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REJECTING THE LEGAL PROCESS THEORY JOKER: BILL
NELSON'S SCHOLARSHIP ON JUDGE EDWARD WEINFELD AND
JUSTICE BYRON WHITE

BRAD SNYDER*

INTRODUCTION

In 2009, Professor William E. Nelson made two excellent contributions to the scholarly literature on the history of Supreme Court clerkships. The main article, *The Liberal Tradition of the Supreme Court Clerkship*, explored how liberals and conservatives used their clerkships to create their own professional networks.¹ The article recognized that Supreme Court clerkships contribute to institutional structures influencing our legal system; in particular, former Supreme Court clerks often play a leading role in framing debates and starting trends in public service, private practice, and the legal academy.² Based on an empirical data set of ninety percent of former clerks between 1882 and 2006, the article (and as well as a companion piece) argued that clerkships are contributing to the Court's political polarization.³

One of the article's principal areas of concern was

the triangular relationship between the Court, the clerks, and the legal academy. . . . Our concern is with the message that emerges from this triangular process. Does the Court teach clerks, and do they then proclaim to the profession, that law is profoundly different from politics? In a world where politicians are distrusted, do former clerks thereby enhance the judicial branch's independence and stature? Or do they teach that the Court is merely one more site of Washington political intrigue?⁴

Nelson was writing based not only on quantitative data but also on personal experience—his clerkships with Judge Edward Weinfeld of the Southern District of New York and Supreme Court Justice Byron White.

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1. William E. Nelson et al., *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation*, 62 VAND. L. REV. 1749, 1751 (2009) [hereinafter *Nelson, Liberal Tradition*].

2. *Id.* at 1751-52.

3. *Id.* at 1753-54; William E. Nelson et al., *The Supreme Court Clerkship and the Polarization of the Court: Can the Polarization Be Fixed?*, 13 GREEN BAG 2d 59 (2009) [hereinafter *Nelson, Polarization*].

4. Nelson, *Liberal Tradition*, *supra* note 1, at 1754.

My contribution to this tribute places Nelson's scholarship about Weinfeld and White within several contexts. It is a personal history of Bill Nelson the law student, law clerk, and young scholar; an intellectual history of legal theory since the 1960s; an examination of the influence of legal theory on Nelson's scholarship based on his writings about Weinfeld and White; and an example of how legal historians contend with the subject of judicial reputation.

Nelson was one of many former Warren Court and Burger Court clerks who joined the professoriate and rejected the legal process theory that they had learned as law students. Legal process theory sought "reasoned elaboration" from judges,⁵ "neutral principles" from judicial decisions,⁶ use of "passive virtues" by the Supreme Court,⁷ and the understanding of institutional interrelationships among courts, legislatures, and administrative agencies. Above all, courses on process theory emphasized fair and democratic procedures over results.⁸ Instead of process theory, Nelson and this upstart generation of scholars gravitated to one of five competing theories:

1. Rights protectors—belief in the Court as rights protector, the liberal decisions of the Warren Court, the efficacy of courts. Otherwise known as legal liberalism or Warren Court preservationism;
2. Post-realism—Critical Legal Studies (CLS) and other New Left theories that assert that legal rules are indeterminate and doctrine is a cover for political values and policy preferences (i.e., that law is politics).
3. Law and economics—developing legal rules based on economic cost-benefit analysis and efficiency with Coase, Calabresi, and Posner leading the way.
4. Originalism—practiced initially on the left by Justice Hugo Black, originalism gained intellectual traction on the right in 1985, when Ed Meese advocated constitutional interpretation

5. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 145–52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

6. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959). For a critique of Wechsler's article, see Gary Peller, *Neutral Principles in the 1950's*, 21 *U. MICH. J.L. REFORM* 561 (1987).

7. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961).

8. William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction in HART & SACKS*, *supra* note 5, at cii, ciii; Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 *VA. L. REV.* 1 (2013).

based on the framers' original intent or original meaning of text and when Antonin Scalia joined the Court a year later.

