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### Justice White and Judicial Review

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# JUSTICE WHITE AND JUDICIAL REVIEW

PHILIP J. WEISER\*

The art of judging remains a subject of heated debate among constitutional scholars. In his paper, Professor Bill Nelson presents a powerful case that Justice White offers an ideal type for the constitutional judge. As countries around the world are increasingly adopting constitutional courts similar to the Supreme Court established in the U.S. Constitution,<sup>1</sup> the scholarly enterprise of explaining the value of judicial review and the role of the constitutional judge has taken on added importance. To add to Professor Nelson's praise for Justice White, I will explain how Justice White's approach to judging reflects an important sensitivity to judicial strategy.

It is a special pleasure for me to have the opportunity to evaluate Justice White's legacy at this Rothgerber Conference. For those of us privileged to know Byron White, there can be little question that he never forgot where he came from. In this respect, this conference also reflects a quality that I respect deeply about Justice White—unlike some judges, the idea of being celebrated and canonized by an academic conference would make him very uncomfortable. From his early days as a football star, Justice White viewed the concept of celebrity with healthy suspicion<sup>2</sup> and, later as a Supreme Court Justice, he viewed academic criticism or notoriety with an ironic detachment at best and a caustic distaste at worst.

Even after his remarkably long tenure, Justice White never viewed his service on the Supreme Court as a central part of his identity and never viewed himself as carrying out a

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\* Associate Professor of Law, University of Colorado. Thanks to David Ebel, Bob Nagel, Josie Sandler, and Heidi Wald for helpful comments and encouragement. It was my great pleasure to serve as a law clerk for Justice White after his retirement, during the October 1995 Term, when I also served as a law clerk to Justice Ginsburg.

1. See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 474 (2003) ("Over the last half-century, judicial review has gone from rare to almost universal in democratic regimes around the world.").

2. This point is detailed in Dennis Hutchinson's well drawn portrait of Justice White. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 39-42 (1998).

jurisprudential mission to remake the law in any particular form. Rather, as Professor Nelson relates, Justice White viewed his service on the Supreme Court as merely a “job,” and as Justice White himself explained at his confirmation hearing, he believed that the essence of the job was to “decide cases.”<sup>3</sup> At his core, Justice White remained a citizen of the West, a friend of scores of Coloradans, and a devoted fan of CU football.<sup>4</sup> This is not to suggest that White did not take his work seriously; to the contrary, Justice White remained an avid reader of the law reviews and continued to keep up with cutting edge scholarship even after he retired from the Court. Nonetheless, I agree with Professor Nelson that he certainly would have wondered whether participating in an academic conference was the best use of one’s time.<sup>5</sup> Indeed, while he appreciated the importance of teaching and scholarship, he often remarked that he wished that more of his law clerks would pursue work in politics and public service than as law professors.

In reflecting on Justice White’s judicial legacy, it is notable how law professors routinely overlook his contributions to the Court and his very admirable approach to judging. This phenomenon probably reflects Justice White’s discomfort with attracting attention, the liberal academic criticism with his stance in *Roe v. Wade*<sup>6</sup> and *Bowers v. Hardwick*,<sup>7</sup> and his reluctance to engage in anything approaching grand, self-conscious theorizing. This last point is reflected most clearly in his understandably criticized concurrence in the *Union Gas* case, where he explained his vote deciding an important Eleventh Amendment issue by curiously stating only “I agree with the conclusion reached by Justice Brennan . . . although I do not

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3. See William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U. COLO. L. REV. 1291, 1299 (2003); Louis F. Orberdorfer, *In Memoriam: Byron R. White*, 116 HARV. L. REV. 3, 4 (2002).

4. For this reason, Justice White’s receipt of the Citizen of the West award is a far more fitting honor than anything that a legal academic conference can convey. Judge David Ebel captured this aspect of Justice White in a tribute to him delivered as part of the Citizen of the West ceremony. See David M. Ebel, *Byron R. White—A Justice Shaped By The West*, 71 U. COLO. L. REV. 1421 (2000) [hereinafter Ebel, *Shaped By The West*].

