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Justice Byron R. White: A Modern Federalist and a New Deal Liberal

William E. Nelson[*]

"Conventional wisdom," as chronicled by a sympathetic former law clerk, "suggests that Justice White has been a disappointment because he did not turn out to be the 'liberal' that many expected of President John F. Kennedy's first appointee."[1] Contrary to this perceived wisdom, I believe that Byron R. White was appointed to the Supreme Court because he was a Kennedy liberal and that, although the Justice's approach may have changed marginally during his three decades on the bench,[2] on the whole he adhered faithfully to the political values that had led to his appointment. The considerable divergence that existed between Justice White's voting record and the voting patterns of other liberal Justices, such as his close personal friend, William J. Brennan, who sat on the Court with Justice White for all but Justice White's final three Terms, emerged almost entirely during the first decade of Justice White's judicial tenure—his decade on the Warren Court. That divergence, I suggest, resulted less from changes in the views of Byron White than from a transformation in important social and political values in the mid- to late 1960s.

My proposed interpretation of Justice White's place on the Supreme Court will proceed first by delineating the contours of what is labelled "Kennedy liberalism"—the ideology that

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1. Pierce O'Donnell, *Common Sense and the Constitution: Justice White and the Egalitarian Ideal*, 58 U. COLO. L. REV. 433, 436 (1987).

2. For two examples of White's shift to a more conservative posture during the late 1980s, see *infra* notes 66, 79 and accompanying text.

produced Byron White's appointment to the Supreme Court. Using a three-part analysis,[3] I will then show how Justice White approached the three values for which history will remember the Supreme Court during his period of tenure: pragmatism, egalitarianism, and individualism. Far from betraying the liberalism embodied by the Kennedy administration and epitomized by the early Warren Court, Justice White consistently advocated and adhered to Kennedy liberalism with its emphasis on pragmatic social reform and its unshakable devotion to equality. The only subject on which the Justice departed from other liberals was individual rights, but this departure did not represent a significant ideological shift for John F. Kennedy's first appointee to the high Court. Finally, I hope to demonstrate that the Justice's jurisprudential philosophy, far from eschewing liberalism, fit well within a coherent and recognized strand of liberalism. Byron R. White's and John F. Kennedy's liberalism was, I believe, a direct descendant of the pragmatic, egalitarian liberalism that lay at the core of Franklin D. Roosevelt's New Deal. It was a more distant descendant of the democratic republicanism of James Madison and ultimately of the community-driven, republican political theories of Hume and Montesquieu. It was a liberalism that other Justices, however, did not fully accept—a liberalism at odds with the romantic individualism of Rousseau and Kant on which other liberals like Justice Brennan ultimately built their jurisprudential edifice.

I. KENNEDY LIBERALISM

Byron White, who served as Deputy Attorney General from 1961 to 1962, was very much a part of the Kennedy team in the Department of Justice; in fact, he as much as anyone put the team together.[4] Thus, even in the absence of direct evidence, there is every reason to believe that Justice White shared the Kennedy administration's liberal values.

What were those values? First was an unapologetic and undying belief in rationalism. The Kennedy team possessed enormous faith in the ability of people to resolve problems

3. *See* Robert C. Post, *William J. Brennan and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123 (Mark Tushnet ed., 1993).

4. *See* VICTOR S. NAVASKY, KENNEDY JUSTICE 163 (1971); ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 237 (1978).

through reason. Members of the administration had "an abiding faith in man as a rational being committing rational acts,"[5] and those working in the Justice Department "cared deeply and professionally about the law"[6] as the rational means to achieve social change. As is shown by Robert Kennedy's two weeks of telephone conversations with Governor Ross Barnett of Mississippi concerning the registration of James Meredith at the University of Mississippi,[7] Kennedy assumed that confrontation should be avoided, that mediation was preferable to coercion, and that reasonable people could always work things out.[8] They understood that law, administered in a practical and sympathetic fashion by evenhanded officials, was essential to compromise.

As an attorney in private practice in Colorado during the 1950s, Byron White had seemed to his partners to be "a pragmatic problem solver,"[9] and he adhered to his pragmatism upon joining the Kennedy administration. His pragmatism in the Justice Department is evidenced by a key episode in the Kennedy years—the appointment of Burke Marshall as Assistant Attorney General for Civil Rights. White, who played an active role in the appointment, "thought that the Administration ought to locate the primary leadership in the civil rights fight outside the Department of Justice. . . . so that initiative, aggressive action, education, persuasion should emanate from a different source than the Department."[10] White viewed the Department solely as "a law enforcement agency and speaking for law and order is to speak for a very strong position but when you mix law enforcement with other things . . . . the two together . . . [become] less effective."[11] Robert Kennedy agreed. For that reason, Kennedy "didn't want to have someone in the Civil Rights Division who was dealing not from fact but was dealing from emotion . . . [or] in the interest of a Negro or a group of Negroes or a group of those who were interested in civil rights."[12] White expressed the

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5. DAVID HALBERSTAM, THE BEST AND THE BRIGHTEST 233 (1972) (referring to Robert S. McNamara).

6. SCHLESINGER, *supra* note 4, at 237.

7. The conversations are reported in NAVASKY, *supra* note 4, at 165-234.

8. *See id.* at 164-65.

9. Donald W. Hoagland, *Byron White as a Practicing Lawyer in Colorado*, 58 U. COLO. L. REV. 365, 367 (1987).

10. NAVASKY, *supra* note 4, at 161.

11. *Id.*

12. ROBERT KENNEDY: IN HIS OWN WORDS 78-79 (Edwin O. Guthman &

same idea when he commented that "it would be more interesting to get a first-class lawyer who would do the job in a technically proficient way that would be defensible in court—that Southerners would not think of as a vendetta, but as an even-handed application of the law."[13] As an aide to Kennedy added, "As Bob and White looked ahead to the role the Justice Department would play in the gathering struggle over civil rights . . . they felt the only proper course for the Department would be to proceed in strict accordance with the law, avoiding any appearance of pitting one social point of view against another."[14] Such an approach might not lead to a triumphant victory for any overarching vision of equality, but it would produce practical advances toward equal civil rights.

All of this is not to claim that Robert Kennedy and Byron White did not favor the cause of civil rights; they clearly did favor it. As Robert Kennedy understood it, one of his main duties in life was to "be kind to others that are less fortunate than we,"[15] and therefore he and White searched for someone "sensitive . . . to the cause of equal rights," even though "not identified with it."[16] But, while Kennedy and White believed in the moral good of equality, they understood the success of the civil rights movement to depend upon the political process, not the law.

Robert Kennedy decided early on that the best way he and the Justice Department could help the civil rights cause was to enforce the federally guaranteed right of blacks to vote.[17] As he explained, he "felt strongly that this was where the most good could be accomplished. . . . From the vote, from participation in the elections, flow all other rights far, far more easily. A great deal could be accomplished internally within a state if the Negroes participated in elections and voted."[18] For this reason, the Attorney General encouraged civil rights leaders to focus their equality drive on voting rights and

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Jeffrey Shulman eds., 1988) [hereinafter KENNEDY].

13. NAVASKY, *supra* note 4, at 162. On White's role in the Marshall appointment, see SCHLESINGER, *supra* note 4, at 288-89.

14. NAVASKY, *supra* note 4, at 52.

15. SCHLESINGER, *supra* note 4, at 612. The other duty was to "love our country." *Id.*

16. NAVASKY, *supra* note 4, at 162.

17. *See* SCHLESINGER, *supra* note 4, at 290-91.

18. KENNEDY, *supra* note 12, at 102-03.

assisted them with a six-fold increase in the number of voter-registration suits filed by the Justice Department.[19]

Promoting the right of blacks to vote was consistent with a broader faith in the right to vote and the democratic process in general. The Kennedy team was quite sympathetic, for example, with the one-person-one-vote line of cases growing out of the 1961 precedent of *Baker v. Carr*.[20] The most hesitant member of the team was Solicitor General Archibald Cox, but the rest of the Department of Justice team pushed him hard in the direction of urging judicial enforcement of equal voting rights.[21] Byron White supported this effort during his stay in the Department, arguing with Cox that the Government had to take an *amicus* posture in favor of the result to which the Court ultimately came in *Baker*.[22] White also took a stand in favor of the free functioning of the democratic process when he wrote President Kennedy a memo urging that strict limits be placed on invocations of the doctrine of executive privilege. He maintained that "Congress's need for the information" should be taken into account in order to make "meaningful investigation" possible and thereby counteract the tendency of the executive branch "to hide its errors."[23]

In short, the Department of Justice team that Byron White assembled on behalf of Attorney General Robert F. Kennedy fully shared two characteristics associated with the Warren Court's liberalism: pragmatism and egalitarianism. White himself, of course, was a strong proponent at Justice of both of these values. Moreover, both White and the Kennedy Justice Department were strong proponents of a third value: democratization of the electoral process and democratic decisionmaking by the legislative branch. In pursuing these values, the Kennedy team cast itself firmly in the mold of Franklin D. Roosevelt's New Deal, reviving for the last time the mixture of pragmatism, equality, and democracy that was its hallmark. At least during his brief stint at the Justice Department, Byron R. White had planted himself squarely within the tradition of New Deal liberalism.

