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When Justice Byron R. White announced his retirement, a reporter asked one of the authors of this article whether Justice White was one of history's "good" Supreme Court Justices or one of the "greats." The answer was, "great."

The reporter responded that he would expect a former law clerk[1] to give that answer, but pointed out that most people reserve the adjective "great" for those Justices who come to the Court with certain favored doctrines, who develop and adhere to these doctrines throughout their careers, and who live to see them (or at least some of them) become settled law partly (and in some cases largely) through their efforts. This pattern, the reporter said, has not described Justice White.

In one sense, the reporter had a point. It has been difficult to identify Byron White with any particular policy or viewpoint. As Professor Leon Friedman noted some fifteen years ago, "[b]ecause he has not aligned himself at either end of the spectrum of the Court, it is difficult to define his work or his judicial philosophy."[2] A more recent (and decidedly less sympathetic) observer has asserted that Justice White appears "uninterested in articulating a constitutional vision."[3] But unlike the reporter (and the last quoted commentator), we

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An earlier (and shorter) version of this Article has appeared in the *Journal of Supreme Court History*. *See* 1993 J. SUP. CT. HIST. 5.

1. Rex E. Lee clerked for Justice White during the October 1963 Term.

2. Leon Friedman, *Bryon R. White*, *in* 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 345, 345 (Leon Friedman ed., 1978).

3. Jeffrey Rosen, *The Next Justice: How Not to Replace Byron White*, NEW REPUBLIC, Apr. 12, 1993, at 21, 21.

believe that Justice White's approach to constitutional adjudication neither disqualifies him for the adjective "great" nor establishes a lack of "constitutional vision."[4] On the contrary, his constant and committed dedication to non-ideological case-by-case adjudication, in the grand common law tradition of American constitutional law, both secures his claim to greatness and evidences his over-arching constitutional vision.

I. THE ROLE OF A JUDGE

It is an article of faith among many that an absolute prerequisite to judicial greatness is a firm commitment to a "persuasive judicial philosophy."[5] And not only must truly great jurists have a persuasive philosophy (meaning, we suppose, a personal commitment to pre-conceived notions of liberty, fairness and/or justice), they must be able to "project their philosophy from case to case."[6] The Justices of the United States Supreme Court—so this line of reasoning goes—fill a role more exalted than merely interpreting a written Constitution: they are judicial policymakers who bring the Constitution into "existence" when they make "hard" decisions (supposedly) too intense for mere politics.[7] It would follow that their philosophy must be not only "persuasive" but also "pervasive."

According to these theorists, democracy has become too inefficient to deal with modern problems. Ordinary politics has

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4. Justice White's incremental and measured approach to judicial decisionmaking clearly does not warrant dismissing him as a mere "legal technician" who has "never transcended his initial incarnation as the jock justice." *Id.*

5. *Id.*

6. *Id.*

7. *E.g.*, ARTHUR S. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT 6 (1982) (stating that one of the book's purposes is "to both defend modern judicial 'activism,' plus call for even more activism"); *id.* at 233-34 ("The Supreme Court—the judges generally—should be even more activist than they are at present. The time has come not only for candid acknowledgment of 'truth in judging'—the view that Supreme Court Justices make up the law as they go along, in accordance with their personal predilections—but for even more intervention by the judiciary into socioeconomic matters.") (footnote omitted); *id.* at 269-70 ("The Judges can show the way, if only they will seize the opportunity, for even more of the corpus of American public policy to take. They can make choices, hard for officers in the political branches, that cannot be avoided as the Constitution of Control comes into existence.").

resulted in a stifling "pluralism"[8] that prevents progress and thwarts development of important rights. Thus, to remedy the perceived "shortcomings of pluralism," some have called upon the Justices of the Supreme Court to hammer out a new "Constitution of Control."[9] The Justices, these commentators seem to assert, must assume the status of social diagnosticians, ascertaining society's ills and then concocting and measuring out the needed constitutional elixir—no matter how unwilling to swallow their medicine the general populace may be.[10]

Such views are provocative and—to judge from discussions in the popular press regarding the importance of the personal views of judicial nominees[11]—rather widely accepted (even if the full ramifications of this acceptance are not fully understood). We believe, however, that the proper role of a judge is not quite as exalted as the foregoing discussion would suggest. The conscious development of policy over time through the exercise of one's office is a function that is normally, and quite properly, associated with the representative—and politically accountable—branches of government. The role of the judge, by contrast, should be to decide discrete cases.[12]

That role, of course, will often raise policy questions. In deciding cases, a judge must "interpret[] the laws passed by the legislature and the regulations issued by executive agencies, and monitor[] the conduct of government agencies, public institutions, and even private individuals and groups in the light of the Constitution."[13] At times, because of statutory or

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8. *Id.* at 270-71.

9. *Id.*

10. *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[T]he notion that the Court must adhere to a decision for as long as the decision faces 'great opposition' and the Court is 'under fire' acquires a character of almost czarist arrogance.")

11. *See, e.g.*, Max Boot, *Ginsburg Hearings Provide Some Insight into Judge's Ideals*, CHRISTIAN SCI. MONITOR, July 26, 1993, at 4; Neil A. Lewis, *A New Era in Abortion: End of Litmus Test for Court Nominee*, N.Y. TIMES, July 19, 1993, at A13 (discussing Justice Ginsburg's view on abortion); *see also* Linda P. Campbell, *Many Pathways Lead to the Supreme Court: Mix of Credentials, Connections, Luck*, CHI. TRIB., May 9, 1993, § 1, at 21 ("[P]otential nominees have faced intense scrutiny of their legal views and personal background.").

12. A federal appellate judge once noted that "[t]he function of the judge is of a quite different order from the functions of the legislator and administrator. The judge has the ancient task of settling disputes between specific individuals, groups, or institutions—a field we could call private law." FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 9 (1980).