5. See Nelson, *supra* note 3, at 1297 (noting oddity of trying to discern a judicial legacy that, due to his humility, Justice White worked so assiduously to “leave us little in the way of a distinctive [articulated] legal philosophy”).

6. 410 U.S. 113 (1973).

7. 478 U.S. 186 (1986).

agree with much of his reasoning.”<sup>8</sup> Whatever the reason(s), it is most unfortunate that the legal academy has not generally appreciated Justice White’s model of judging, particularly when it celebrates theories of judicial review long after Justice White put them into practice.<sup>9</sup>

In recent times, as appeals courts judges and academic-minded individuals have predominated among those elevated to the Supreme Court, there is often a stark contrast between how Supreme Court Justices view the political process and how it actually works. Justice White’s training for the Court, like a number of his contemporaries in the middle part of the twentieth century, stemmed from his work in practice and government. As such, he brought three important qualities to judging that are essential to an effective judicial strategy and not always in great supply at the Supreme Court: a humility that appreciates the limits of courts as instruments for social change; a deep-seated pragmatism that shaped his thinking about how judges should decide cases; and, finally, an acute recognition that legal doctrine shapes a system that must be implemented by practicing lawyers and judges.

As Justice White was a man of action first and foremost, I do not claim that his appreciation for judicial strategy reflected a self-conscious and preconceived judicial philosophy. Rather, I believe that Justice White’s intuitive and learned appreciation for the nature of law and politics shaped how he did his job. Unfortunately, legal academics and even journalists—who tend to value self-conscious theorizing—have underappreciated Justice White’s model of judicial strategy.<sup>10</sup>

Justice White’s judicial humility captures both his personal temperament and his view of the judiciary in relation to the other branches of government.<sup>11</sup> Some critics of Justice

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8. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 57 (1989) (White, J., concurring in the judgment).

9. In particular, I have in mind the theories “democratic experimentalism” and “judicial minimalism.” See *infra* notes 10, 45.

10. Justice White, for example, would appear to be an exemplary model and a precursor for Cass Sunstein’s ideal approach of taking “one case at a time.” See CASS SUNSTEIN, *ONE CASE AT A TIME* 4 (1999) (“[M]inimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions.”). With only a few exceptions, however, Sunstein’s account of judicial minimalism does not recognize Justice White’s sensitivity on this score. See *id.* at 33 (discussing Justice White’s position in *Griswold*).

11. For a poignant description of Justice White’s character and humility, see

White focus on his opinions in *Roe* and *Bowers* and suggest that Justice Blackmun, for example, better typifies an ideal judge for “taking the right position” in both cases. But focusing on Justice Blackmun’s conclusions in those two cases (and the “heroism” associated with the causes he championed) overlooks the point that Justice White’s understanding of the judiciary provides a better model for judging in that he recognized the institutional limitations of the judiciary.<sup>12</sup> Thus, regardless of the lessons one draws with regard to the institutional limits of the judiciary and their application to the *Roe* and *Bowers* cases, one must appreciate that brushing aside those limits, as Justice Blackmun’s perspective on judging often led him to do,<sup>13</sup> threatens to mire the judiciary in matters for which it is ill-suited. Notably, Justice White regularly called the Court’s attention to comparative expertise issues—such as in dissenting from its oversight of the campaign finance laws under *Buckley v. Valeo*<sup>14</sup>—even though such concerns were brushed aside not only by Justice Blackmun, but by most of his colleagues on the Court.