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19. *See* NAVASKY, *supra* note 4, at 118, 204.
20. 369 U.S. 186 (1962).
21. *See* NAVASKY, *supra* note 4, at 297-322.
22. *See id.* at 301-02.
23. SCHLESINGER, *supra* note 4, at 381.

When Charles E. Whittaker resigned from the Supreme Court in the spring of 1962, President Kennedy appointed Byron R. White to replace him because everyone participating in the nomination process perceived White as a loyal member of the Kennedy team. There were two other serious candidates for the position—William H. Hastie and Paul Freund—but Chief Justice Earl Warren and Justice William O. Douglas found both of them too conservative and hence objectionable.[24] As Warren said of Hastie, "He's not a liberal, and he'll be opposed to all the measures that we are interested in."[25] The opposition of Warren and Douglas killed consideration of Hastie and Freund, and when Senator Richard Russell threatened to bring a delegation to the White House to seek the appointment of a conservative, President Kennedy moved quickly to appoint to the Court his liberal Deputy Attorney General, Byron R. White.[26]

II. JUSTICE WHITE AND PRAGMATISM

Upon ascending to the Supreme Court bench, Justice White continued to make decisions concerning the substance of the law not on grounds of abstract philosophical theory or technical legal doctrine, but on the basis of "a pragmatic estimate as to how effective [his approach] would be."[27] As he wrote in his 1966 dissent in *Miranda v. Arizona*,[28] constitutional decisions "cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice"; the Supreme Court and each of its Justices had a continuing duty "to inquire into the advisability of its end product in terms of the long-range interest of the country."[29] Or, as he maintained a decade later with a quotation from the writings of Justice Cardozo, "[T]he juristic philosophy of the common law is at bottom the philosophy of pragmatism. . . . The rule that functions well produces a title deed to recognition."[30]

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24. *See* KENNEDY, *supra* note 12, at 115-16; SCHLESINGER, *supra* note 4, at 376-77.

25. KENNEDY, *supra* note 12, at 115.

26. *See* SCHLESINGER, *supra* note 4, at 377-78.

27. William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347, 348 (1987).

28. 384 U.S. 436, 526 (1966) (White, J., dissenting).

29. *Id.* at 531-32.

30. Gertz v. Robert Welch, Inc., 418 U.S. 323, 403 (1974) (Cardozo, J.,

Justice White's "focus on the actual operation of the law"[31] rather than on theory and technicality is so clear and so widely accepted that no need exists to dwell on it at length. Just a few examples will suffice. One example from the Warren Court era was his opinion concurring in the judgment in *Griswold v. Connecticut*,[32] where the Justice refused to join in the opinions proclaiming a constitutional right to privacy and debating its source; instead, he decided the case on the wholly practical ground that he could not "see how the ban on the use of contraceptives by married couples in any way reinforce[d] the State's ban on illicit sexual relationships."[33] Similarly, Justice White wrote his 1965 opinion in *Swain v. Alabama*[34] not because he felt compelled by precedent but because he wanted to give a practical warning to "prosecutors that using peremptories to exclude blacks [from juries] on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause";[35] and when he learned that *Swain* was not giving that warning, he did not feel that precedent or legal theory precluded him from joining in overruling it.[36] Finally, in *Furman v. Georgia*,[37] White relied upon "common sense and experience" to hold the death penalty unconstitutional, since "its imposition" had become a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose."[38]

In short, Justice White was part of a generation trained in legal realism and sociological jurisprudence, and, as such, he was far more interested in the practical ramifications than the theoretical soundness of Supreme Court opinions. White thereby fit into a long line of twentieth-century liberals, beginning with Louis D. Brandeis, who were willing to ignore precedent and alter doctrine in the interest of progressive social change.

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dissenting) (quoting SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 149 (Margaret E. Hall ed., 1947)).

31. Post, *supra* note 3, at 135.

32. 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).

33. *Id.* at 505.

34. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

35. Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring), *modified by* Powers v. Ohio, 499 U.S. 400 (1991).

36. *Id.* at 100-01.

37. 408 U.S. 238 (1972).

38. *Id.* at 312 (White, J., concurring).

III. JUSTICE WHITE AND EGALITARIANISM

Much has been written of Justice White's views on affirmative action and civil rights.[39] Justice White's alignment with the more conservative members of the Court often has been cited to demonstrate his jurisprudential move toward a more restricted involvement by the federal courts in the enforcement of civil rights. Contrary to this widely held belief, the Justice's opinions in racial equality cases during his thirty-one years on the Supreme Court were entirely consistent with the concept of liberalism forged during the New Deal and predominant at the Kennedy Justice Department.

To begin, during the Warren Court era Justice White typically voted with Justice Brennan and other liberals on racial equality issues. In leading cases like *Goss v. Board of Education*,[40] *Griffin v. County School Board*,[41] and *Green v. County School Board*,[42] Justice White joined a unanimous Court in its efforts to make the promise of school desegregation a reality, and in two important cases in which state and local governments adopted legislation making housing integration more difficult, he authored important 8-1 and 5-4 opinions striking the legislation down.[43] When the Court began to divide during the early years of the Burger Court, White remained with the pro-integration forces in all the main constitutional cases—*Swann v. Charlotte-Mecklenburg Board of Education*,[44] *Palmer v. Thompson*,[45] *Milliken v. Bradley*,[46] *Arlington Heights v. Metropolitan Housing Development Corp.*,[47] and *University of California Regents v. Bakke*[48]—although now, sometimes, in dissent. His position, first articulated in *Palmer* and then adopted by the Court in *Washington v. Davis*[49] and the Columbus[50] and Dayton[51]

39. *See, e.g.*, Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987); O'Donnell, *supra* note 1.

40. 373 U.S. 683 (1963).

41. 377 U.S. 218 (1964).

42. 391 U.S. 430 (1968).

43. *See* Hunter v. Erickson, 393 U.S. 385 (1969); Reitman v. Mulkey, 387 U.S. 369 (1967).

44. 402 U.S. 1 (1971); *accord* Missouri v. Jenkins, 495 U.S. 33 (1990).

45. 403 U.S. 217, 240 (1971) (White, J., dissenting).

46. 418 U.S. 717, 762 (1974) (White, J., dissenting).

47. 429 U.S. 252, 272 (1977) (White, J., dissenting).

48. 438 U.S. 265, 324 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

49. 426 U.S. 229 (1976).

50. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

school desegregation cases, was that "official denigrations" of blacks and "expression[s] of official policy that Negroes are unfit to associate with whites" are "at war with the Equal Protection Clause"[52] and justify full-scale remedial intervention by the courts.[53]

White also remained strongly committed on the Court to the position he had held earlier at the Justice Department in respect to voting rights.[54] In *Gray v. Sanders*,[55] *Wesberry v. Sanders*,[56] and ultimately *Reynolds v. Sims*,[57] he joined a series of majority opinions that produced the one-person-one-vote rule in legislative apportionment cases. Later in the Warren years he joined a majority opinion written by Justice Brennan requiring states to "make a good-faith effort to achieve precise mathematical equality" in congressional districting[58] and authored another majority opinion extending the equal representation requirement to units of local government.[59]

The Justice failed to commit himself to a broad reading of the egalitarian principle in only two major cases during the Warren years: *Swain v. Alabama*,[60] where he wrote the

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51. Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

52. *Palmer*, 403 U.S. at 240-41 (White, J., dissenting).

53. *See generally* Nelson, *supra* note 27, at 355-58.

54. Recall that White, while he was Deputy Attorney General, was part of a group that persuaded Solicitor General Archibald Cox to intervene strongly on behalf of equality in *Baker v. Carr*. *See supra* notes 19-23 and accompanying text.

55. 372 U.S. 368 (1963).

56. 376 U.S. 1 (1964).

57. 377 U.S. 533 (1964).

58. Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

59. Avery v. Midland County, 390 U.S. 474 (1968).

60. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986). His position in *Swain*, however, appears to be an extension of his view as Deputy Attorney General that "the occurrence of crime" would not alone "be a sufficient reason to displace local law enforcement officials" with federal authorities; in addition, there would need to be "some solid evidence that local law enforcement people were not going to live up to their responsibilities." Deposition of Justice Byron R. White, Peck v. United States, 76 Civ. 93 (CES), S.D.N.Y., Dec. 6, 1982, pp. 8-9. Similarly, the statistical showing in *Swain* that blacks were underrepresented on juries did not alone convince White that they were subjects of purposeful discrimination, and thus he was not prepared to limit prosecutorial use of peremptory challenges against black prospective jurors. Nonetheless, he adhered to the basic anti-discrimination principle in *Swain* and hoped that the case would warn "prosecutors that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause." Batson v. Kentucky, 476 U.S. 79, 101 (1986) (White, J., concurring). And, when prosecutors failed to heed *Swain*'s warning, White "agree[d] with the Court that the time ha[d] come" for the case to be overruled. *Id.* at 102.

majority opinion which he later voted to overrule in *Batson v. Kentucky*,[61] and *Jones v. Alfred H. Mayer Co.*,[62] where he joined Justice Harlan's dissent. I cannot account for White's position in *Jones* except, perhaps, on one of the theories stated in Harlan's dissent—that in view of the recent congressional adoption of fair housing legislation, it was unnecessary to reinterpret the Thirteenth Amendment in ways that would cast much existing Supreme Court doctrine into doubt.[63] Having joined an opinion giving a narrow construction to the Civil Rights Act of 1866, he continued to support a narrow construction of that Act in cases such as *Runyon v. McCrary*[64] and *Patterson v. McLean Credit Union*.[65] In his dissent in *Runyon*, where the Court held that a refusal by a private school to admit black students solely on account of their race violated a statutory prohibition against racial discrimination in the making and enforcement of contracts, Justice White argued that both the legislative history of the statute and "common sense" precluded such an expansive construction of the 1866 act.[66] In his view, there was a stark difference between racial discrimination practiced by the government and that practiced by private individuals. While the Fourteenth Amendment's Equal Protection Clause addressed the former in very broad fashion, Congress, with several very notable but specific exceptions,[67] had left the latter unregulated. Consistent with his pragmatic and deferential approach to judicial interpretation, White felt that the "sensitive policy considerations" involved in determining which areas of private associations to regulate left it "a task appropriate for the Legislature, not for the Judiciary."[68] In the absence of a more explicit statute passed by Congress, White was unwilling to involve the Court in such a wholesale transformation of American society.

61. 476 U.S. 79, 101 (1986) (White, J., concurring).
62. 392 U.S. 409 (1968).
63. *Id.* at 477-79 (Harlan, J., dissenting).
64. 427 U.S. 160, 192 (1976) (White, J., dissenting).
65. 491 U.S. 164 (1989).
66. *Runyon*, 427 U.S. at 211 (White, J., dissenting).
67. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253-66 (current version, as amended, at 42 U.S.C. §§ 2000e-2000e17 (1988)); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81-90 (currently codified, as amended, at 42 U.S.C. §§ 3601-3631 (1988)).
68. *Runyon*, 427 U.S. at 212 (White, J., dissenting).

Although White wrote in dissent in *Runyon*, his views on this issue gained the support of a majority of the Court during the early years of the Rehnquist Court. In *Patterson*, Justice Kennedy, while refusing to overrule *Runyon*, held, in an opinion joined by Justice White, that the same statutory provision construed in *Runyon* did not prohibit racial harassment on the job. Perhaps taking heed of Justice White's dissent in *Runyon*, Congress, in the wake of *Patterson* and other civil rights opinions that restricted the scope of civil rights protection, enacted legislation in 1991 that overturned *Patterson* and gave clear guidance to the federal judiciary that racial discrimination in the making and enforcing of private contracts was prohibited.[69]

Although Justice White's opinions in civil rights cases during the Burger and Rehnquist Courts are often cited as evidence of a gradual conservative shift in the Justice's views, I suggest that Justice White's approach to civil rights adjudication, particularly his opinions in affirmative action and voting rights cases, was consistent with the egalitarian values of the Kennedy Justice Department. Far from retreating from the judicial protection of civil rights, Justice White remained committed to eradicating governmental barriers to equal rights, but as the civil rights agenda embraced a more expansive role for government in remedying the legacy of racial discrimination, Justice White's pragmatism and unerring faith in the political process's ability to address social problems led the Justice to join Court opinions that prodded Congress to address via legislation what, in his view, the judiciary could not resolve via court order. A quick survey of Justice White's opinions in affirmative action and voting rights cases after the Warren Court era reveals this consistent and, I argue, egalitarian approach to civil rights enforcement.

To his last days on the Court, Justice White remained an ardent supporter of giving broad construction to twentieth-century federal legislation that prohibited racial discrimination in employment and housing. His approach to this legislation was markedly different from his reading of the 1866 law. Although the Justice, as his opinions in *Runyon* and *Patterson* indicated, felt that it was the duty of Congress to address via the political process the complex problems presented in

69. Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071-81 (currently codified at 42 U.S.C. § 1981 (Supp. III 1991)).

defining the appropriate scope and remedy for discrimination in the private sector, White was unwilling to side with conservatives on the Rehnquist Court who invariably pursued narrow interpretations of statutes after Congress had enacted others. Thus, in one of the last civil rights cases in which the Justice participated, White joined the dissent in *St. Mary's Honor Center v. Hicks*,[70] which raised the threshold for the burden of proof that a victim of employment discrimination had to satisfy in order to prevail in a Title VII claim. The dissent recognized that it was "unfair and utterly impractical" to require victims of discrimination to meet this higher burden, particularly since the sole beneficiaries of the ruling were employers "who have been found to have given false evidence in a court of law."[71] Moreover, the dissent did not ignore the practical ramifications of the majority's refusal to read Title VII capaciously. The Court's approach "promote[d] longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary."[72]

Justice White also sided with the liberals in every major affirmative action case questioning the power of Congress and the states to adopt race-conscious remedies to redress past discrimination. When the Court confronted the constitutionality of affirmative action in *Regents of the University of California v. Bakke*,[73] Justice White authored, together with Justices Brennan, Marshall, and Blackmun, a joint opinion which denied that the Constitution mandates color-blindness and held that "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice."[74]

70. 113 S. Ct. 2742, 2756 (1993) (Souter, J., joined by White, Blackmun, and Stevens, JJ., dissenting).

71. *Id.* at 2758, 2763 (Souter, J., joined by White, Blackmun, and Stevens, JJ., dissenting).

72. *Id.* at 2763 (Souter, J., joined by White, Blackmun, and Stevens, JJ., dissenting).

73. 438 U.S. 265 (1978) (holding the special admissions program administered by a state university medical school whereby a specific number of spots in the entering class were reserved for racial minorities violated the Fourteenth Amendment's Equal Protection Clause). Justice Powell announced the judgment of the Court and delivered an opinion which, to the extent that it reversed the California Supreme Court's determination that the University could never take race into account in its admissions criteria, commanded a majority of the Court. *Id.* at 320 (opinion of Powell, J.); *id.* at 326 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

74. *Id.* at 325 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.,

Recounting the nation's long history of providing separate but unequal educational opportunities to racial minorities, the Justices explained that the affirmative action program adopted by the medical school of the University of California at Davis "does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination."[75]

Two years later in *Fullilove v. Klutznick*,[76] Justice White joined Chief Justice Burger's plurality opinion upholding the authority of Congress to adopt legislation requiring a 10% set-aside of federal funds for minority businesses on local public works projects. Unlike the affirmative action program challenged in *Bakke*, which was adopted and administered by an instrumentality of the state, the congressionally mandated set-aside for minority-owned businesses upheld in *Fullilove* was a creature of the federal government. Lest anyone doubt the broad authority granted Congress to remedy the legacy of racial discrimination through the use of race-conscious provisions, the plurality announced that "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."[77] Justice White remained committed to this broad construction of federal authority to adopt race-conscious remedies up to his last years on the Court, when, in *Metro Broadcasting, Inc. v. FCC*,[78] three years prior to his retirement, he joined Justice Brennan's broad affirmation of the power of a federal agency, pursuant to congressional authorization, to adopt policies designed to increase minority participation—in this case in radio and television broadcasting ownership.

Although Justice White gave great deference to action by the states and the national government to redress past

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concurring in the judgment in part and dissenting in part).

75. *Id.* at 375-76 (Brennan, J., joined by White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

76. 448 U.S. 448, 453 (1980) (opinion of Burger, C.J., joined by White and Powell, JJ.).

77. *Id.* at 483 (opinion of Burger, C.J., joined by White and Powell, JJ.).