5. Judicial restraint holdouts—the rearguard that rejected rights protection and originalism as leading to judicial supremacy and that preferred a minimalist role for judges and the resolution of legal problems through the democratic political process.⁹

Nelson went to law school and became a scholar during a transformational period in the academy and in legal theory. His scholarship about Weinfeld and White represents a case study about a scholar struggling to fit two judges whom he clerked for and greatly admired into one of these five schools of thought.

I. NELSON AS LAW STUDENT, LAW CLERK, AND YOUNG PROFESSOR

A. Rejecting Process Theory

Like many law students and legal historians who came of age during the civil rights and antiwar movements, Nelson rejected the theory most often associated with judicial restraint—legal process theory. Nelson graduated from N.Y.U. Law School in 1965 and clerked for Judge Weinfeld immediately after graduation. In the opening paragraph of the preface to *In Pursuit of Right and Justice*, his biography of Weinfeld, Nelson wrote:

As a first-year student in the autumn of 1962, I became fascinated by the question of how judges actually decide cases. In my second year of law school, I took the Legal Process course, in which Norman Dorsen taught the famous Hart and Sacks materials. Although I developed immense admiration for and a lifelong friendship with Norman and great respect for Professors Hart and Sacks, whom I later came to know, the course itself did not address my empirical concerns. Indeed, I received my lowest grade in law school in Legal Process and an implicit message that I was fascinated by the wrong questions.

A little more than a decade later, my clerkship with Judge Weinfeld gave me the answer I was seeking. . . . I came to appreciate that the outcome of litigation was largely a product of effective fact-finding and analysis.¹⁰

After clerking for Weinfeld, Nelson entered the Ph.D. program in history at Harvard, was part of the first group of Charles Warren Fellows in

9. For a discussion of former Warren Court and early Burger Court clerks who rejected process theory and adopted one of these five legal theories, see Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2131 (2014) [hereinafter Snyder, *Former Clerks*].

10. WILLIAM E. NELSON, IN PURSUIT OF RIGHT AND JUSTICE: EDWARD WEINFELD AS LAWYER AND JUDGE ix (2004) [hereinafter NELSON, IN PURSUIT].

legal history at Harvard Law School, then clerked for Justice White during the 1970 Term.¹¹ Nelson's time at Harvard soured him on legal process theory even further. In the opening paragraph of his *Harvard Law Review* memorial tribute to Justice White, Nelson equated the theory with a "virus":

I came to the Justice's clerkship out of a Ph.D. program at Harvard, where I had been exposed to the legal process virus and to the related musings of Felix Frankfurter about why Oliver Wendell Holmes (and by implication Justice Frankfurter himself) had been a great Supreme Court Justice. I had learned that judicial greatness resulted from the articulation of a distinctive jurisprudential perspective that would go down in history with the name and key opinions of the Justice who had invented it. Justice White, in the minds of the intellectual leaders of Harvard Law School at the time, was not a Justice of great consequence because in a decade on the Court he had not yet laid claim to such a distinctive point of view.¹²

And in another posthumous tribute to Justice White, Nelson wrote: Against whatever success Brennan has achieved, we must balance the costs of achieving it. Constitutional theorists of the legal process school always worried that an activist Court would injure its standing and prestige if it tried to impose on the public values that the public rejected. This worry has not materialized. The Supreme Court has emerged from the Warren years and the era of *Roe v. Wade* stronger than ever. Indeed, it seems so strong at the outset of the twenty-first century that its determination of a presidential election and invalidation of important Congressional legislation has met with little protest beyond that from the liberal legal academy.¹³

Nelson's antipathy for legal process theory is not surprising. Many of his contemporaries who went to law school during the theory's heyday rejected its emphasis on "reasoned elaboration," "neutral principles," fair procedures, guarding the Court's legitimacy, and recognizing the Court's limited institutional competence.¹⁴ At the height of the Civil Rights Movement and the Warren Court's protection of civil rights, rights trumped these concerns.

11. G. Edward White, *The Origins of Modern American Legal History*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY, II: LAW, IDEOLOGY, AND METHODS – ESSAYS IN HONOR OF MORTON J. HORWITZ 13, 13-19, n.19 (Daniel W. Hamilton & Alfred L. Brophy eds., 2010) (exploring origins of the Charles Warren Fellow program at Harvard Law School).