Justice White and Justice Blackmun (or Justice Brennan, on Professor Nelson’s account) offer polar opposite examples about how courts should act in relation to other branches of government. On my account, Justice White’s views in *Roe*, *Bowers*, and *Buckley* do not necessarily reflect a moral insensitivity, but rather reflect a very cautious sensibility about how

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

12. Professor Ronald Dworkin offers a similar explanation for how the framers of the Fourteenth Amendment can be understood to hold a robust concept of equality, even if they misapplied that concept by also holding a conception of equality that allowed for segregated schools. See RONALD M. DWORKIN, *LAW’S EMPIRE* 70-72, 362-63 (1986).

13. See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) (calling for judicial oversight of child welfare authorities and requirement of affirmative assistance to protect children from parents). For an effective critique of *DeShaney* and how the judicial recognition of rights of actions in areas not well understood by courts can lead to unfortunate unintended consequences, see RICHARD POSNER, *OVERCOMING LAW* 208-211 (1995).

14. 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part). Echoing Justice White’s approach taken over twenty five years earlier, Justice Breyer recently endorsed judicial humility for such questions as campaign finance laws, where “answers [to those questions] reflect empirical matters about which the legislature is comparatively expert.” See Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 254 (2002).

the Court should act strategically vis-à-vis other branches of government.<sup>15</sup> Regardless of whether one thinks Justice White applied this strategic sensibility with an overabundance of caution—and it is important to remember that he sided with the Warren Court majority in *Griswold v. Connecticut*,<sup>16</sup> a number of important civil rights cases,<sup>17</sup> and the gender discrimination cases<sup>18</sup>—it is important to realize that the Supreme Court must be pragmatic about when it is institutionally well suited to effectuate constitutional principles.<sup>19</sup> In *Griswold*, for example, it bears notice that, unlike *Roe*, the Court's decision only affected the two states that had refused to repeal laws limiting access to contraception for married couples.<sup>20</sup> Significantly, Justice White did not reject the premise that the Due Process Clause could give rise to substantive rights, but he did believe that the Court needed to be very careful in defining the liberty interest protected by it.<sup>21</sup>

The current member of the Court whose views are closest to Justice White's on the role that courts should play in a constitutional democracy may well be Justice Ginsburg, who took

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15. Where Justice White deserves criticism is for the detached and unsympathetic tone he took towards the nature of the claim advanced by the plaintiff in *Bowers*. See Ebel, *Shaped By The West*, *supra* note 4, at 1423 (noting that Justice White's opinions were "often criticized as much for their tone as for the result" and explaining that "for better or worse, style and tone never were matters of very high priority with Justice White."). For a powerful argument that constitutional courts should respect the moral claims of those before them, even when rejecting their arguments, see Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 1, 4-68 (1983).

16. 381 U.S. 479, 503 (1965) (White, J., concurring in the judgment).

17. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 762 (1974) (White, J., dissenting) (arguing for a more robust form of judicial relief to address segregated schools).

18. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

19. As Chris Eisgruber put it, where "strategic issues dominate moral ones . . . the case for judicial deference to legislatures is strong." Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply To Five Critics*, 37 U.S.F. L. REV. 115, 182 (2002). In a related conception of this issue, Lawrence Sager suggests that courts can withhold relief—and defer to other bodies—in cases where their ability to implement constitutional principles are suspect. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

20. See Posner, *supra* note 13, at 226.

21. See John Paul Stevens, *A Tribute To Justice White*, 112 YALE L.J. 969, 971 (2003) (discussing Justice White's belief in, but tempered interpretation of substantive due process rights); Michael Herz, *To Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1346-1349 (2003) (discussing Justice White's approach in *Griswold*).