78. 497 U.S. 547 (1990).

discrimination through affirmative action, the Justice was less tolerant of attempts by local governments to do the same thing. In *City of Richmond v. J.A. Croson Co.*[79] Justice White joined the Court majority holding that Richmond's minority set-aside program for city-funded public works projects, modeled upon the federal government's program upheld by the Court in *Fullilove*, violated the right of non-minority contractors to participate in government contracts. Although Congress had been explicitly empowered by the Civil War Amendments to enforce the mandate of racial equality, the fact that "Congress may identify and redress the effects of society-wide discrimination does not mean, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."[80] Instead, the Fourteenth Amendment imposed "clear limits on the States' use of race as a criterion for legislative action," since the Amendment reflected "a distrust of state legislative enactments based on race."[81] Without any compelling evidence that Richmond was responding to discrimination in city public works contracting, the fact that a city, in which blacks constituted 50% of the population and held a majority of the city council seats, had adopted a policy designed to assist black-owned business prompted concern that a political majority was acting to the disadvantage of a minority—this time whites.[82]

Justice White also remained faithful throughout his tenure on the Court to the Kennedy Justice Department's belief that equality for racial minorities could best be achieved through political participation—through voting. A quick review of Justice White's approach to the Court's voting rights cases indicates that White never veered from his steadfast support for a broad federal guarantee of the right of racial minorities to participate in the electoral process and to have their votes counted.

In *United Jewish Organizations v. Carey*,[83] Justice White, writing for a plurality of the Court, upheld against constitutional attack a state legislative redistricting plan that used racial considerations in drawing district lines so as to

79. 488 U.S. 469 (1989).
80. *Id.* at 490.
81. *Id.* at 491.
82. *Id.* at 495-96.
83. 430 U.S. 144 (1977).

comply with the Voting Rights Act.[84] The effect of the plan was to divide a large Hasidic Jewish community in Brooklyn into two state Assembly districts, one of which contained a majority non-white population. The Justice found that "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5."[85] Although the plan could be justified as a remedial measure, he thought that "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment."[86] Moreover, the Hasidic community had not been denied a fair and equal opportunity to participate in the electoral process, nor did the plan "minimize or unfairly cancel out white voting strength."[87] White felt that a state, seeking "to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters," could constitutionally "attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation" to these underrepresented groups.[88] Emboldened by the Court's decision in *United Jewish Organizations*, Congress amended the Voting Rights Act in 1982 to effectively mandate the creation of congressional districts in which racial minorities constitute a majority of the population.[89]

Justice White served long enough to see the Rehnquist Court retreat from the broad affirmation of congressional power

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84. Congress, in addressing the variety of ways that recalcitrant state legislatures could draw district lines to dilute minority voting power and thereby prevent the election of minority representatives, passed the Voting Rights Act of 1965 which, among other things, required certain states to submit reapportionment plans to the Attorney General for approval. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 439 (currently codified, as amended, at 42 U.S.C. § 1973(c) (1988)).

85. 430 U.S. at 161 (opinion of White, J.).

86. *Id.*

87. *Id.* at 165 (opinion of White, J.). White explicitly noted that even under the challenged plan "[t]he percentage of districts with nonwhite majorities [(30%)] was less than the percentage of nonwhites in the county as a whole (35%)." *Id.* at 163 (opinion of White, J.). "Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population." *Id.* at 166 (opinion of White, J.).

88. *Id.* at 167, 168 (opinion of White, J.).

89. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134 (currently codified at 42 U.S.C. § 1973(b) (1988)).

articulated in *United Jewish Organizations*, though the Justice remained steadfast in his commitment to enhancing the political participation of historically underrepresented or disenfranchised groups. In his last opinion on the Court, Justice White dissented from the Court's holding in *Shaw v. Reno*,[90] where the Court ruled that a reapportionment scheme designed to create a minority congressional seat may violate the Equal Protection Clause if it could be understood only as an effort to segregate voters into separate districts on the basis of race. Despite the fact that the North Carolina reapportionment plan challenged in *Shaw* still ensured that whites, who constituted 76% of the total population and 78% of the voting age population, retained a voting majority in ten of twelve (83%) of the State's congressional districts,[91] the Court felt that the redistricting plan bore "an uncomfortable resemblance to political apartheid."[92] White chastised the Court for comparing this remedial political reform to affirmative action since "remedying a Voting Rights Act violation does not involve preferential treatment. It involves, instead, an attempt to *equalize* treatment, and to provide minority voters with an effective voice in the political process."[93] Consistent with Robert Kennedy's faith in political participation as the principal means for blacks and other racial minorities to achieve equality,[94] Justice White distinguished efforts to segregate minority voters so as to dilute their voting strength—the political apartheid which troubled the Court—from efforts mandated by the Voting Rights Act, which did not seek to entrench the political strength of the majority but to increase the political influence of minorities who had historically been disenfranchised. In fact, White reproached the Court for "unnecessarily hinder[ing] to some extent a State's voluntary effort to ensure a modicum of minority representation."[95]

Justice White's limited departures in statutory construction cases from the egalitarian agenda of progressives are trivial in comparison with the vast areas of the law—school

90. 113 S. Ct. 2816, 2834 (1993) (White, J., dissenting).
91. *Id.* at 2838 (White, J., dissenting).
92. *Id.* at 2827.
93. *Id.* at 2842-43 (White, J., dissenting).
94. *See supra* notes 17-19 and accompanying text.
95. *Shaw*, 113 S. Ct. at 2841 (White, J., dissenting).

desegregation, affirmative action, voting rights, and reapportionment—where the Justice consistently supported the principle of equality. Justice White, both during the Warren Court era and during the subsequent Burger and Rehnquist Courts, remained faithful to the Kennedy liberalism that favored the political, not judicial, process as the best means to accomplish the difficult task of making "equal protection of the laws" more than an empty promise. Moreover, the Justice gave broad latitude to congressional efforts to prohibit private discrimination and remedy the legacy of past discrimination through remedial programs such as affirmative action.

IV. JUSTICE WHITE AND INDIVIDUALISM

The Warren Court, through its doctrine of applying to the states the constitutional protections embodied in the Bill of Rights and its decisions such as *Baker v. Carr* that rested legislative apportionment on population rather than historical political boundaries, simultaneously repudiated a broad conception of states' rights and developed a jurisprudence centered upon the protection of individual rights. Like Chief Justice Earl Warren and Justice William J. Brennan, but unlike Justices Felix Frankfurter and John M. Harlan, Justice White demonstrated little sympathy for states' rights, which "is a form of cultural pluralism that valorizes the diversity of local cultures."[96] Moreover, he generally found it "incomprehensible to appeal" to states' rights "as a reason not to protect individual rights."[97] Like Warren and Brennan, Justice White was a consistently ardent nationalist.

White first expressed his nationalism in a dissenting opinion in an important 1963 preemption case, *Florida Lime & Avocado Growers, Inc. v. Paul.*[98] More significantly during the Warren Court era, he joined majority opinions authored by Justice Brennan in three cases that had a profound nationalizing impact: *New York Times Co. v. Sullivan,*[99] which nationalized the law of libel; *Fay v. Noia,*[100] which removed bars to habeas corpus proceedings in federal courts instituted

96. Post, *supra* note 3, at 126.

97. *Id.*

98. 373 U.S. 132, 159 (1963) (White, J., dissenting).

99. 376 U.S. 254 (1964).

100. 372 U.S. 391 (1963), *abrogated by* Coleman v. Thompson, 111 S. Ct. 2546 (1991).

by prisoners in state custody;[101] and *Dombrowski v. Pfister*,[102] which expanded federal jurisdiction in civil rights cases. As another scholar has observed, "Justice White consistently has supported broad-ranging federal authority and vigorous institutions of national government" and "has attached great importance to national unification, and the supremacy *and* uniformity of federal law."[103]

Justice White, in short, consistently strove to undermine aberrant, localistic policies obstructing the advancement of individuals. In pursuit of this individualist goal, he authored and joined opinions limiting the power of local communities and enhancing the power of the national government. Even during the Rehnquist Court era, Justice White, writing for the majority in *Missouri v. Jenkins*,[104] affirmed the power of the federal judiciary to order tax increases in order to fund constitutionally mandated school desegregation plans. In his view, the ability of a federal court to direct a local authority to raise taxes "is plainly a judicial act within the power of a federal court," and any state statute preventing the local authority from levying the additional taxes disregards "the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them."[105] Justice White also supported legislative apportionment schemes that destroyed the power of localities in the legislative process and instead gave equal voice to every individual. He worked to make the political branches of government effective institutions for the advancement of individual well-being.

Thus, White, like Warren and Brennan, was a nationalist, but unlike them he was not a complete individualist. There was another side to Warren's and Brennan's individualism—its opposition to governmental authority—that Justice White never shared. When the interests of a particular individual came into conflict with the interests of those individuals who had effectively gained control of the instruments of government, liberals like Justice Brennan generally created individual

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101. But compare Teague v. Lane, 489 U.S. 288, 316-17 (1989), where White concurred in a judgment of the Court creating new bars to habeas relief.