13. *Id.*

constitutional ambiguity, this interpretive task will inevitably involve resolution of policy disputes. But while judges unquestionably grapple with policy, they do it in the context of discrete cases.

It follows, we believe, that the only legitimate way that policy should result from judicial minds and pens is through the exercise of case-by-case, decisional authority. Policy development should not be *the* primary judicial objective. On the contrary, the judge's forging of policy should be incidental to the decision of actual cases, progressing *only* as necessity and experience mandate.[14]

Some who adhere to a more sweeping conception of the judicial role have lamented Byron R. White's purported lack of "vision" on the Court.[15] We believe, however, that this criticism—with its concomitant emphasis on personal philosophy—is seriously flawed. A judge is not (or at least *should* not be) a policy czar who marks the boundaries of the Constitution by the light of an unknown (and perhaps unknowable) inner vision. Rather, a judge (and especially a Justice of the Supreme Court) decides discrete controversies and sets policy only in the context of interpreting written law—*i.e.*, statutes and the Constitution. And evaluated by that standard, Justice White belongs with the best.[16]

II. "HE DECIDES CASES"

Undoubtedly, Bryon R. White has been something of a judicial enigma.

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14. As Justice Felix Frankfurter has noted,

> [I]t is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.

Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting). Of course, Justice Frankfurter's view of the judicial role is criticized as shortsighted by those holding grander judicial pretensions. *E.g.*, MILLER, *supra* note 7, at 268 ("Frankfurter and [Learned] Hand are the leading saints in the hagiology of what may be called the Frankfurter School of Judicial Criticism," which insists that judges follow "Whiggish, Burkean views of proper public policy.").

15. *E.g.*, Rosen, *supra* note 3.

16. *See* Pierce O'Donnell, *Justice Byron R. White: Leading from the Center*, A.B.A. J., June 15, 1986, at 24, 27 (noting Justice White's "preference for case-by-case adjudication" over "assertions of overriding philosophy").

> Over the years, [he] has defied labeling. Early on, he voted with the liberal bloc on civil rights and school desegregation but with conservatives on crime. In the landmark criminal rulings of the Warren era, White often dissented, as he did in the Miranda case. Along with Rehnquist, he cast a dissenting vote in *Roe v. Wade* and has made clear he will overturn the right to abortion if the opportunity arises. Unlike Rehnquist or Brennan, however, he has never set forth a broad view of the Constitution or of the Court's role in interpreting it. White has a quick, penetrating mind but avoids philosophy or broader principles of law. He decides cases and no more.[17]

The inability of journalists and scholars to pin an appropriate label on Justice White has generated much of the criticism thrown his way.[18] Indeed, some of Justice White's harshest critics[19] cite as Exhibit 1 for their case-in-chief his propensity to "decide[] cases and no more."[20] Others, moving from the same starting point, have asserted that his jurisprudence lacks "consistency."[21] These purported "defects," some have argued, evidence an overall lack of judicial greatness.[22] We believe these complaints not only reach the wrong conclusion, but establish the basis for exactly the opposite conclusion.

To begin, there is a decent argument that—if one takes into account not only the quality but also the breadth of his accomplishments—the most accomplished person to come out of the American twentieth century is Byron R. White. In sports, he was an All-American and professional football player,[23]

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17. DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 92-93 (1992); *see also* Reynolds Holding, *Byron White—High Court's Legal Purist: A Kennedy Appointee but Known as a Conservative*, S.F. CHRON., Mar. 20, 1993, at A1 ("[H]e has proved as adept at avoiding ideological tags as he was at eluding tacklers . . . .").

18. *See, e.g.*, Holding, *supra* note 17, at A1 (characterizing Justice White's record as "maddeningly inconsistent to those looking for clear stands on the major issues of the day"); Rosen, *supra* note 3; *see also* Charles Fried, *A Tribute to Justice Byron R. White*, 107 HARV. L. REV. 20, 20 (1993) (characterizing Justice White's votes in two cases as "clearly, even provocatively, inconsistent"); Richard Carelli, *Court Swings from Conservative Path: Ruling on Inmates' Rights Is a Further Sign of Split*, STAR TRIB., Apr. 23, 1993, at 7A (characterizing Justice White's vote in one case as "somewhat inconsistent").

19. Rosen, *supra* note 3.

20. SAVAGE, *supra* note 17, at 93.

21. *See supra* note 18.

22. *See supra* notes 5-10 and accompanying text.

23. Byron White earned nine varsity letters at the University of Colorado, played professional football for the Pittsburgh Steelers and the Detroit Lions, and was later enshrined in the Pro Football Hall of Fame. WILLIAM H. REHNQUIST, THE

known to many as "Whizzer White."[24] In law school, he was an editor of the *Yale Law Journal.* In practice, he was a partner in one of Denver's most prestigious firms. In the executive branch of the federal government, he occupied one of the most significant positions: Deputy Attorney General. And in the judicial branch, he held one of the most important posts for thirty-one years, the ninth longest tenure in the history of the Court.[25]

In short, even though the twentieth century may have produced better athletes, a few (but only a few) lawyers and top Justice Department officials who were in his class, and several Supreme Court Justices who were as good (though, for reasons discussed below, very few), perhaps no one in this century has excelled across such a broad range of accomplishments as has Byron R. White.[26] This remarkable record must be given significant weight in *any* calculation of Justice White's stature.

Indeed, if far-flung knowledge is (as some have argued) an essential element of judicial greatness,[27] Byron White is

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SUPREME COURT: HOW IT WAS, HOW IT IS 257 (1987).

24. Justice White, to our knowledge, has not wanted people to call him "Whizzer," perhaps because he does not want to be remembered principally as a football player. The one possible exception seems to consist of athletes with whom or against whom he has competed. Once when he visited the Brigham Young University Law School in the late 1970s, Justice White was joined for dinner by "Hack" Miller, a news reporter for the *Deseret News*, who in his college playing days at the University of Utah had competed against the Justice in basketball. As the evening progressed, Justice White seemed not to mind—and to even enjoy—being addressed as "Whizzer" by "Hack."