Justice White's seat on the Court. Given her important role in litigating on behalf of gender equality, commentators are often quick to link her to Justice Blackmun rather than Justice White. But a more careful examination of her judicial philosophy underscores the connections between her thinking and Justice White's—even if they view *Roe* and *Bowers* differently. Most notably, Justice Ginsburg has offered her own criticism of *Roe* on grounds related to Justice White's criticism of that decision; in particular, she explained that *Roe* suffered from judicial hubris in that it created its own legal regime that displaced almost every state law in force.<sup>22</sup> Using a more effective judicial strategy, Justice Ginsburg argued, the Court might have chosen a more modest role for itself, complementing, rather than displacing, the political reform debates then underway.<sup>23</sup> This sensitivity, reflected both in Justice White and Ginsburg's thinking, not only provides important lessons for the scope of judicial doctrine, but also provides important lessons for the development and implementation of judicially devised remedies.<sup>24</sup> Justice Ginsburg continues Justice White's legacy of being very sensitive to the institutional competence limitations of federal courts. Indeed, Justice Ginsburg's description of Justice White as "constantly remind[ing] the Court to consider the consequences and common sense of the legal rules it announce[s]"<sup>25</sup> could easily describe her approach to judging.<sup>26</sup>

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22. Ruth Bader Ginsburg, *Speaking In A Judicial Voice*, 67 N.Y.U. L. REV. 1165, 1199 (1992).

23. *Id.*

24. For an application of how this lesson translates to constitutional law, see Phil Weiser, *What's Quality Got To Do With It: Constitutional Theory, Politics and Education Reform*, 21 N.Y.U. REV. L. & SOC. CHANGE 745 (1995); see also Jonathan R. Werner, *No Knight In Shining Armor: Why Courts Alone, Absent Public Engagement, Could Not Achieve Successful Public School Finance Reform In West Virginia*, 35 COLUM. J. L. & SOC. PROBS. 61 (2002) (explaining why judicial remediation without public support or legislative involvement is a failing strategy for social change). For an application of this lesson to antitrust law, see Philip J. Weiser, Goldwasser, *The Enforcement of the Telecom Act, and Reflections on Antitrust Remedies*, 55 ADMIN. L. REV. 1 (2003).

25. Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003).

26. At her confirmation hearing, Justice Ginsburg described her judicial philosophy as "rooted in the place of the judiciary—of judges—in our democratic society." 18 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1993: RUTH BADER GINSBURG 260 (Roy M. Mersky et al eds., 1995). For a recent example of Justice Ginsburg's sensitivity to democracy and the practical effect of the Court's decisions, see *State Farm Mut. Automobile Ins.*

The second salutary aspect of Justice White's judicial philosophy was his refreshing pragmatism.<sup>27</sup> Unlike other judges, who often suggest that they are not exercising discretion even when engaged in interstitial law making, Justice White did not shy from the fact that the judiciary plays an essential law-making role. In interpreting the Constitution, he generally avoided relying on history, original intent, or the manipulation of past doctrine, instead focusing on the context and consequences of the decision at hand. For this reason, Judge Louis Oberdorfer termed Justice White a "realistic, common law constitutionalist" who eschewed a hyper-technical approach to legal doctrine in general and constitutional law in particular.<sup>28</sup>

For an example of Justice White's pragmatic approach, consider *New York v. United States*,<sup>29</sup> in which Justice O'Connor authored a majority opinion that justified its results, at least in part, by pointing to a historical record that provided ambiguous support for the Court's ultimate judgment.<sup>30</sup> In so doing, Justice O'Connor ignored, as Justice White pointed out in dissent, that the claimed "coercion" to which the states objected involved legislation for which the states had lobbied.<sup>31</sup> Justice White, in both federalism cases and separation of powers ones, argued very forcefully and effectively for a functionalist perspective on how the judiciary could aid the political process as opposed to a formalistic perspective that all too often denied reality.<sup>32</sup> The Supreme Court did not follow his lead in

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Co. v. Campbell, 123 S. Ct. 1513, 1531 (2003) (Ginsburg, J., dissenting) (calling judicially crafted regime imposed on states to restrict punitive damage awards as "boldly out of order").

27. I recognize the debates around the use of the term "pragmatism" and like Professor Grey find it sufficient for my purposes to define it as "antiformalism." See Grey, *supra* note 1, at 478.

28. See Louis F. Oberdorfer, *Justice White and The Yale Legal Realists*, 103 YALE L.J. 5, 16 (1993).

29. 505 U.S. 144 (1992).