102. 380 U.S. 479 (1965).

103. Jonathan D. Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371, 371-72 (1987).

104. 495 U.S. 33 (1990).

105. *Id.* at 55, 58.

rights that acted as trumps over government authority.[106] Justice White, in contrast, never adopted this anti-authoritarian stance.

The Supreme Court's controversial forays into the expansion of individual rights under the rubric of substantive due process never received Justice White's support. In *Griswold* the Justice rejected resting the decision on a broad conception of unenumerated rights protected by the Due Process Clause of the Fourteenth Amendment; rather he based his vote to overturn Connecticut's anti-contraception law on its utter inability to achieve the professed goals of the State.[107] To Justice White, the problem with the Court's willingness to expand constitutional rights was that the political process, not the judiciary, was a far better forum for balancing the competing interests involved in defining the scope of rights. The primary evil lay in the fact that judicial recognition of a constitutional right automatically discarded the careful compromises reached by political resolution of the issues in state legislatures. In the absence of an explicit Constitutional provision upon which to rely, Justice White refused to accept the idea that nine Justices of the Supreme Court had the legitimate authority to set aside the considered judgment of state legislatures representing, as they do, the will of the people. Regardless of his own personal views, the Justice refused to impose his own moral hierarchy upon state legislatures, even if he did agree, for instance, that women should have the right to undergo an abortion.

Justice White gave strong voice to these views in his dissent in *Roe v. Wade*,[108] a case that still divides the nation and the Court. As the Justice wrote, referring to the Court's favoring of women's reproductive freedom over the State's interest in the life of the unborn, "[w]hether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States."[109] "I find nothing in the language or history of the Constitution to support the Court's

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106. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

107. *See supra* note 33 and accompanying text.

108. 410 U.S. 113, 221 (1973) (White, J., dissenting), *modified by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

109. *Id.* at 222 (White, J., dissenting).

judgments," and therefore, "[t]his issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs."[110] While "[a]s an exercise of raw judicial power" the Court had the authority to invalidate Texas' anti-abortion statute, the Court's "improvident and extravagant exercise" of this authority had deprived the people of their right "to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand."[111] As recently as 1992, Justice White expressed his willingness to join three other Justices in overturning *Roe*.[112]

Justice White restated his hostility to judicial recognition of unenumerated yet fundamental rights, this time while writing for a majority of the Court, in *Bowers v. Hardwick*,[113] in which the Court held that the Constitution did not protect the right of homosexuals to engage in consensual acts of sodomy. Noting that "[t]he 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," the Justice was "quite unwilling" to announce a "fundamental right to engage in homosexual sodomy," particularly since other forms of sexual conduct such as adultery or incest remain criminal even when committed in the home.[114]

White's repudiation of an expansive, rights-oriented jurisprudence reflected not only his faith in the democratic process and fear of the delegitimatizing effect of judicial activism but also his own pragmatic concern that the courts were ill-equipped to undertake the controversial and complex inquiries necessary to identify and articulate the permissible scope of democratic legislation and individual rights. White repudiated any attempt to limit the authority of the majority to impose particular conceptions of morality as a legitimate basis

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110. *Id.* at 221, 222 (White, J., dissenting).

111. *Id.* at 222 (White, J., dissenting).

112. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855 (1992) (Rehnquist, C.J., joined by White, Scalia, and Thomas, JJ., concurring in the judgment in part and dissenting in part); *id.* at 2873 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., concurring in the judgment in part and dissenting in part).

113. 478 U.S. 186 (1986).

114. *Id.* at 191, 194-96.

for legislation. In fact, White recognized in *Bowers* that the law "is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated . . . the courts will be very busy indeed."[115] Moreover, the overuse of the power of judicial review would reduce respect for the Court and waste its precious political capital necessary to achieve dramatic social reform in other areas, such as school desegregation.

It is important to understand, however, that Byron White's rejection of the use of individual rights as trumps over government authority did not signal an ideological change from when he first entered government and initially came to the Court. In fact, White's deference to the legislative process and his concomitant hostility to arguments focusing on unenumerated yet fundamental rights reflected the training he received as a young student at Yale Law School in the late 1940s, during the heyday of legal realism and the aftermath of the New Deal.[116] Concerned that an imperial judiciary acting on its own preconceived notions of fundamental rights posed a grave threat to the democratically adopted social and economic reforms passed during the New Deal,[117] the legal realists taught that all legal reasoning reflects the sociological cast of the judge. Since every legal decision is therefore tainted by—if not entirely a reflection of—the judge's policy preferences, the judiciary should defer to the policy choices made by the legislative and executive branches as the democratically elected branches of government accountable to the people. In fact, in *Bowers* the Justice acknowledged the Court's need "to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government."[118]

In addition to the narrow scope accorded the right to privacy, Justice White also disfavored an expansive view of the rights of criminal defendants and the rights of radical protestors. This is not surprising since the Kennedy Justice

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115. *Id.* at 196.

116. *See* Nelson, *supra* note 27, at 348; *see also* LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 145-64 (1986) (discussing postwar realism at Yale).

117. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *But see* Nebbia v. New York, 291 U.S. 502 (1934).

118. *Bowers*, 478 U.S. at 191.

Department, of which Byron White was so central a part, also had an unfavorable record toward individual rights in these two areas. Byron White probably shared at least some responsibility for the Department's policies during his year of service there, and, on the whole, he continued to vote consistently with those policies upon his ascension to the bench.

The Kennedy Justice Department showed little enthusiasm for expanding the constitutional rights of persons accused of a crime. Indeed, Robert Kennedy himself had built his early reputation as counsel to the Senate's Select Committee on Improper Labor Activities, where he had vigorously pursued the likes of Dave Beck and Jimmy Hoffa[119] and "attack[ed] organized criminals with weapons and techniques as effective as their own."[120] In particular, critics of Kennedy's techniques accused him of "badgering . . . witnesses,"[121] of treating "the plea of self-incrimination [a]s tantamount to a confession of guilt," and of holding "hearings for the sole purpose of accusing, judging and condemning people."[122] Even Arthur Schlesinger, Kennedy's sympathetic biographer, agreed that Kennedy "had displayed an excess of zeal" and "was a man driven by a conviction of righteousness, a fanaticism of virtue, [and] a certitude about guilt that vaulted over gaps in evidence."[123] This tough attitude toward racketeering and other crime, and a corresponding tendency to construe narrowly the law of criminal constitutional procedure, continued after Kennedy became Attorney General, when he proposed that the administration support legislation to permit wiretapping when authorized by a federal judge, a proposal that Byron White as Deputy Attorney General strongly supported.[124]

The Kennedy Justice Department's faith in the prevailing power structure also demonstrated itself in its attitude toward the right of blacks—or anyone else for that matter—to engage in protests that might offend public sensibilities. The Kennedy

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119. *See generally* SCHLESINGER, *supra* note 4, at 137-69.

120. *Id.* at 169 (quoting Robert Kennedy).

121. *Id.* at 149 (quoting George M. Belknap to Robert F. Kennedy, Mar. 8, 1957, JPK Papers).

122. *Id.* at 188 (quoting Alexander M. Bickel, *Robert F. Kennedy: The Case Against Him for Attorney General*, NEW REPUBLIC, Jan. 9, 1961).

123. *Id.* at 189.

124. *See* NAVASKY, *supra* note 4, at 74-75; SCHLESINGER, *supra* note 4, at 270-71.

Justice Department had little understanding of the functions of protest or how to deal with it, and accordingly the Department did a terrible job providing federal protection for civil rights demonstrators in the South. The position of the Justice Department was that state governments had the duty to protect citizens—including black citizens—from violence, and accordingly the Department routinely negotiated with state and local officials to provide protection rather than use the F.B.I. or the army for that purpose.[125] Officials like Burke Marshall "were very concerned about the complex . . . problems implied in the use of federal force," even when they "could have written an executive order permitting an occupation" of a southern state by the military. They found use of the military "as a practical matter . . . impossible" and as "a policy matter . . . undesirable."[126] Nicholas Katzenbach thought it "all very well to move troops in" but then wondered "how . . . you get them out,"[127] while Byron White's close friend, Louis Oberdorfer, thought "[c]ivilian authority ought to avoid the use of troops like the plague." Troops were "an insult to the people" and set "a precedent for some less civilized President to use in a tyrannical way."[128]

Death and mayhem resulted among civil rights workers on many occasions from the absence of federal protection, and the "unbelievable position of confidence" which the Kennedy Justice Department had maintained "in the minds of the oppressed"[129] rapidly eroded. When several black leaders, including Jerome Smith, a CORE official who had been bludgeoned by southern police, met in 1963 with Robert Kennedy and Burke Marshall, they reported that begging for federal protection while fighting for the American dream of equal rights made them "nauseous,"[130] while Smith acknowledged he would "[n]ever"[131] serve in a war on behalf of the United States. When Kennedy reported his shock at these statements, the black leaders, in turn, "were shocked that he was shocked."[132] From that point on the meeting

125. *See* NAVASKY, *supra* note 4, at 119-20, 164-67.
126. *Id.* at 198.
127. *Id.* at 198-99.
128. *Id.* at 199.
129. *Id.* at 204.
130. *Id.* at 113.
131. SCHLESINGER, *supra* note 4, at 332.
132. NAVASKY, *supra* note 4, at 113.

deteriorated into a "violent, emotional verbal assault" on Kennedy[133] with the blacks stating that Kennedy could not "understand what this young man is saying"[134] and Kennedy feeling that the black leaders "didn't want to talk" about facts but were all "emotion, hysteria—they stood up and orated—they cursed—some of them wept and left the room."[135] In his years as Attorney General, Robert Kennedy simply could not understand what this fear and distrust of government was about.