12. William E. Nelson, *In Memoriam: Byron R. White: The Justice Who "Never Thought about Himself,"* 116 HARV. L. REV. 9 (2002) [hereinafter Nelson, *In Memoriam*].

13. William E. Nelson, *Justice Byron R. White: His Legacy for the Twenty-First Century*, 74 U. COLO. L. REV. 1291, 1301 (2003) [hereinafter Nelson, *Legacy*].

14. See Snyder, *Former Clerks*, *supra* note 9 (discussing Hart and Sacks, Wechsler, Bickel, and other leading process theorists).

B. *Becoming a Law Professor*

Legal theory was at an intellectual crossroads when Nelson entered the legal academy in 1971 at the University of Pennsylvania and joined the Yale law faculty two years later. Process theory was passé; rights protection was in ascendancy. Law and economics, led by Coase, Calabresi, and Posner, was gaining steam. By the time Nelson joined the N.Y.U. faculty in 1979, post-realism, led by CLS, was challenging both rights protection and law and economics.

Nelson was a rights protector, a Warren Court liberal through and through. One of the leaders of the rights protectors from Nelson's generation was John Hart Ely (others included Fiss, Michelman, and Tribe). Ely's "participation-oriented, representation-reinforcing approach to judicial review"¹⁵ in *Democracy and Distrust* borrowed heavily from process theory—particularly footnote four of *Carolene Products*.¹⁶ Ely, however, rejected process theory's notions that judges should decide cases based on Wechsler's neutral principles or that the Court should zealously guard its legitimacy by invoking Bickel's passive virtues.¹⁷ Like Nelson, Ely rejected what he referred to as "the 'legal process' joker, the assumption that there are times when one may strongly disapprove of a law without being prepared to declare it unconstitutional."¹⁸

Nelson also rejected the New Left's post-realism—CLS's notion that doctrine did not account for judicial results and that legal rules were indeterminate—the "indeterminacy thesis."¹⁹ One need only read Bob Gordon's colloquy with Nelson about critical legal studies to know that Nelson was not a post-realist.²⁰ Nelson objected to CLS's Marxist underpinnings.²¹ He

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

16. *Id.* at 77-78 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).

17. See Snyder, *Former Clerks*, *supra* note 9 (discussing Ely's response to Bickel).

18. John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures*, 77 VA. L. REV. 833, 841-42, 865-66 (1991).

19. See Snyder, *Former Clerks*, *supra* note 9, at nn.76-77 (discussing CLS scholarship about indeterminacy thesis).

20. Robert W. Gordon & William E. Nelson, *An Exchange on Critical Legal Studies between Robert W. Gordon and William Nelson*, 6 LAW & HIST. REV. 139, 165 (1988) [hereinafter *Exchange on Critical Legal Studies*] (characterizing critical legal studies scholarship, based on its "realist/instrumental theme," as "dull and familiar": "Mine is the left of John Kennedy's New Frontier, Lyndon Johnson's Great Society, and Jimmy Carter's Justice Department, which all stood for racial and religious equality and individual autonomy. Critical legal studies, in contrast, seems part of the New Left and presents a puzzling program which is said to be non-Marxist but which, to the best of my understanding, regards minority rights as an issue of secondary importance and individual rights possibly with hostility."). This exchange began with an open, 12-page letter from Gordon to Nelson which Gordon mailed to twenty legal historians. See Letter from Gordon to Nelson, Aug. 26, 1985 (on file with author) (responding to William E. Nelson, *Legal and Constitutional History*, 1984 ANN. SURV. AM. L. 227).

believed that the Court could protect rights and make society better. He believed in the mission of what historian Laura Kalman labeled “legal liberalism.”²² Yet based on his clerkship with Weinfeld, Nelson also believed that judges could find the law and get it right. Critical legal historians reacted to high-sounding rhetoric about rights discourse and the rule of law with deep skepticism.

The tensions among rights protectors, judicial restraint holdouts, and post-realists during the 1970s and 1980s played out in Nelson’s scholarship about his judicial mentors.