30. See Martin S. Flaherty, *Byron White, Federalism, and The "Greatest Generation(s)"*, 74 U. COLO. L. REV. 1573, 1605-06 (2003); see also *New York*, 505 U.S. at 207 n.3 (White, J., dissenting) (arguing that majority's "many invocations of history" constituted nothing "other than elaborate window dressing").

31. Compare 505 U.S. at 166 (invoking history and precedent) with 505 U.S. at 189-90 (White, J., dissenting) (recounting origin of legislation as ratification of regime developed by states and urged upon Congress by them).

32. See Flaherty, *supra* note 30, at 1576. Two defenses of a formalist approach bear notice. First, as Larry Lessig has argued, it is possible that one might invoke formal reasons for an approach as a justification, even while supporting that approach on functional grounds. See Lawrence Lessig, *Translating*

many of those cases, but Justice White's conception of the role of judges continues to be very influential and important. In particular, as Justice Stevens acknowledged in a recent tribute, Justice White—not surprisingly given his sensitivity to institutional competence—played a crucial role in moving the Supreme Court towards the deferential stance taken towards administrative agencies in the *Chevron* doctrine.<sup>33</sup>

Finally, let me salute Justice White's appreciation for the fact that Supreme Court decisions provide rules to be implemented by lower courts and practicing attorneys.<sup>34</sup> More so than any of his contemporaries, Justice White remained acutely conscious of instances where the Supreme Court needed to step in to resolve circuit conflicts or clear up areas of legal doctrine that confused lower courts and practicing attorneys.<sup>35</sup> In a similar vein, Justice White's focus on the importance of developing sound and workable rules also led him to be a leader in the Court's antitrust revolution, which rejected the broad use of formal, categorical rules in favor of a more fact-sensitive inquiry.<sup>36</sup> In short, Justice White championed the importance of clearly resolving the issues addressed by the Court, expressing his hope upon leaving the Court that its "mandates will be clear [and] crisp, . . . leav[ing] as little room as possible for disagreement about their meaning."<sup>37</sup>

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*Federalism*, 66 GEO. L. REV. 1218, 1234 (1998). Second, as Allison Eid has explained, it is conceivable that formal and categorical rules—as opposed to more flexible and functional ones—are necessary to implement any judicially enforced commitments to federalism on the ground that federal judges will be all too willing to compromise state interests in favor of federal ones to which they are more obedient. See Allison Eid, *Federalism and Formalism*, 11 WM. & MARY BILL OF RTS. J. (forthcoming 2003).

33. See John Paul Stevens, *In Memoriam: Byron R. White*, 116 HARV. L. REV. 1, 1-2 (2002). For an explanation of the significance of this approach, and its contribution towards a more effective lawmaking system, see Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

34. Professor Fallon elaborates on this critical role of the Supreme Court in a recent book. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

35. John Paul Stevens, "Cheers!" *A Tribute to Justice Byron R. White*, 1994 B.Y.U. L. REV. 209, 216-17.

36. Most notably, Justice White's opinion in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, which famously explained that "easy labels do not always supply ready answers," instructed courts to be very careful before condemning unexamined conduct as per se illegal. 441 U.S. 1, 8 (1979).

37. Ginsburg, *supra* note 25, at 1289 (quoting Justice White's letter upon announcing his retirement).

His sensitivity to the role of the Supreme Court in superintending a legal system reflects Justice White's functionalist orientation. In particular, Justice White appreciated that formalism, where divorced from reality, threatened to create considerable instability by providing unworkable legal regimes. Returning to the examples of federalism and the political process, this concern proved prescient both in *National League of Cities v. Usery*<sup>38</sup> and in *Shaw v. Reno*.<sup>39</sup> As for the Court's recent federalism jurisprudence in *New York* and its progeny, I believe that there is a useful (albeit limited) role for an anti-commandeering principle, but I acknowledge that there are legitimate concerns that the Court will go far beyond such a role in the current federalism revival.<sup>40</sup> Moreover, I most certainly agree with Justice White's sentiment that the justification for any judicially enforced anti-commandeering principle should be whether it facilitates an effective regime of cooperative federalism and not whether it follows from a formalistic understanding of federal-state relations.<sup>41</sup>