Once elevated to the Supreme Court, Justice White continued to adhere to the attitudes on criminal procedure and radical protest that had been prevalent in the Justice Department during his brief stint as Deputy Attorney General. As a result, those who had hoped that Justice White, as President Kennedy's first appointee to the Supreme Court, would regularly side with Chief Justice Earl Warren in important cases were quickly disillusioned. A mere two months after his appointment, he wrote his first major dissent to an opinion of a Warren majority. The case that provoked White's dissent was *Robinson v. California*,[136] which held that the states could not make narcotics addiction a crime. In response, the new Justice, wanting not to impede local police efforts to stamp out narcotics abuse, accused the majority of "writ[ing] into the Constitution its own abstract notions of how best to handle the narcotics problem."[137]

Justice White's string of dissents from some of the major criminal procedure opinions of the Warren Court continued thereafter. He dissented in *Escobedo v. Illinois*,[138] which invalidated a confession obtained at a police station from a defendant who had asked to see his lawyer, who was present in another room in the station house; in *Malloy v. Hogan*,[139] which held the Fifth Amendment binding on the states through the Fourteenth Amendment; in *Miranda v. Arizona*,[140] which prohibited all custodial interrogation in the absence of an

133. SCHLESINGER, *supra* note 4, at 333 (quoting Kenneth Clark, who was present at the meeting).
134. *Id.* at 332.
135. *Id.* at 334.
136. 370 U.S. 660, 685 (1962) (White, J., dissenting).
137. *Id.* at 689 (White, J., dissenting).
138. 378 U.S. 478, 495 (1964) (White, J., dissenting).
139. 378 U.S. 1, 33 (1964) (White, J., dissenting).
140. 384 U.S. 436, 526 (1966) (White, J., dissenting).

attorney; in *Berger v. New York*,[141] which invalidated New York legislation authorizing wiretapping upon issuance of a judicial warrant; and in *United States v. Wade*,[142] which prohibited the holding of post-indictment lineups in the absence of counsel.

In his dissents, White expressed a concern similar to that held by Robert Kennedy and the Kennedy Justice Department about the effectiveness of law enforcement. In *Miranda*, for instance, he wrote that the majority's rule would "slow down the investigation and the apprehension of confederates" and "return a killer, a rapist or other criminal to the streets . . . to repeat his crime."[143] He worried about the rule's "impact on those who rely on the public authority for protection and who without it can engage only in violent self-help."[144] Similarly in *Berger v. New York*,[145] where the majority struck down a statute similar to one that White supported as Deputy Attorney General,[146] the Justice argued that official eavesdropping and wiretapping are "irreplaceable investigative tools which are needed for the enforcement of criminal laws," especially in view of the "interrelation between organized crime and corruption of government officials" and "the enormous difficulty of eradicating both forms of social cancer."[147]

His concern for effective law enforcement endured until his last days on the Court. With the conservative ascendance of the Burger and Rehnquist Courts, the federal judiciary took an increasingly hostile view of the rights of the accused, and Justice White found himself authoring opinions of the Court instead of dissents. A classic example of White's pragmatism and concern for effective law enforcement is *Minnesota v. Dickerson*,[148] in which the Court upheld the right of the police to seize contraband, such as cocaine, detected while frisking a suspect. Justice White believed that the "practical considerations" that justified the warrantless seizure of contraband in the "plain view" of the police also justified the

141. 388 U.S. 41, 107 (1967) (White, J., dissenting).
142. 388 U.S. 218, 250 (1967) (White, J., dissenting).
143. *Miranda*, 384 U.S. at 542, 544 (White, J., dissenting).
144. *Id.* at 542 (White, J., dissenting).
145. 388 U.S. 41 (1967).
146. *See supra* note 124 and accompanying text.
147. *Berger*, 388 U.S. at 113, 116-17 (White, J., dissenting).
148. 113 S. Ct. 2130 (1993).

seizure of materials discovered during a routine pat-down of a suspect.[149]

Nevertheless, Justice White proved not to be a complete conservative. Thus he joined the Court's opinion in *Gideon v. Wainwright*[150] requiring appointment of counsel for all indigents accused of felonies, and wrote a concurring opinion in *Spinelli v. United States*,[151] a 5-3 decision requiring strict guidelines for the issuance of search warrants based on informants' tips. In 1967, he authored two leading decisions applying the Fourth Amendment to administrative searches,[152] and in the years following Earl Warren's retirement as Chief Justice, White joined in two important pro-civil-liberties decisions: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[153] which authorized judicial implication of civil remedies for violation of the Constitution, and *Furman v. Georgia*,[154] which temporarily suspended use of the death penalty. In the past decade, he even dissented on occasion from majority opinions upholding warrantless searches in criminal cases,[155] and in *James v. Illinois*[156] he provided the critical fifth vote in a 5-4 case that refused to enlarge the impeachment exception to the exclusionary rule. In one of the last Court opinions which White authored before he retired, *Helling v. McKinney*,[157] he held that the Eighth Amendment's prohibition against cruel and unusual punishment prevented state prison authorities from exposing prisoners to unreasonable risks to their future health by placing them in a cell with a smoker.

Moreover, Justice White's refusal to acknowledge a broad panoply of federally protected individual rights did not stem from the old Frankfurter-Harlan concern for state autonomy. The Justice never opposed the application of the Bill of Rights to the states; indeed, he authored *Duncan v. Louisiana*,[158] a

149. *Id.* at 2137.
150. 372 U.S. 335 (1963).
151. 393 U.S. 410, 423 (1969) (White, J., concurring), *abrogated by* Illinois v. Gates, 462 U.S. 213 (1983).
152. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).
153. 403 U.S. 388 (1971).
154. 408 U.S. 238, 310 (1972) (White, J., concurring).
155. *See* Varat, *supra* note 103, at 406.
156. 493 U.S. 307 (1990).
157. 113 S. Ct. 2475 (1993).
158. 391 U.S. 145 (1968).

leading incorporation opinion. When White dissented from criminal procedure cases, he did so on the merits—with reasons applicable in federal as well as state prosecutions—because he thought the majority was too severely restricting the power of all levels of government by creating individual rights. Thus, Justice White's views on issues of constitutional criminal procedure do not follow a discernible pattern embraced by other members of the Court.

A comparably mixed but ultimately anti-individualist pattern emerges from White's votes and opinions in a series of freedom of expression cases that came before the Court during the social tumult of the 1960s. In the first two of these cases, the Justice voted to protect protestors' rights of expression. Thus, in *Edwards v. South Carolina*,[159] he joined an opinion of the Court reversing breach of the peace convictions of 187 black students who had marched along the grounds of the state capitol to protest against racial discrimination; the Constitution, according to the Court, did "not permit a State to make criminal the peaceful expression of unpopular views," especially when the convictions were not the product of "the evenhanded application of a precise and narrowly drawn regulatory statute."[160] Similarly in *Brown v. Louisiana*,[161] involving the conviction of five young blacks for refusing to leave a segregated reading room of a public library, White found it "difficult to avoid the conclusion that petitioners were asked to leave the library because they were Negroes,"[162] and therefore he concurred in reversing the convictions. He was also willing to concur in *Tinker v. Des Moines Independent Community School District*,[163] which permitted high school students to wear black armbands in protest against the Vietnam War.

When protest threatened either to destabilize the power structure or to become offensive, however, White pulled back from a broad reading of the First Amendment. In *Cox v. Louisiana*,[164] he would have affirmed the conviction of a

159. 372 U.S. 229 (1963).

160. *Id.* at 236-37.

161. 383 U.S. 131, 150 (1966) (White, J., concurring in the result).