Nelson was a rights protector. Most people considered Weinfeld and White to be judicial restraint holdouts. Nelson, therefore, admirably portrayed, and sometimes reframed, Weinfeld and White as rights protectors as well as judicial restraint holdouts. Nelson’s portrayals provoked rejoinders from post-realists who rejected both theories as covers for political preferences and policy choices. Politics, according to post-realists such as Gordon and Duncan Kennedy, had to be hiding somewhere. To his credit, Nelson did not shrink from the intellectual challenge.

II. NELSON ON WEINFELD

Edward Weinfeld was one of the most respected federal district court judges of his generation.²³ A graduate of N.Y.U. Law School and Democratic political ally of New York governor and U.S. Senator Herbert Lehman, Weinfeld was nominated to the bench in 1950 by President Harry S. Truman largely because of Weinfeld’s political connections.²⁴ Weinfeld quickly proved himself to be a first-rate jurist. His judgment was sound. His work ethic was legendary. He never forgot his Lower East Side Jewish upbringing and looked out for the underdog. In 1955, he threw out the contempt convictions of three men who had defied Senator Joe McCarthy.²⁵ Weinfeld earned the admiration and friendship of Second Circuit Judges Learned Hand and Henry Friendly.²⁶ Like Hand and Friendly, Weinfeld attracted a superstar lineup of law clerks who thrived in private practice, public service, and the professoriate—Martin Lipton of Wachtell, Lipton, Judge John G. Koetl of the Southern District of New York, and Professor

21. See *Exchange on Critical Legal Studies*, *supra* note 20, at 143-44, 146 (Gordon: attacking Nelson’s attacks on CLS history as Marxist); see also *id.* at 159-60 (Nelson: responding on Marxist point).

22. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2 (1996).

23. NELSON, *IN PURSUIT*, *supra* note 10, at 113.

24. *Id.* at 113-32.

25. *Id.* at 156-73 (citing 18 F.R.D. 27 (S.D.N.Y. 1955)).

26. *Id.* at 107-11, 209-10, 217-19.

William Eskridge of Yale Law School, to name three.²⁷ Nelson's clerkship with Weinfeld influenced the aspiring legal historian's ideas about judging and forced Nelson to reconcile those experiences and ideas with the academy's most influential legal theories.

In a 1975 *New York University Law Review* tribute in honor of Weinfeld's twenty-fifth anniversary on the bench, Nelson argued that Weinfeld was a "fact judge."²⁸ By fact judge, Nelson meant that Weinfeld adopted "a style of writing opinions" in which "he avoids infusing his personal policy predilections into his decisions in an arbitrary fashion" yet he "maintain[s] a concern for social justice."²⁹ Nelson argued that "[t]he reader of [Weinfeld's] opinions will almost never find the Judge engaged in the self-conscious making of new law."³⁰ Weinfeld's opinions, according to Nelson, "are characterized by a consistency of style that reveals him as a judge who believes in the existence of unchanging legal rules and principles that he must find and follow, and as one who, in fact, pronounces judgments that are products of reason rather than acts of will."³¹

Nelson seemed to be labeling Weinfeld a judicial restraint holdout. This view makes sense. After all, Weinfeld's two closest intellectual colleagues, Hand and Friendly, were paragons of judicial restraint. Hand was more a grandfatherly mentor; Friendly was a close friend and contemporary.³² Nelson's description of Weinfeld's opinions, moreover, invokes process theory's buzzwords. Weinfeld follows "unchanging legal rules and principles" and writes opinions "that are products of reason rather than acts of will."³³ As described by Nelson, his approach sounds a lot like Wechsler's "neutral principles" and Hart and Sacks's calls for "reasoned elaboration." Nelson rejected Bickel's institutional considerations or the law and economics movement as having influenced Weinfeld.³⁴ Instead, Nelson insisted that that Weinfeld could put his personal preferences aside and "turn to already existing legal rules and principles."³⁵

To CLS scholars, Nelson's description smacked of formalism and a naïve belief in politics-free judging. They rejected the argument in Nelson's article that Weinfeld could have been a "law finder." In several foot-

27. *Id.* at 174-93. Weinfeld also hired women clerks such before it became standard practice.

28. William E. Nelson, *Judge Weinfeld and the Adjudicatory Process: A Law Finder in an Age of Judicial Lawmakers*, 50 N.Y.U. L. REV. 980, 982 (1975) [hereinafter: Nelson, *Law Finder*].