All three elements of Justice White's appreciation for judicial strategy reflect an approach to constitutionalism as a means for practical governance. As Justice Jackson explained in his concurrence in the Steel Seizure cases, interpreting the Constitution—and exercising the discretion accorded to judges under it—should seek to advance the cause of “workable government” by developing legal doctrine that takes account of political realities.<sup>42</sup> In the case of Justice White, he plainly en-

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38. 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

39. 509 U.S. 630, 661(1993) (White, J., dissenting) (arguing that the type of claim recognized in *Shaw* would give rise to “constant and unmanageable” judicial intrusion into the redistricting process).

40. For my discussion of this point, see Philip J. Weiser, *Towards A Constitutional Architecture For Cooperative Federalism*, 79 N.C. L. REV. 663 (2001).

41. Viewed on the functionalist ground alone, the merits of a federalism-based anti-commandeering rule is, to be sure, debatable. See Breyer, *supra* note 14, at 259 (suggesting that the anti-commandeering rule hinders the development of cooperative federalism programs).

42. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). In terms of the significance of sensitivity to political realities, Justice Jackson prefaced his opinion with the following candid explanation of his approach to legal doctrine:

That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety. While an interval of detached reflection may temper

dorsed this perspective, underscoring that any legal regime the Court institutes should be workable in practice. In one of his flagship opinions, his dissent in *INS v. Chadha*, Justice White quoted with approval Justice Jackson's "workable government" concept and bemoaned the fact that the majority opinion invalidated nearly 200 statutory uses of the legislative veto by taking a broad, formalist swipe at a well worn practice.<sup>43</sup> This type of sensitivity not only reflects what Cass Sunstein calls judicial minimalism,<sup>44</sup> but also what others term a constitutional philosophy of "democratic experimentalism," which recognizes that judges should be mindful of the opportunity to experiment with alternate approaches until a single one emerges as superior.<sup>45</sup> A hallmark of this approach is to encourage judges to adopt contingent (or limited) rules—i.e., ones like those in the dormant Commerce Clause context that can be modified by congressional action—where there are reasons to be concerned about the impact of the judgment in question.<sup>46</sup>

To Justice White's great credit, he took the concept of experimentation very seriously and, where appropriate, even changed his approach to certain issues. This flexibility, which Professor Nelson attributes to Justice White's view that "every-

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teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.

*Id.* at 634.

43. 462 U.S. 919, 967, 978 (1983) (White, J., dissenting).

44. See Sunstein, *supra* note 10. In *Chadha*, for example, Justice White began his opinion by noting that, on Justice Powell's rationale, the Court could have invalidated the action before it and left standing an array of other statutory provisions. 462 U.S. at 967 n.1 (White, J., dissenting). To underscore the severe impact of the Court's decision, Justice White attached an appendix listing the affected statutory regimes. See *id.* at 1003.

45. See Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60-73 (1998); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Again, in *Chadha*, Justice White emphasized the uncertainty of the merits of the legislative veto in criticizing the majority's decision, calling for more experimentalism before adopting a broad approach to the issue. See 462 U.S. at 976-977 (noting active debate on issue); see also Dorf & Sabel, *supra*, at 441 & 441 n.581 (commenting favorably on Justice White's position in *Chadha*).