162. *Id.* at 151 (White, J., concurring in the result).

163. 393 U.S. 503, 515 (1969) (White, J., concurring). For later majority and dissenting opinions by White upholding the rights of high school students, see Ingraham v. Wright, 430 U.S. 651, 683 (1977) (White, J., dissenting), and Goss v. Lopez, 419 U.S. 565 (1975).

164. 379 U.S. 536 (1965); 379 U.S. 559, 591 (1965) (White, J., concurring in

minister who led a march on the third-floor jail in a local courthouse to protest the arrest of students who had picketed stores maintaining segregated lunch counters. In Justice White's view, the marchers had obstructed public passageways and, by marching on a courthouse, had threatened the independence and integrity of the judiciary. The next year he became part of a 5-4 majority affirming the convictions of black students who had demonstrated on the premises of a jail,[165] and two years after that case, he joined another majority that affirmed a conviction of an anti-war protester who had burned his draft card.[166] Arguably, demonstrations in a jail yard and public burnings of draft cards somehow threatened the ability of government agencies—the prison system and the Selective Service System—to carry out their functions; and perhaps these slim threats to the functioning of government account for Justice White's narrow reading of the First Amendment in the *Adderley* and *O'Brien* cases. A year after *O'Brien*, however, the Justice made it clear that he would permit the prosecution of protesters even when their protests lacked any tendency to destabilize the power structure: in his dissent in *Street v. New York*[167] and his later refusal to join the majority in *Cohen v. California*,[168] he signalled his view that offensive protest, such as burning the flag or including four-letter expletives in political speeches, was not entitled to constitutional protection.

Justice White's lukewarm support for dissenters' rights of free expression continued into the 1980s. For instance, in *Perry Education Ass'n v. Perry Local Educators' Ass'n*[169] the Justice, writing for the majority of the Court, held that the First Amendment's Free Speech Clause did not forbid a school district from giving the exclusive bargaining representative of

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part and dissenting in part).

165. Adderley v. Florida, 385 U.S. 39 (1966).

166. United States v. O'Brien, 391 U.S. 367 (1968).

167. 394 U.S. 576, 610 (1969) (White, J., dissenting). Justice White joined the dissents in Texas v. Johnson, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting), and United States v. Eichman, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting), in which a divided Court reaffirmed that burning the American flag is protected expression under the First Amendment. The dissent in *Texas v. Johnson* equated flag burning with "an inarticulate grunt or roar that . . . is most likely to be indulged in not to express any particular idea, but to antagonize others." *Johnson*, 491 U.S. at 432 (Rehnquist, C.J., dissenting).

168. 403 U.S. 15, 28 (1971) (White, J., concurring in part with the dissenting opinion of Blackmun, J.).

169. 460 U.S. 37 (1983).

the district's teachers preferential access to the district's internal mail system, even though a rival union sought access. Since the mail system was not a traditional or designated public forum open for use by the public generally, the district needed only show that its denial of equal access was "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[170] As long as there was no conscious purpose on the part of officials "to discourage one viewpoint and advance another," White saw nothing wrong with granting preferential treatment due to the one union's *status* as the exclusive bargaining representative of the district teachers,[171] even if the effect of the preference would be to preserve the power of the established union at the expense of the potentially destabilizing outsider.

Justice White appears to have been ready to give effect to libertarian values incorporated in the First Amendment only when they posed no danger of destabilizing or offending traditional sensibilities. Thus, in *Lamb's Chapel v. Center Moriches Union Free School District*,[172] he authored a unanimous opinion striking down as a violation of the First Amendment a school district regulation that prohibited the after-hours use of school property for meetings with religious purposes, on the ground that the regulation discriminated against the presentation of religious views concerning otherwise acceptable subjects such as the family and child-rearing.[173] Justice White dismissed the school district's concern that to allow religious groups to use school facilities would violate the Establishment Clause, since there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[174]

Justice White's views about the propagation of traditional values, the propriety of rational political discourse, and the inappropriateness of destabilizing and offensive protest were probably shared by most liberal Americans in the early 1960s. His views were certainly shared by his colleagues in the

170. *Id.* at 46.
171. *Id.* at 49.
172. 113 S. Ct. 2141 (1993).
173. *Id.* at 2143, 2147.
174. *Id.* at 2148.

Kennedy Justice Department: recall, for instance, the 1963 meeting between Department officials and black activists at which Robert Kennedy was shocked by the statement of a young black activist that he would not fight for the nation in a war.[175] By the late 1960s, however, many liberals had changed their views: Robert Kennedy himself, after attending a June, 1968 meeting with black militants in Oakland, California, where he was abused with statements such as, we "don't want to hear none of your shit. What the goddamned hell are you going to do, boy," told an aide that he was "glad" he had gone to the meeting, since the militants "need to know someone who'll listen."[176] He knew that many blacks have "got a lot of hostility and lots of reasons for it" and that, "[w]hen they get somebody like me, they're going to take it out on me."[177] He also knew that, "after all the abuse the blacks have taken through the centuries, whites are just going to have to let them get some of these feelings out."[178] As the Kennedy biographer Arthur Schlesinger commented, Robert Kennedy had taken a "long journey" from his first meeting with black militants nearly five years earlier.[179] Justice White, having gone to the Court, never took that journey and so had remained in a world where rational discourse rather than emotion was the essence of political expression in a free society.

V. THE NEW LIBERALISM AND THE SUPREME COURT

As we have seen, Justice White diverged from other liberals on the Supreme Court in a variety of cases. Although he joined the liberals in most of the civil rights cases, particularly those dealing with the desegregation of public facilities, White refused to sign on to the liberal agenda of recognizing and expanding individual rights. In the seminal right to privacy cases such as *Roe* and *Bowers*, in the criminal procedure cases such as *Miranda* and *Escobedo*, in the freedom of expression cases such as *Texas v. Johnson* and *United States v. Cohen*, White and other liberal Justices found themselves on opposing sides of an ongoing jurisprudential debate. While the Warren Court's embrace of individual rights unleashed a tidal

175. *See supra* note 132 and accompanying text.
176. SCHLESINGER, *supra* note 4, at 909.
177. *Id.* at 908.
178. *Id.* at 909.
179. *Id.*

wave of liberal academic commentary that envisioned the judiciary as an engine for social change, Justice White remained steadfast in his belief that the Court's ability and authority to engineer a better world were limited.

This refusal to embrace the individual-rights-oriented jurisprudence of the Warren Court did not reflect as much a conservative shift for the Justice as a distinct ideological transformation in concepts of liberalism. The late 1960s wrought a fundamental change in the goals of many American liberals. In the early 1960s the goal of liberals—and the primary goal of the Warren Court—was the use of national power, including the judiciary's power, to facilitate pragmatic social change, especially in the areas of racial equality and legislative apportionment. For this purpose, government and the democratic political process were to be trusted and their power enhanced, not impaired. When he was appointed to the Court in 1962, Justice White agreed with this liberal agenda of nationalism, democracy, equality, and pragmatic social reform. But the Warren Court also embraced a second goal: the enhancement of individual rights and the consequent restriction of governmental authority. Justice White never signed on to this anti-statist program. When he came to the Court in the early 1960s, it was a subsidiary part of the Warren agenda. But as first the racial protests, then the Vietnam War and the anti-war protests, and finally the misfeasance of the Nixon years convinced many Americans that government often cannot be trusted, the goal of creating individual rights to restrict governmental power assumed increasing centrality for the liberal wing of the Warren and Burger Courts. The Justice had not changed; liberalism had.

The divergence between Justice White and other liberals on the Court also reflected division on a more fundamental question of political philosophy: the value of individual rights in a representative democracy. Jurists and academics alike have struggled for over two centuries with the question of how to integrate the distinctly anti-majoritarian notion of individual rights into a system of government premised upon the democratic majoritarian ideal.[180] During the early debates over ratification of the Constitution, Federalists and Anti-Federalists divided over the need for an express enumeration of

180. HENRY S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS (1943); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

individual rights in the constitutional text. The potential tyrannical impulse of the majority troubled both Federalists and Anti-Federalists alike, but the two groups diverged over how to address the problem. The Federalists had an abiding faith that the democratic process, if properly constructed, could mitigate the intemperate zeal of the majority. In *The Federalist No. 10*, James Madison argued that both the size of the republic and the method of electing representatives insured that factions could not constitute a repressive majority.[181] While the Federalists thought the answer lay in the structure of the government, the Anti-Federalists desired an express enumeration of individual rights to limit the power of the national government.[182] Alexander Hamilton in *The Federalist No. 84* responded that a bill of rights was not only unnecessary but "dangerous" since the enumeration of rights "would afford a colorable pretext to claim more [powers] than were granted."[183] Nevertheless, the Anti-Federalists demanded, as the price for their support in ratifying the Constitution, a promise by the Federalists to introduce a bill of rights in the first Congress.[184]

The history of American jurisprudence in the intervening two hundred years confirms that no final resolution of this debate has been achieved. At different points in American history, one view has prevailed for a period of time only to witness the reemergence of the other. In the early twentieth century, for example, the Court embarked, under the aegis of substantive due process, upon a dramatic and controversial program of invalidating national and state legislation in the name of individual property rights. In cases such as *Lochner*, the Court set aside progressive socio-economic legislation in the name of liberty of contract. Although the New Deal nailed closed the coffin on economic substantive due process,[185] the underlying tension between majoritarianism and individual rights remained.[186] The Warren Court's expansion of civil

181. THE FEDERALIST No. 10, at 127-28 (James Madison) (Isaac Kramnick ed., 1987).

182. *See Essays of Brutus, reprinted in* THE ANTI-FEDERALIST 117-22 (Herbert J. Storing ed., 1985).