25. Other Justices who have served longer are William O. Douglas (36 years), Hugo L. Black (34 years), John Marshall (34 years), William J. Brennan (33 years), Stephen J. Field (34 years), John Marshall Harlan I (33 years), Joseph Story (33 years), and James M. Wayne (32 years). THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 965-71 (Kermit L. Hall et al. eds., 1992); Albert P. Blaustein & Roy M. Mersky, *The Statistics on the Supreme Court*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 3187, 3189 (Leon Friedman & Fred L. Israel eds., 1969).

26. *See* SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES 221-22 (1971) (stating that "Byron R. White exemplifies the Greek ideal of a sound mind in a sound body. . . . A clear example of the cool and dispassionate 'New Frontiersman' . . . . White's personality exudes competence and the ability to make close and practical judgments."). Some of his characteristics as an athlete also characterized his later life as a member of the Supreme Court. It has been said that he was a football player who was fast enough to run around the defenders, but really preferred to run through them. SAVAGE, *supra* note 17, at 89.

27. One study has listed "wide general knowledge and learning" as one of the characteristics of a successful Supreme Court Justice, ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 50-51 (1978), while Judge Learned Hand

plainly one of the greats. He is a man who is interested in almost everything, whether legal issues or others, and his mind is capable of reaching almost as much as his interest. Over the decades, law clerks consistently observed that he always managed to stay several steps ahead of their efforts. His reputation among Supreme Court practitioners as a relentless and difficult questioner is well deserved, mainly because he was consistently so well prepared and had thought through the difficult issues with such thoroughness and care that he was always able, and usually willing, to challenge even the most sophisticated argument made by counsel.[28]

With such a background, the complaint that Justice White has failed to articulate an overarching "judicial philosophy"[29] and has, instead, "decide[d] cases and no more"[30] is hardly damning. Rather, his non-ideological approach to deciding cases has been the fountain of his strength.

One of Byron White's greatest strengths has been his acute awareness of the respective competencies of the legislative and judicial branches.[31] Indeed, at his confirmation hearing, he testified that the "legislative power is not vested in the Supreme Court," and he asserted that the "major instrument for changing the laws in this country is the Congress of the United States."[32] This fundamental commitment to a limited judicial role is the foundation for the Justice's "preference for case-by-case adjudication," as well as for his "'aversion to large statements, to assertions of overriding philosophy.'"[33]

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asserted that a judge passing on a constitutional question must "have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant," LEARNED HAND, THE SPIRIT OF LIBERTY 81 (1952).

28. *See* REHNQUIST, *supra* note 23, at 257 ("His gruff voice and penetrating questions still strike terror into the hearts of unprepared attorneys arguing orally before the Court the way he used to terrify his football opponents."); Friedman, *supra* note 2, at 356 ("[Justice White] is generally the most penetrating questioner of lawyers who argue before the Court.").

29. Rosen, *supra* note 3, at 25.

30. SAVAGE, *supra* note 17, at 93.

31. *See, e.g.*, Byron R. White, *Some Current Debates*, 73 JUDICATURE 155, 158, 161 (1989) (noting the interpretive problems faced by the Court in construing detailed legislative schemes, and outlining steps Congress might take to insure judicial implementation of legislative policy).

32. *Nomination of Bryon R. White: Hearing Before the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 23 (1962) (statement of Byron R. White).

33. O'Donnell, *supra* note 16, at 27 (quoting Lance Liebman). Both Liebman and O'Donnell are former Byron White law clerks.

To be sure, by the time of his retirement, after more than three decades of deciding cases, we know his views on abortion,[34] the three-part *Lemon*[35] test for deciding establishment of religion cases,[36] *Miranda v. Arizona*[37] and its correctness,[38] and other important constitutional and law enforcement issues. But this has come about not because he characterized himself as a "liberal" or "conservative," and then did his judging consistent with what a good liberal or good conservative would be expected to do, or because in any other respect he started from some pre-determined policy position. Rather, Justice White's views have evolved over time as he has exercised the only authority that the Constitution vests in Article III judges: to decide cases and controversies.

Because of his case-by-case orientation, Justice White has been hesitant to impress his personal views upon the body of American constitutional law. A sterling example of this trait is the opinion he wrote for the Court in *Lamb's Chapel v. Center Moriches Union Free School District*[39] during his final Term. In that opinion, Justice White explicitly declined to reverse *Lemon*,[40] a much-maligned (especially by him) Establishment Clause precedent,[41] despite the apparent presence of five votes to inter the case.[42] Why did Justice White fail to write an

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34. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2855, 2873 (concurring and dissenting opinions joined by White, J.); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 785 (White, J., dissenting); Roe v. Wade, 410 U.S. 113, 221 (1973) (White, J. dissenting).

35. Lemon v. Kurtzman, 403 U.S. 602 (1971).

36. *See, e.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring in judgment); Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., joined by White, J., dissenting).

37. 384 U.S. 436 (1966).

38. *Id.*, 384 U.S. at 526 (White, J., dissenting); Michigan v. Mosley, 423 U.S. 96, 107 (1975) (White, J., concurring in the result); Harris v. New York, 401 U.S. 222 (1971).

39. 113 S. Ct. 2141 (1993).

40. Lemon v. Kurtzman, 403 U.S. 602 (1971).

41. *E.g.*, ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

42. *See Lamb's Chapel*, 113 S. Ct. at 2149-51 (Scalia, J., concurring) (noting Justice White's past disagreement with *Lemon* and chastising the Court for its failure to reverse a supposedly discredited precedent).

opinion in *Lamb's Chapel* reversing *Lemon* when his own disapproval was clear?