46. As Chris Eisgruber puts it, this form of judicial action allows for the "benefits of judicial involvement in questions of political structure, but [to address the] worry that judges will make strategic errors, we might encourage judges to impose restrictions subject to congressional revision—just as they do under . . . dormant Commerce Clause jurisprudence." Eisgruber, *supra* note 19, at 203.

thing is up for grabs<sup>47</sup> can be best explained by Justice White's awareness that changing social circumstances and experience can justify different approaches. Two such notable instances of Justice White's willingness to change his position are his views on *Times v. Sullivan*<sup>48</sup> and *Miranda v. Arizona*.<sup>49</sup> In *Sullivan*, Justice White joined the majority opinion imposing a national regime to govern libel actions by public officials, presumably concluding that sufficient experimentation at the state level with the standard adopted in that case revealed both its soundness and workability.<sup>50</sup> (Unlike *Roe*, for example, the approach adopted by the Supreme Court in *Sullivan* was not a novel one.) But as time went on, Justice White's judgment about this experiment changed and he concluded that a less federally restrictive regime would be preferable to the *Sullivan* approach.<sup>51</sup> Significantly, in his *Gertz v. Welch* dissent, he termed the Court's extension of *Sullivan* to remake libel law in "all of or most of the 50 States" an "ill considered exercise" of its authority.<sup>52</sup> Invoking the experimentalist perspective, Justice White explained that "I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damage awards before retooling the established common-law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses."<sup>53</sup> Similarly, when he later criticized *Sullivan*, Justice White suggested that the Court could have—and should have—adopted a less intrusive legal regime to govern libel law.<sup>54</sup>

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47. See Nelson, *supra* note 3, at 1298.

48. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

49. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

50. See *Sullivan*, 376 U.S. at 280 n.20 (noting that 11 states adopted actual malice rule and that the consensus of scholarly opinion endorsed the rule).

51. Over twenty years after *Sullivan*, Justice White explained that "*Sullivan* was the first step in what proved to be a seemingly irresistible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 766 (1985) (White, J., concurring in the judgment). Consequently, Justice White "came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it" and ultimately concluded that *Sullivan* was wrongly decided. *Id.* at 767.

52. 418 U.S. 323, 369-70 (1974) (White, J., dissenting).

53. *Id.* at 397.

54. See *Dun & Bradstreet*, 472 U.S. at 771 (White, J., concurring in the judgment) ("In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press.").

In *Miranda* and its progeny, Justice White took the opposite approach from that he took in *Sullivan* and the decisions in its stead. Initially, he dissented from the creation of a new legal regime to govern interrogation, believing that the states should be allowed more latitude on this score.<sup>55</sup> Over time, however, as the *Miranda* regime went into effect, Justice White concluded that it did work and, consequently, he voted to retain—and even extend—it.<sup>56</sup> Reflecting this experimentalist approach to constitutional judging, Justice White would have, in my view, joined the majority decision in *United States v. Dickerson* to retain *Miranda* on the ground that, despite his earlier concerns, *Miranda* now provides an effective and stable regulatory regime.<sup>57</sup> In sum, Justice White's judicial practice—captured by the three elements of judicial strategy outlined above—focused on devising rules for workable governance and eschewing judicial oversight of unmanageable regimes that take judges into terrain that is beyond their institutional competence.

I want to close by offering a different emphasis than Professor Nelson in order to explain the implications of Justice White's judicial practice. As Professor Nelson explains, Justice White's approach to judging reflected his concern that judicially developed rules lacked democratic legitimacy.<sup>58</sup> This concern fits within the classic concern articulated by Alexander Bickel's suggestion that the practice of judicial review reflects a "counter-majoritarian difficulty"<sup>59</sup> and a continuing academic focus on the purported "undemocratic" nature of judicial review.<sup>60</sup> As my discussion suggests, I find it equally plausible that Justice White's approach to judging does not reflect a con-

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55. See *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting).

56. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (applying and extending *Miranda*).