183. THE FEDERALIST No. 84, at 476 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

184. *See* RICHARD B. BERNSTEIN & KYM S. RICE, ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION 207-13 (1987).

185. *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934).

186. *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed.

rights for individuals rekindled the long-standing debate; much of the criticism levelled by liberals at the *Lochner*-era Court found new adherents in the conservative critics of the Warren Court and its jurisprudential progeny such as *Roe*.[187]

Here lies the most important lesson to draw from American constitutional history: the recognition and expansion of individual rights is not the sole province, much less the defining characteristic, of liberalism. The most ardent critics of *Lochner*-era jurisprudence were the New Dealers intent upon using the power of government to implement progressive social policies, and it was jurisprudential liberals, precursors of Justice Byron R. White, who repudiated the doctrine of substantive due process that jeopardized and delayed the implementation of the New Deal. Moreover, an individual-rights-oriented jurisprudence is not the sole domain of liberalism even today. Several noted academic theorists such as Richard Epstein and Bernard Siegan are proponents of an individual-rights-based jurisprudence that, if ever embraced by the Court, would trigger an avalanche of liberal criticism.[188] Many of the hallmarks of liberalism, such as rent control, employment discrimination, and consumer protection statutes, would be among its first victims. Thus, to equate liberalism with individual rights is to take a very narrow view both of American constitutional history and of the ends of liberalism.

This tension between individual rights and majoritarian power also implicates a more fundamental and long-standing debate among political theorists. At the time of the American founding, two competing conceptions of just government were fighting for preeminence in Western political philosophy. On the one hand, the Scottish philosopher David Hume and the French political theorist Montesquieu had focused upon republican mechanisms for creating a regime immune to the destabilizing and reactionary impulses of majoritarian government.[189] Hume acknowledged that human nature was

1988).

187. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

188. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

189. *See* Lance Banning, *Republican Ideology and the Triumph of the*

inherently self-interested and that "[a]ll plans of government which suppose great reformation in the manners of mankind are plainly imaginary."[190] Instead, the superior regime was one that acknowledged yet counterbalanced the frailties of human nature. "Good laws may beget order and moderation in the government where the manners and customs have instilled little humanity or justice into the tempers of men."[191] Montesquieu added that a separation of powers among the different organs of government, together with a system of checks and balances among those organs, was the best method to ensure both the stability of the regime and its political liberty.[192] The influence of this strand of liberalism upon the Federalists should not be doubted. In fact, Madison's *The Federalist No. 10* was both inspired by and borrowed heavily from Hume.[193] Presaging Madison's own discourse upon the propensity of democratic regimes to fall prey to factionalism, Hume remarked that "[t]hough it is more difficult to form a republican government in an extensive country than in a city, there is more facility, when once it is formed, of preserving it steady and uniform without tumult and faction."[194]

On the other side, Jean-Jacques Rousseau and Immanuel Kant were less sanguine about the internal mechanics of political authority. Rather, they, and more particularly Kant, focused upon the limits and ends of governmental power. Largely ignoring the practical question upon which Hume and Montesquieu had dwelled of how to construct the best republic, Rousseau searched for universal principles of civil government and claimed that "[i]f one enquires [sic] into precisely wherein the greatest good of all consists, which should be the purpose of every system of legislation, one will find that it boils down to

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Constitution, 1789 to 1793, 31 WM. & MARY Q. 167, 173-74 (1974), *reprinted in* THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 39, 45-46 (Kermit L. Hall ed., 1987).

190. DAVID HUME, *Idea of a Perfect Commonwealth*, *in* HUME'S MORAL AND POLITICAL PHILOSOPHY 373, 374 (Henry D. Aiken ed., 1948).

191. DAVID HUME, *That Politics May Be Reduced to a Science*, *in* HUME'S MORAL AND POLITICAL PHILOSOPHY, *supra* note 190, at 295, 302.

192. *See* 1 CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. XI, ch. VI, 162-74 (Thomas Nugent trans. & J.V. Prichard ed., 1902) (1748).

193. *See* Douglass Adair, *"That Politics May Be Reduced to a Science": David Hume, James Madison, and the Tenth* Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957), *reprinted in* THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS, *supra* note 189, at 21.

194. HUME, *supra* note 190, at 384.

the two principal objects, *liberty* and *equality*."[195] Rousseau believed that the only sovereign worthy of the name was the general will of the people and that human rights were both its ultimate expression and the greatest safeguard of liberty and equality.[196] Kant, who was heavily influenced by Rousseau, expanded Rousseau's idea that the general will embodied itself in rights. Kant postulated the kingdom of ends, a metaphysical empire where autonomous individuals were both rulers and ruled. This reciprocity, epitomized by the categorical imperative, reflected Kant's unflagging belief in the inalienable dignity and equality of humanity. As such, Rousseau and Kant were the philosophical fathers of modern individualism with its emphasis on rights as the basis of political legitimacy and progressivity and its reliance on law as the guarantor of political liberty and equality. Whether by design or by happenchance, these two strands of liberalism—the republicanism of Hume and Montesquieu and the individualism of Rousseau and Kant—are embedded within the American political system.

This is where disappointment voiced by many liberals about Justice White goes astray. Justice White remained a committed adherent of liberalism, albeit a particular strand of liberalism that fell out of favor with Justice Brennan and other judicial liberals. Much like the Federalists of 1787-1788, Justice White believed in the republican system with its reliance on the democratic process. His record in the reapportionment and voting rights cases reflected his belief that the most social good comes from a correctly designed and well-functioning democratic system. In his opinion, political participation, not judicial creation of rights, holds the greatest promise for true social and economic reform. As Justice White suggested in *Bowers*, the judiciary's recognition of anti-statist, individual rights would not create a better world for the weak and powerless any more than anti-statist, property-rights jurisprudence did in the 1930s.[197] Only the power of government can, in White's view, improve the world.

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195. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT: DISCOURSE ON THE ORIGIN OF INEQUITY, DISCOURSE ON POLITICAL ECONOMY 46 (Donald A. Cress ed. & trans., 1983).

196. *Id.* at 37

197. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

In the end, we need to understand that Justice White divided from other liberals on the Supreme Court like Justice Brennan, not over whether to be a liberal but over how to be liberal. White appeared and sometimes acted as a conservative primarily because of his commitment to a Madisonian political style focusing on the proper ordering of government institutions—an approach that has been co-opted by conservative theorists in recent decades, and his rejection of Kantian philosophy—to which today's liberals are tending to link their cause. But there is no necessary connection between liberalism and Kantian theory, and thus, it is a mistake to conclude that Justice White and others who reject Kantian individualism thereby cease to be progressive.

Indeed, Madisonian thought may in the end prove superior to Kantian thought as a means to social justice. If the object of a just society is to protect individuals from majoritarian encroachment on their rights, Madison's political thought continues to provide a useful approach. Perhaps it is even superior to a Kantian approach: the relative value of the two must depend on the ease with which repressive majorities can coalesce in a Madisonian world in comparison with the nature of the rights that any particular interpretation of Kantian theory would protect, and the solidity with which it would protect them. If, in contrast, the progressive goal is to redistribute wealth, Madisonian theory almost surely trumps Kantian philosophy since it is centrally a theory about channelling government power for achievement of the public good, while Kant focuses almost entirely on protecting individuals.

This Article, which is written to congratulate Justice White on his retirement after thirty-one years on the bench, is not the place for ultimate judgments on the relative merits of Madisonian and Kantian theory. What needs to be noted is only that Justice White by the end of his tenure had become the Court's only progressive in the Madisonian and New Deal tradition—a tradition that has contributed significantly to the American polity as we know it today. Whether or not we agree with the Justice, we owe him our appreciation for keeping this important tradition alive.