While no definitive answer (short of candid disclosure by Justice White himself) can be given, there is one likely possibility. At the time he wrote the opinion in *Lamb's Chapel*, Justice White knew he would be leaving the Court. He was also aware that, while he and four other members of the then-current Court disapproved of *Lemon*, the case had not lost the support of perhaps as many as four other sitting Justices.[43] Justice White, moreover, did not know whether his replacement on the Court would support (or disapprove of) *Lemon*. Accordingly, if he wrote an opinion reversing *Lemon* in *Lamb's Chapel*, he might be discarding a precedent that—in the near future—could again have the support of a majority of the Court.

In such circumstances, it is quite possible that Justice White simply determined that he would leave the fate of *Lemon* to his successor. He would not, in short, force his personal views upon the United States Constitution as a matter of individual will. If this plausible explanation for Justice White's refusal to make "*Lemon*ade" in *Lamb's Chapel* is accurate, it is yet another indication of the Justice's careful—and laudable—decisionmaking style.

This measured approach to the judicial role has not resulted—as some have charged—in a jurisprudence that lacks "consistency."[44] It has become almost commonplace for certain commentators to claim that Justice White, a supposed "liberal" at the time of his appointment, has often joined "conservative" opinions.[45] Building upon this observation, others have argued

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43. *See Lamb's Chapel*, 113 S. Ct. at 2150 (Scalia, J., concurring) (counting the votes against—and, inferentially for—*Lemon*).

44. *E.g.*, Rosen, *supra* note 3, at 25 (asserting that Justice White somehow "relish[es] his inconsistencies").

45. *E.g.*, Fred L. Israel, *Bryon R. White*, *in* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, *supra* note 25, at 2951, 2960-61 ("With White, a New Frontier Democrat, replacing Whittaker, a conservative Republican, it was expected that the Court balance would decisively tilt toward the liberal bloc—*but, alas*, this was a misplaced expectation . . . .") (emphasis added); Holding, *supra* note 17, at A8 ("Perhaps no one would have been more surprised by White's record than the man who appointed him . . . ."); David O. Stewart, *White to the Right*, A.B.A. J., July 1990, at 40 (asserting that Justice White is "[o]rdinarily conservative"). The utility of such observations is questionable. *See* COFFIN, *supra* note 12, at 201 ("All that I think can be justly said about the utility of applying overworked labels to judges is that they are appropriate to some judges on some issues some of the time. But to use them as

that the Justice has reached "inconsistent" results in individual cases.[46] In our view, Byron White has been mercurial neither in his philosophy nor in his results.

As an initial matter, it is far from clear that Byron White has, in fact, deviated much from the supposed liberalism of the man who appointed him: John F. Kennedy. One can question, for example, whether JFK himself was really as liberal as most people assume.[47] Indeed, Justice White's jurisprudence has been described as a snapshot of the Kennedy era: "pro-labor, pro-civil rights (but not affirmative action), strong on national security and *very* anti-crime."[48] If this description is accurate (as we believe it is), Byron White's supposed conservatism may result more from shifts in the liberal agenda than from any discernable movement on the part of the Justice himself.[49]

The conjectured conservatism of Justice White, in any event, is hardly apparent from a candid review of his voting record. His votes implicating racial or sexual preferences,[50] school desegregation[51] and other discrimination cases[52] (as will be discussed below)[53] are neither "liberal" nor "conservative." To be sure, his performance in such public attention-catching areas as abortion,[54] law enforcement,[55]

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generic descriptions characterizing judges on supposedly major points of difference exaggerates the extent to which they may fairly apply.").

46. *See generally* Rosen, *supra* note 3, at 25.

47. Stuart Taylor, Jr., *Justice Byron White: The Consistent Curmudgeon*, LEGAL TIMES, Mar. 22, 1993, at 30, 30 (asserting that JFK was not "the kind of liberal" that many assume).

48. Stewart, *supra* note 45, at 42.

49. *E.g.*, *id.* at 42 (noting that Justice White's Kennedy-era agenda "is not a pace-setting agenda because it is an agenda from the past").

50. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Grove City College v. Bell, 465 U.S. 555 (1984); Fullilove v. Klutznick, 448 U.S. 448 (1980); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

51. Board of Educ. v. Dowell, 111 S. Ct. 630 (1991). *But see* Missouri v. Jenkins, 495 U.S. 33 (1990); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Milliken v. Bradley, 433 U.S. 267 (1977).

52. Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Washington v. Davis, 426 U.S. 229 (1976); Stanley v. Illinois, 405 U.S. 645 (1972).

53. *Infra* notes 65-82 and accompanying text.

54. *See supra* note 34.

55. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1967) (White, J., concurring in holding that when a reasonably prudent police officer is warranted in believing that his safety or that of others is endangered, he may make a reasonable search for weapons of the person believed by him to be armed and dangerous regardless of whether he has probable cause to arrest); Miranda v. Arizona, 384 U.S. 436, 526 (1966) (White, J., dissenting); Escobedo v. Illinois, 378 U.S. 478, 495 (1964) (White,

sodomy,[56] church-state relationships,[57] and pornography[58] could be called "conservative" by a traditional pigeonholer. On the other hand, however, if that same pigeonholer looks to cases involving the powers of state and local governments vis-à-vis the federal government,[59] federal regulatory authority in general (including antitrust),[60] labor and securities issues,[61]

J., dissenting from holding that right to counsel attaches when police investigation focuses on a particular suspect in police custody and that statements made after suspect has been denied access to counsel are inadmissible against suspect); Malloy v. Hogan, 378 U.S. 1, 33 (1964) (White, J., dissenting from holding that witness's claim of privilege against self-incrimination in statutory inquiry should have been upheld); Robinson v. California, 370 U.S. 660, 685 (1962) (White, J., dissenting from holding that California statute criminalizing addiction to narcotics inflicts cruel and unusual punishment in violation of Eighth and Fourteenth Amendments); *see also* United States v. Ojeda Rios, 495 U.S. 257 (1990); Clemons v. Mississippi, 494 U.S. 738 (1990); Caplin & Drysdale v. United States, 491 U.S. 617 (1989); Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting); United States v. Watson, 423 U.S. 411 (1976); United States v. Chavez, 416 U.S. 562 (1974); United States v. Edwards, 415 U.S. 800 (1974); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. White, 401 U.S. 745 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); Chimel v. California, 395 U.S. 752 (1969); Mancusi v. DeForte, 392 U.S. 364 (1968). *But see* James v. Illinois, 493 U.S. 307 (1990).