29. *Id.*

30. *Id.*

31. *Id.* at 981.

32. NELSON, IN PURSUIT, *supra* note 10, at 109.

33. Nelson, *Law Finder*, *supra* note 28, at 981.

34. *Id.* at 996.

35. *Id.* at 996.

notes to his article, Nelson acknowledged the realist critique of formalism but rejected the idea that Weinfeld was a formalist.³⁶ And on the first page of the preface to his Weinfeld biography, Nelson addressed the skeptics:

But the academy was largely unpersuaded. I distinctly remember a conversation in which Duncan Kennedy, after reading a draft of the article, expressed a view that no judge in the late twentieth century possibly could function as I claimed Weinfeld functioned. And, I remember a debate with Bob Gordon on the pages of the *Law and History Review*, where I defended, many would say implausibly, what I understood to be Weinfeld's faith that law has substantive meaning and content derived from fundamental principles of justice.

I owe a great deal to Norman Dorsen, Bob Gordon, Henry Hart, Duncan Kennedy, Al Sacks, and others like them who, however much they disagree with each other, all understand that substantive judicial judgments contain an important political ingredient. They have forced me to continue striving to articulate how law can be something other than politics, and what we can learn today from the legacy of Edward Weinfeld. They and, of course, Weinfeld himself are the intellectual grandparents of this book.³⁷

That Nelson would include these words in the opening pages of his preface to a judicial biography of more than two hundred pages reveals Nelson's modesty and intellectual humility. It also reveals the theoretical crosscurrents flowing among process theory, rights discourse, law and economics, and CLS that a former law clerk navigated in order to write about his judges.

Nelson's biography of Weinfeld, like his earlier law review article, portrayed the judge not only as a law finder but also as a rights protector on the side of social justice. Nelson wrote:

Politically, Weinfeld was as fairly typical mid-twentieth century New Dealer, and not surprisingly his jurisprudence had a liberal or progressive cast. . . . He also was a champion of civil liberties and individual autonomy. On the surface, Weinfeld's jurisprudence appears similar to that of leading members of the Warren Court, such as Justice William J. Brennan, whose judicial career overlapped Weinfeld's, and to the progressives of their era.

But, in fact, Weinfeld's jurisprudence was markedly different. For the Warren Court and those inspired by its example, law is an instrument used to steer the course of progressive social reform. . . .

Weinfeld, in contrast, found fact finding and the routine duties of a trial judge fulfilling Weinfeld never approached a case as a vehicle for creating legal doctrine that would change the way the world worked. His goal in every case was only to do justice between the parties. None-

36. *Id.* at 981-82 n.12; 996 nn.88-89, 991.

37. NELSON, IN PURSUIT, *supra* note 10, at ix-x.

theless, his conception of justice routinely led to liberal, progressive results.³⁸

It is fruitless to try to take issue with Nelson's description of Weinfeld's jurisprudence—especially given that Nelson cited many cases supporting this description.³⁹ And yet, one wonders why Nelson tried so hard to associate Weinfeld's commitment to social justice with Brennan's.

In fact, it is easy to differentiate Judge Weinfeld's approach from Justice Brennan's—Weinfeld was a trial judge. Indeed, Nelson acknowledged as much.⁴⁰ Different jobs lead to different judicial philosophies. Weinfeld did not often confront the highly politicized cases that Brennan faced. Nelson could describe Weinfeld as a “fact judge” who followed the law and who did not use every case as an exercise in social engineering because the judge, though adept at filling gaps in the law, yearned to be vindicated on appeal. In fact, Weinfeld loved nothing more than “double-reversals”—cases where the Second Circuit reversed him, then the Supreme Court reversed the Second Circuit.⁴¹ Nelson described Weinfeld in the same idealized, non-politicized way that Chief Justice John Roberts often described his judicial mentor (and Weinfeld's closest friend), Second Circuit Judge Henry J. Friendly.⁴² That's because Weinfeld and Friendly, though technically proficient lower-court judges, were largely insulated from the political issues that confronted the Supreme Court. They were more concerned with getting the law right because they did not want to be reversed and they did want the Supreme Court to think highly of their work.