57. See *Dickerson v. United States*, 530 U.S. 428 (2000) (clarifying that *Miranda* reflected a constitutional decision and declining to overrule it). In so doing, however, Justice White might well have emphasized the invitation, offered in *Miranda* itself, for experimentation with "legislative action to protect the constitutional right against coerced self-incrimination" other than the famous warnings that are now routinely used—i.e., required videotaping of all confessions. *Id.* at 440-43; see also Dorf & Sabel, *supra* note 45, at 452-57 (emphasizing this point).

58. See Nelson, *supra* note 3, at 1293.

59. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 17 (1962).

60. For a terrific exploration of this debate, see Barry Friedman, *The Birth Of An Academic Obsession: The History of The Counter-majoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

courts' lack of democratic pedigree as such, but rather stems from concerns related to the courts' institutional competence to implement certain legal regimes.<sup>61</sup>

Like Professor Nelson, commentators routinely link arguments about the limits of judicial authority to claims that the judiciary lacks democratic legitimacy. For some, this argument leads to a tepid endorsement for an undemocratic practice; others argue for the abolition of judicial review entirely.<sup>62</sup> There is, however, an alternative perspective. In particular, as Chris Eisgruber explains, there are ways of accounting for judicial review that recognize how judges, like other branches of government, can represent the people and, acting in concert with other governmental actors, can produce better and more democratic results than legislatures acting alone.<sup>63</sup> Conceptualizing and implementing such a pragmatic account of judging calls for more real-world examination of when and how judicial review can be effective.<sup>64</sup> As I see it, Justice White's legacy provides support for such an account of judicial review, particularly when coupled with his sensitivity to the importance of judicial strategy. Significantly, this view does not rule out judicial policymaking—through interstitial lawmaking, for example—as illegitimate, but it calls for an acute awareness of the judiciary's institutional limitations.<sup>65</sup>

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61. Put differently, Justice White's approach can fit comfortably within the Yale justification that judicial review reflects a tool of democracy – as opposed to the Harvard critique offered by Bickel, among others. See Friedman, *supra* note 60, at 231-36 (contrasting traditions); see also Louis Oberdorfer, *Justice White and Legal Realism: An Addendum to Professor Stith-Cabranes*, 74 U. COLO. L. REV. 1567, 1568 (2003) (contrasting the Harvard School and Yale Schools, noting that the latter focuses on the practical effect of the relevant decision). The Yale conception of judicial review is nicely captured by its former Dean, Eugene Rostow. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

62. For a cogent argument along these lines to abolish the practice of judicial review, see JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

63. See CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); Eisgruber, *supra* note 19. Justice Breyer recently offered a similar defense of judicial review. See Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

64. In urging a move away from the obsession with the “counter-majoritarian difficulty,” Barry Friedman has called for this approach to constitutional theory. See Friedman, *supra* note 60, at 257 (calling for an inquiry into the political economy of judging that would “study judicial review on more pragmatic terms, trying to assess how well it functions, and what it offers in the real world”).

65. In his dissent in *Basic v. Levinson*, for example, Justice White reminded the Court of this very point:

One important means of implementing a democratic experimentalist, minimalist, and pragmatic account of judicial review is to look for judges in the mold of Justice White. In this regard, an ideal judge would bring to the bench not only Justice White's appreciation for judicial strategy (whether self-consciously theorized or not) and experience in government and practice, but also the personal qualities of collegiality, a sense of humor, and the considerable humility that made Justice White an important member of the Supreme Court for over thirty years. Justice White set a tremendously high bar in this regard and his personal presence cannot be replaced, but by appreciating his sage perspective on the role of the judiciary, his legacy will continue to live on. And that is why, despite whatever discomfort Justice White himself might have had with this conference, it is worth examining, explaining, and remembering his unique contributions to the Supreme Court.

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The Congress, with its superior resources and expertise, is far better equipped than the federal court for the task of determining how modern economic theory and global finance markets require that established notions of legal fraud be modified. In choosing to make these decisions itself, the Court, I fear, embarks on a course that it does not genuinely understand, giving rise to consequences it cannot foresee.

485 U.S. 224, 254 (1988) (White, J., dissenting).