56. Bowers v. Hardwick, 478 U.S. 186 (1986).

57. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968).

58. Osborne v. Ohio, 495 U.S. 103 (1990); FW/PBS v. Dallas, 493 U.S. 215 (1990); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973); John Cleland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413, 460 (1966) (White, J., dissenting from holding that material must be utterly without redeeming social value in order to be banned as obscenity).

59. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); ASARCO Inc. v. Kadish, 490 U.S. 605 (1989); Harris v. Reed, 489 U.S. 255 (1989).

60. Albrecht v. Herald Co., 390 U.S. 145 (1968) (holding that fixing maximum as well as minimum resale prices by agreement or combination is a per se violation of § 1 of the Sherman Act); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (holding that any merger must be tested by standard of § 7 of the Clayton Act, that is, whether it may substantially lessen competition, which requires a prediction of the merger's impact on present and future competition); United States v. Von's Grocery Co., 384 U.S. 270 (1966) (White, J., concurring in holding that merger tended to decrease competition in violation of § 7 of the Clayton Act); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (holding that proposed merger might lessen competition in violation of § 7 of the Clayton Act); *see also* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

61. United Steelworkers of Am. v. Rawson, 495 U.S. 362 (1990); Carpenter v.

or the powers of Congress vis-à-vis those of the President,[62] then he belongs in the "liberal" box. Byron R. White, in sum, has been neither liberal nor conservative. He has been the proverbial "man in the middle."[63]

Some might (and, indeed, have) looked at this record and asserted that Justice White has lacked "consistency" in deciding cases.[64] On that issue, we ask, consistency with what? Precisely because the job of the Article III judge is to decide cases and controversies, it would be a mistake for a federal judge to fit himself or herself into a liberal or conservative slot and then decide cases on that basis. The consistency that really counts is consistency with Article III obligations, and not consistent performance as an ideologue. And on this score, no one has evidenced more consistent devotion to the careful, non-ideological decision of individual cases than has Byron White.

A sampling of Justice White's views regarding constitutional and legislative prohibitions on racial discrimination is illustrative. Early in his career, he joined opinions which read the Fourteenth Amendment broadly to prohibit state practices (such as poll taxes) that limited access to the voting booth.[65] He also joined opinions which greatly expanded congressional authority to regulate private, invidious discrimination[66] and recognized Congress' plenary power to

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United States, 484 U.S. 19 (1987); United States v. Turkette, 452 U.S. 576 (1981). *But see* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973).

62. Bowsher v. Synar, 478 U.S. 714 (1986).

63. For the past several years, one of the authors has conducted a statistical study of the voting patterns of Supreme Court Justices. *See, e.g.*, Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1992 Term*, 8 B.Y.U. J. PUB. L. 229 (1993) [hereinafter Wilkins et al., *1992 Term*]; Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1991 Term*, 7 B.Y.U. J. PUB. L. 1 (1992). This statistical study shows that Justice White ended his judicial career as he conducted it: without closely aligning himself with either ideological wing of the Court. Wilkins et al., *1992 Term*, *supra*, at 236 (noting that Justice White ends his career between the Court's ideological poles, precisely where he was positioned during most of the years covered by the study); *see also* James J. Kilpatrick, *Justice Byron White, Hard to Classify, Will Be Missed on the Supreme Court*, ATLANTA J. & CONST., Mar. 31, 1993, at A19 (Justice White "brought no ideological baggage"; a "simplistic view regards White as a 'conservative'" while "[a]n equally superficial [view] could establish White's credentials as a liberal.").

64. Rosen, *supra* note 3, at 25; *see also* sources cited *supra* note 18.

65. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

66. *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

enforce the Equal Protection Clause.[67] Nevertheless, Justice White also wrote the Court's opinion in *Washington v. Davis*,[68] which limited the reach of the Fourteenth Amendment to "purposeful" discrimination, and joined the opinion in *City of Richmond v. J.A. Croson Co.*,[69] which subjected a municipal ordinance affording class-based relief to minority businesses to "strict scrutiny."

Are these positions consistent? Why would a Justice who voted to strike down a poll tax thereafter conclude that the Equal Protection Clause reaches only "purposeful" discrimination? Why would a Justice who would accord Congress substantial latitude in remedying racial discrimination nevertheless subject state-created class-based remedies to strict scrutiny? Are these results, as some have charged, merely the result of an *ad hoc* approach to the decision of constitutional questions that is pragmatic but ultimately unsound? We believe that there are plausible answers to these (and similar) queries, and that the decisions noted above are not only consistent, but display a clear judicial (and constitutional) vision.

