decision; others did not. That the genuine and the opportunistic were all mixed up together helped make White's judicial record opaque.

⁴⁹ Id at 390 (White dissenting).

One observation that Hutchinson does not make, but that is richly supported by his account, is how closely White's strengths and weaknesses as a judge echoed his talents as an athlete. A keen sense of contest dominated both contexts. In both, White was tough, hard-driving, and utterly purposive. In both, he shunned doubt. The openness, unguardedness, and sympathy for opposing concerns that were missing from White the judge would have disadvantaged White the athlete. The frank admissions of uncertainty or indecision so rarely encountered in White's opinions would have been seen as weakness in football—or worse, as whining excuses for poor performance. If some of White's opinions are the intellectual equivalent of brute force, that was how he had triumphed on the field. He relied on power, not finesse, on the willingness to dish out punishment and the capacity to absorb it, on all the manly virtues of the athlete as warrior. The same traits that look uncomplicated and heroic on the football field or the deck of a burning aircraft carrier may seem obtuse and belligerent on the bench. Despite White's early fame, the Supreme Court was the main event of his public life and the source of the prominence that induces a leading scholar to write his biography. Ironically, the Supreme Court may also have been the one environment that could obscure White's enormous strengths. Appointment to the Supreme Court crowned White's professional career but at the same time isolated him from the arenas of contest in which he so consistently excelled and rewarded a style of intellectualization for which he had no taste.

Ultimately, it may be beyond the capacity of any biographer to resolve completely the "impenetrable enigma"⁵⁰ of Byron White, especially without the subject's cooperation or access to his private papers, but Dennis Hutchinson has made a splendid effort. His account is nuanced, detailed, often insightful, always intelligent, and beautifully written. Time and again, we see the traits and characteristics so finely etched in Hutchinson's rendition of White's early life surfacing in his decisions and opinions as a Justice. These kinds of coherences are a main aim of judicial biography, and Hutchinson has succeeded in bringing them to life in this fascinating portrait of a complex man.

⁵⁰ This phrase comes from Gerald Gunther's admiring blurb on the dust jacket.