Justice White's voting record—from invalidating the poll tax[70] to *Washington v. Davis*—is consistent with the central command of the Equal Protection Clause: no "person" shall be denied "the equal protection of the laws."[71] Indeed, if proof of a disproportionate impact—*i.e.*, the fact that a regulatory scheme bears more heavily upon blacks than whites, or upon males than females—were sufficient to establish a constitutional violation, the focus of the Equal Protection Clause would undergo a dramatic shift. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race," wrote Justice White.[72] But if disproportionate impact alone established a constitutional violation, government could never act *without* acting on the basis of race. Virtually every governmental decision—from taxation, to zoning, to usury rates—would become enmeshed in racial politics, resulting in a

67. *E.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966).
68. 426 U.S. 229 (1976).
69. 488 U.S. 469 (1989).
70. *E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
71. U.S. CONST. amend. XIV, § 1.
72. *Davis*, 426 U.S. at 239.

shift in focus from constitutional protection of the "person" to protection of the person's "class."[73] In short, the jurisprudence of the man whose work we examine here demonstrates profound respect for (and consistency in adjudicating) the equal protection claims of *individuals*.[74]

There is, furthermore, no inconsistency between the Justice White who would accord Congress substantial latitude to enforce the Fourteenth Amendment[75] and the Justice White who would subject state-created racial classifications to strict scrutiny.[76] Nothing in *Croson* cuts back on congressional authority to implement class-based remedies. Indeed, one year after joining *Croson*, Justice White joined the majority opinion in *Metro Broadcasting, Inc. v. FCC*,[77] in which the Court held that class-based remedies enacted by Congress need not pass strict scrutiny but, instead, will be tested under a substantially more deferential standard of review.[78] Justice White's apparent conclusion, *i.e.*, that state-created racial

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73. *See, e.g., id.* at 248.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id.

74. *E.g.*, SAVAGE, *supra* note 17, at 218.

> Almost alone among the justices, [Byron White] could claim a record of consistency on the issue of racial discrimination. When confronted in the 1960s and 1970s with cases where blacks had suffered racial discrimination, White sided with them. This put him in the liberal camp, at least on civil rights. However, in the 1980s, when whites came to the Court with evidence that they had suffered racial discrimination, he sided with them, too.

Id.; *see also* Burton Atkins & William Taggart, *Substantive Access Doctrines and Conflict Management in the U.S. Supreme Court: Reflections on Activism and Restraint*, in SUPREME COURT ACTIVISM AND RESTRAINT 351, 375-76 (Stephen C. Halpern & Charles M. Lamb eds., 1982) (finding Justice White one of only three Justices whose voting on issues concerning access to court was "highly consistent over the Warren and Burger Court years").

75. *E.g.*, South Carolina v. Katzenbach, 383 U.S. 301 (1966).

76. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

77. 497 U.S. 547 (1990).

78. Under *Croson*, municipal class-based remedies must be necessary to further a compelling governmental interest. 488 U.S. at 498-506. Under *Metro*, however, congressionally enacted class-based remedies will pass constitutional muster so long as they are substantially related to the achievement of an important governmental purpose. 497 U.S. at 565-66.

classifications are highly suspicious and therefore require rigorous justification[79] while similar federal actions do not, is hardly "inconsistent" or "unprincipled." On the contrary, it represents the modern embodiment of federal theory reaching back at least as far as *The Federalist Papers*: political action at the national level is less subject to abuse than similar action at the local level.[80]

Justice White, finally, has refrained from inflexible, doctrinaire stands on the issues raised by the foregoing cases. While he insists upon proof of "purposeful" discrimination, he will accept—as indicative of "purpose"—evidence that some members of the Court have suggested amounts to little more than a disguised "disproportionate impact" analysis.[81] Justice White's record, in short, confirms the observation of one of his former clerks that he is "'a lawyer's lawyer, and . . . sees the cases as law cases, not as matters of social policy.'"[82]

The results capsulized above are not the result of accident, nor do they evidence a lack of vision or consistency.[83] On the contrary, they confirm that Byron White is perhaps the most consistent member of the Supreme Court in the only respect in which consistency really matters: fidelity to the constitutional duty to decide individual cases in accordance with the facts and applicable law. Presented with discrete controversies, Justice White has concluded that there *are* limits beyond which the Fourteenth Amendment may come to protect a "class" rather than a "person," and that there *is* a difference between

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79. *See, e.g.*, *Croson*, 488 U.S. at 495-96 (noting that the class-based preference invalidated in *Croson* was adopted by a city council composed predominantly of minorities).

80. *See, e.g.*, THE FEDERALIST No. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961) (noting that the size of the federal government "will render an unjust combination of a majority of the whole very improbable, if not impracticable"); THE FEDERALIST No. 10, at 82-84 (James Madison) (Clinton Rossiter ed., 1961) ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.").

81. *E.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (concluding that the so-called "*Zimmer* factors," developed in a line of disparate impact cases, nevertheless established purposeful discrimination); *see* Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

82. Stewart, *supra* note 45, at 42.

83. *See* Rosen, *supra* note 3, at 21.

congressional action dealing with race and similar action at the local level. While scholars and others may quibble with how the man from Colorado has drawn these particular lines, no one can doubt that he has a clear vision of what he has done: decided discrete cases on the particular facts and law presented.

III. IS HE GREAT?

We have attempted to establish two points. First, there is a disparity of views regarding the role of a Supreme Court Justice: while some would have the Justices establish broad social policy in the context of construing the Constitution,[84] others (including ourselves) would limit the Justices rather closely to the decision of discrete cases, indulging in judicial policymaking only to the extent absolutely necessary (and even then only in the light of established statutory and constitutional policies). Our view is bottomed on the Constitution itself. Article III authorizes the members of the "least dangerous"[85] branch to decide "cases or controversies."[86] Strangely enough, Article I vests "all legislative Powers"[87] somewhere else. Second, Justice White has quite clearly eschewed the role of social policymaker: he has declined the crown of philosopher king and, instead, has rather doggedly decided individual cases on their distinct records.

These two points raise the ultimate question: Is he great?

The answer to this query, of course, depends to some extent upon the ideology of the respondent. For those who have adopted the model of the Supreme Court Justice as a social engineer, a truly great Justice must be a true visionary. Because (under this view) the Justices "make up the law as they go along, in accordance with their personal predilections,"[88] the individual jurist must have fairly lofty predilections or all (including the Constitution) is lost. "Persuasive judicial philosophy"[89] and "vision"[90] are all

84. *Supra* notes 5-10.

85. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

86. U.S. CONST. art. III, §2.

87. U.S. CONST. art. I, §1.

88. MILLER, *supra* note 7, at 233-34.

89. Rosen, *supra* note 3, at 25.

90. *Id.* at 21.

important; without such virtues, not only would a Justice of the Supreme Court lack greatness, the Nation would run the risk of losing justice (with a small "j") itself. Accordingly, those who adhere to this conception of justice and Justices may well be somewhat dismissive of Byron R. White; after all, he "decides cases and no more."[91]

We take a contrary view because we believe that a great Supreme Court Justice *should*—first and foremost—decide cases. Indeed, transforming the Justices of the Supreme Court into visionary constitutional diagnosticians and social engineers poses at least three significant risks for a democratic society.

The first risk is that the fact-finding capabilities of judges may be limited; they must "make policy" (to the extent they "make policy") in the context of facts presented, organized (and sometimes created) by legal counsel in a discrete case. Legislators, by contrast, are limited neither by Article III's case-or-controversy requirement,[92] nor by the decision of legal counsel to construct the record in a particular way.[93] The legislator not only is free to inquire into any relevant facts, but also can carry that inquiry wherever the *public* interest—rather than the interests of private litigants—might indicate.

The second risk raised by broad judicial policymaking is lack of accountability. A major difference between the judiciary and the legislature is that legislators must periodically account to the people for the way they have carried out their public

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91. SAVAGE, *supra* note 17, at 93.

92. Indeed, the judicial authority granted in Article III is limited, by its own terms, to deciding cases and controversies. U.S. CONST. art. III, § 2.

93. Litigation records, particularly in public interest lawsuits, are often engineered by counsel. For example, in recent litigation involving a Utah abortion statute, counsel for the American Civil Liberties Union—hoping to bring an "as applied" challenge to an 18-year-old spousal-notification statute—advertised for potential plaintiffs in four states. Despite intensive effort, the attorneys were unable to uncover a single individual who could complain about the past administration of the statute. Without a concrete complainant, legal counsel were forced to bring a facial challenge to the statute, arguing what "might" occur under the statute rather than what "had" occurred during the past 18 years. *See* Brief for the Defendants-Appellees at 5, Jane L. v. Bangerter, No. 93-4145 (10th Cir. filed Aug. 2, 1993). As a result, the constitutionality of the spousal-notification provision was determined—not on the basis of actual experience—but on the basis of expert opinion regarding what "could" happen, even though there was no evidence that it "had" happened. Such a "record" may be firm ground for legislative policymaking; it is a rather unstable foundation for judicial pronouncement.

responsibilities. The absence of judicial accountability makes judicial policymaking a decidedly problematic endeavor.

By definition, "policy" involves issues that affect people, and peoples' views regarding those effects may differ mightily. The resulting disparity of views may render the legislative process difficult—sometimes, exceedingly difficult. In fact, commentators who argue for an expansive judicial role assert that such a role is necessary precisely *because* political choices are "hard."[94] But just because a decision is "hard" does not mean it should be made by a judge. On the contrary, vesting policymaking authority in the judiciary—rather than the legislature—renders a representative government less accountable for the exercise of that authority.[95] As a result, expanding the role of the judiciary to compensate for the perceived shortcomings of "pluralism"[96] and the political process may only further stultify the ability of our representative democracy to deal with crisis.[97]

The third risk an expansive judicial role poses for government by "the People"[98] flows from the preceding point:

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94. MILLER, *supra* note 7, at 269-70 (Judges "can make choices, hard for officers in the political branches, that cannot be avoided.").

95. *See, e.g.*, JAMES E. BOND, THE ART OF JUDGING 53 (1987) ("[J]udges who decide cases as statesmen usurp lawmaking authority from the people and thus undermine the rule of law. . . . [A] Court of statesmen encourages an often all-too-willing Congress to abdicate its responsibility to decide what the law ought to be and whether that law is constitutional."); *see also* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.").

96. MILLER, *supra* note 7, at 270-71.

97. *E.g.*, *Richardson*, 418 U.S. at 188 (Powell, J., concurring) ("[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.").

As James Bradley Thayer described in his biography of John Marshall:

> [T]he exercise of [the judiciary's power of review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.

JAMES B. THAYER, JOHN MARSHALL 106-07 (1901).

98. U.S. CONST. pmbl.

judicial policymaking may prematurely (and unwisely) cut off policy debate. To the extent that an issue becomes constitutionalized, it is taken from the realm of public discourse. This may inhibit both the quality *of* the ultimate policy decision as well as necessary public support *for* that decision.

The quality of the ultimate lawmaking product is enhanced by leaving the relevant issues exposed to the legislative process and the public pressures that are brought to bear on that process.[99] One of the fundamental postulates undergirding a free and open democratic society is that the search for truth is enhanced by permitting a full and uninhibited discussion of public questions.[100] Necessarily, such a discussion is more effective if the ultimate resolution has not been removed from the realm of public debate and solution through constitutional adjudication. The best way to determine who is right and who is wrong on difficult social issues is to permit and encourage the opposing sides to exercise their persuasive efforts on state and national legislatures.[101] Equally beneficial to the search for the optimal solution is the likelihood that, on any given

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99. *E.g.*, Ball v. James, 451 U.S. 355, 373 (1981) (Powell, J., concurring). The Founding Fathers emphatically rejected the suggestion that the federal judiciary serve as a "council of revision" to pass upon the wisdom of "every act of the National Legislature before it shall operate." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS]. *But cf.* MILLER, *supra* note 7, at 296-97 (arguing that the Supreme Court *should* function as a "council of revision" where "[n]ot only presidential but Congressional actions would be submitted to it before promulgation"). Nathaniel Gorham of Massachusetts argued that he "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." 2 RECORDS, *supra*, at 73. It was also argued to be "necessary that the Supreme Judiciary should have the confidence of the people" and this confidence would "soon be lost, if [judges] are employed in the task of remonstrating agst. popular measures of the Legislature." 2 *id.* at 76-77 (statement of Luther Martin). Elbridge Gerry of Massachusetts asserted that "[h]e relied for his part on the Representatives of the people as the guardians of their Rights & interests." 2 *id.* at 75. This sentiment was echoed almost a century and three-quarters later by Judge Learned Hand: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." LEARNED HAND, THE BILL OF RIGHTS 73 (1962).

100. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

101. *E.g.*, San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (1973) (In areas where opinions are divided, "the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to [social] problems and to keeping abreast of ever-changing conditions.").

issue, different legislatures will reach different results and the ensuing practical experience will cast further light on the underlying issues.[102] This is the process by which a free, elected government works best.

Pretermitting democratic debate by constitutional adjudication, finally, may erode the public support that is vital to a secure democratic society. The Supreme Court purported to "end" the divisive social debate regarding abortion by deciding *Roe v. Wade*.[103] But rather than "ending" the debate, *Roe* has engendered social unrest like that last seen during the 1960s' civil-rights and anti-war movements. That unrest, moreover, continues unabated[104]—despite ongoing calls from the Court for the disputants to lay down their arms before a supposed constitutional concordat.[105] Ironically, most other democratic

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102. See and compare Justice Brandeis's classic statement on the value of social experimentation in his dissent in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have the power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

103. 410 U.S. 113 (1973).

104. *See, e.g.*, Sandra G. Boodman, *Abortion Foes Strike at Doctors' Home Lives: Illegal Intimidation or Protected Protest?*, WASH. POST, Apr. 8, 1993, at A1 (discussing tactics used by anti-abortion groups to intimidate abortion providers); *Doctor Is Slain During Protest over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1; Amy Goldstein & Richard Morin, *Clinton Cancels Abortion Restrictions of Reagan-Bush Era: Thousands Voice Opposition in 20th March for Life*, WASH. POST, Jan. 23, 1993, at A1; Mimi Hall, *Abortion Defenders: Stop Clinic 'Terror'*, USA TODAY, Nov. 5, 1993, at A3 (citing survey that shows half of the nation's abortion clinics had been the targets of violence in 1993); Mary Jordan & Don Phillips, *Abortion Foe Arrested in Shooting: Wounded Doctor Returns to Clinic*, WASH. POST, Aug. 21, 1993, at A1 (discussing shooting of abortion provider by anti-abortion activist); Serge F. Kovaleski, *Both Sides in Abortion Debate Adopt Commando Tactics*, WASH. POST, Jan. 21, 1994, at B3; Sharman Stein, *Abortion Doctors Under Siege: Protesters Decry Killing, Defend Focus on Physicians*, CHI. TRIB., Mar. 12, 1993, § 1, at 1; *see also Abortion Foe Accused of Stalking*, L.A. TIMES, Apr. 2, 1993, at A4; *Anti-Abortion Activists Convicted in 2 Incidents*, CHI. TRIB., Sept. 3, 1993, § 2, at 1 (recounting conviction of 36 anti-abortion activists for activities related to protests).

105. *E.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2815 (opinion of

nations—through the give-and-take of political (rather than judicial) debate—have adopted compromise positions that, while completely cheering neither "pro-choice" nor "pro-life" interests, have muted and largely ended the controversy that still rages in American streets.[106] As the abortion debate illustrates, broad judicial intervention in the policy arena may well thwart the development of the consensus necessary to communal stability.[107]

The above concerns convince us that Justice White—by "decid[ing] cases and no more"[108]—got it right. Rather than a social diagnostician, he was an arbiter of public and private disputes who filled in policy gaps only as absolutely necessary. This gap-filling role, moreover, was undertaken not to satisfy overarching idiosyncratic goals, but to give incremental content to established constitutional and statutory policies. And while these achievements may be described as modest by some, they are hardly that. Dispassionate, impartial judging is absolutely essential to the proper functioning of our constitutional government. And few individuals have performed that role better than Byron R. White.

IV. CONCLUSION

At the inauguration of the tenth President of Brigham Young University, Justice White made the following remarks: "[O]ur leaders in the government and the private sectors . . . must not let the country be paralyzed by the clash of special interest groups that may seem unwilling to recognize what must necessarily be done, or indeed what must be tried, once such a course becomes reasonably clear."[109] We believe that

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O'Connor, Souter and Kennedy, JJ.) (asserting that the Court's resolution of an "intensely divisive controversy" has a "dimension" not carried by the "normal case"; *i.e.* "the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution"); *see also id.* at 2882, 2885 (Scalia, J., dissenting) (criticizing view that the Court's resolution of divisive policy issues must end social debate *per proprio vigore*).

106. *See generally* MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 22-23 (1987).

107. Richard Sherlock, Richard G. Wilkins & Camille S. Williams *Modern Abortion Policy: Mother vs. Child*, 9 WORLD & I (forthcoming Aug. 1994).

108. SAVAGE, *supra* note 17, at 93.

109. Byron R. White, Address at the Inauguration of President Rex Edwin Lee, Brigham Young University, Provo, Utah (Oct. 27, 1989) at 3 (transcript in Brigham Young University Library).

the above observation is the ultimate answer to critics who charge that Byron White lacks greatness or constitutional vision. He has not been paralyzed by the "clash of special interest groups"; instead, he has had the courage—in the course of deciding individual cases—to do "what must necessarily be done, or indeed what must be tried," once that course became "reasonably clear."

As Leon Friedman once wrote, Justice White "approaches each case without preconceived ideas and with a desire to examine the individual problem in that case rather than deducting the result from set principles. His approach makes his work more difficult to analyze but it makes for greater justice in the cases coming before our highest Court."[110] No grander claim to greatness or to constitutional vision could be made by any person who has served on the United States Supreme Court.

110. Friedman, *supra* note 2, at 356. We would add that this approach makes his work not only "more difficult to analyze" but also more difficult to perform because it requires greater effort.