At the same time, Nelson refused to label Weinfeld a judicial restraint holdout in the Bickelian or Hart-and-Sacks tradition of legal process theory:

It may be tempting to pigeonhole Weinfeld as a judicially restrained liberal, rather than a liberal judicial activist such as Justice Brennan. But it would be wrong. The concept of judicial restraint, at least as it was developed by the legal process theorists at the time, does not account for Weinfeld's style of decision making. The idea of deference to other

38. *Id.* at 4-5.

39. *Id.* at 133-55; Nelson, *Law Finder*, *supra* note 28, at 983-84.

40. NELSON *IN PURSUIT*, *supra* note 10, at 157 (“Of course, Weinfeld's practice of handling cases as disputes between particular litigants rather than as clashes of interest between larger social groups was facilitated by his sitting on a trial rather than an appellate judge. . . . Weinfeld's status as a trial judge also bred caution. He often worried that as a single federal district judge he lacked the breadth of information and experience or the moral authority to change social and political practices and policies instituted by elected public officials.”); Nelson, *Law Finder*, *supra* note 28, at 988-89 (contrasting a trial judge's role with that of a Supreme Court justice).

41. I owe this comment to former Weinfeld clerk, Victoria Nourse.

42. Brad Snyder, *The Judicial Genealogy of John Roberts*, 71 OHIO ST. L.J. 1149, 1235-36 (2010) (quoting Roberts's Supreme Court nomination testimony describing Friendly as a judicially modest and arguing that Roberts created an idyllic image of Friendly as an unattainable umpire).

branches of government, whether legislative or executive, simply did not enter his mind. He never worried about the countermajoritarian difficulty. The wishes of political majorities carried little weight in Weinfeld's courtroom; he always sought to achieve justice under law, whether others liked it not. Weinfeld, as we shall see, often was an activist in trumping the ambitions of political actors in other branches of government when his vision of justice required.⁴³

Nelson's antipathy toward legal process theory pours out of this paragraph. He works hard to disassociate his judge from process theory and judicial restraint. Nelson once again may be right that Weinfeld did not think about the countermajoritarian difficulty or the court's institutional competence vis-à-vis other branches. But that does not mean that Weinfeld may not have practiced judicial restraint—just for different reasons. Weinfeld was a trial judge who wanted to be affirmed by the Second Circuit and especially by the Supreme Court. He was cautious and fact-based because he was a lower-court judge—not because he was like Justice Brandeis, who was fact-based but also believed in social engineering.⁴⁴ The countermajoritarian difficulty and institutional considerations apply to Supreme Court justices but rarely crossed Weinfeld's mind. He was an excellent trial judge who rarely if ever thought about legal or constitutional theory.

It is telling how hard Nelson works to portray Weinfeld as a rights protector rather than a judicial restraint holdout. It says a lot about how much Nelson admires Weinfeld but even more about how much Nelson loathes legal process theory and judicial restraint. It reflects Nelson's rejection of legal process theory as a law student and his embrace of the Warren Court's rights protection as a law clerk and young legal historian.

One might be tempted to think that I am reading too much into Nelson's writings about Judge Weinfeld. Certainly trial judges can be both rights protectors and judicial restraint holdouts. But that view is hard to sustain in light of Nelson's scholarship about Justice White, scholarship that also tries to place White in both categories.

III. NELSON ON BYRON R. WHITE

The conventional wisdom about Byron R. White is that he was a liberal disappointment.⁴⁵ President John F. Kennedy's first nominee to the Su-

43. NELSON, IN PURSUIT, *supra* note 10, at 5.

44. *Id.* at 130-31, 224-25 (comparing Weinfeld's style of opinion writing to Brandeis's).

45. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 444-45 (1998) (citing Nelson, *infra*); William E. Nelson, *Byron R. White: A Liberal of 1960*, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 139 (Mark Tushnet ed., 1993) [hereinafter Nelson, *A Liberal of 1960*] (quoting Pierce O' Donnell, *Common Sense and the Constitution: Justice White and the Egalitarian Ideal*, 58 U. COLO. L. REV. 433, 435 (1988));

preme Court, White earned a reputation as a judicial restraint holdout who often sided with the more conservative justices.⁴⁶ He dissented from *Roe v. Wade*, wrote the 5–4 majority opinion in *Washington v. Davis* rejecting disparate impact evidence of racial discrimination in equal protection cases, and wrote the 5–4 majority opinion in *Bowers v. Hardwick* upholding a Georgia anti-sodomy law.⁴⁷ *Washington v. Davis* marked a turning point in the Court’s protection of the rights of African Americans; *Bowers v. Hardwick* is regarded by many as the *Plessy v. Ferguson* of the gay rights movement. Most of all, White was a hard guy. A former All-American and NFL running back nicknamed Whizzer (a name he detested), White displayed a competitiveness and mean streak in his opinions and in his personal interactions.⁴⁸ The first time he shook hands with Justice Sandra Day O’Connor, he shook her hand so hard that she was tears.⁴⁹

A. White as Rights Protector

A law clerk for White during the 1970 Term, Bill Nelson rejected the conventional wisdom that the Justice was a liberal disappointment.⁵⁰ In fact, Nelson argued that White was a “Kennedy liberal”:

[A]lthough the justice grew marginally more conservative during his nearly three decades on the bench, he on the whole adhered faithfully to the liberal values that led to his appointment. The considerable divergence that exists between White’s voting record and the voting patterns of other liberal justices emerged almost entirely during the first decade of White’s judicial tenure – his decade on the Warren Court. That divergence resulted less from changes in the views of Byron White than from a transformation in the content of liberalism in the mid to late 1960’s.⁵¹

White’s jurisprudence, Nelson argued, embodied the values that he displayed as the deputy attorney general to Robert Kennedy—“a faith in the pragmatic use of law to resolve social problems and to facilitate social change”—particularly when it came to protecting the civil rights and voting rights of African Americans in the Jim Crow South.⁵²

William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 B.Y.U. L. REV. 313, 313.

46. Nelson, *A Liberal of 1960*, *supra* note 45, at 139.

47. *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Washington v. Davis*, 426 U.S. 229 (1976); *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting).

48. HUTCHINSON, *supra* note 45, at 447–48 (on his hatred of the nickname Whizzer).

49. Molly McDonough, *O’Connor Digs at Gibson Dunn, Demos Byron White Handshake on Letterman*, ABA JOURNAL (June 26, 2009, 8:00 AM), http://www.abajournal.com/news/article/oconnor_digs_at_gibson_dunn_demonstrates_byron_white_handshake_on_letterman/.

50. Nelson, *A Liberal of 1960*, *supra* note 45, at 139.

51. *Id.*

52. *Id.* at 140–43.

As Nelson points out, President Kennedy nominated White to the Court rather than one of two Frankfurter protégés, Harvard law professor Paul Freund or Judge William H. Hastie, both of whom Earl Warren and William O. Douglas rejected as too conservative.⁵³

Based on White's experiences with Robert Kennedy helping James Meredith integrate Ole Miss and in protecting the Freedom Riders, Nelson argued that White "was a liberal reliably cast in the Brennan mold," that is, that White was a rights protector.⁵⁴ Nelson wrote that White

was the same sort of pragmatist and an egalitarian as Justice Brennan and that the only issue on which White and Brennan split was individualism . . . the two justices had overlapping attitudes even toward individualism, with the distinction between them being that Brennan's individualism assumed an antistatist cast. . . . The members of the Kennedy administration who knew Justice White best in the early 1960s considered him a liberal. Thus, if he was no longer a liberal by 1970, the meaning of liberalism had changed. . . . By decade's end . . . , antistatistism had come to lie at liberalism's core, and a man like Byron White who continued to place his faith in the affirmative use of government power to achieve social change and justice would no longer be counted as a liberal.⁵⁵

Take away the antistatistism, Nelson argues, and White's individualism looked very much like Brennan's. White joined Brennan's majority opinion in *New York Times v. Sullivan*,⁵⁶ concurred in *Griswold v. Connecticut*⁵⁷ establishing a right to privacy, and concurred in outlawing Georgia's capital punishment statute in *Furman v. Georgia*.⁵⁸ He was trained like Brennan in legal realism and sociological jurisprudence and "thereby fit into a long line of liberals, beginning with Louis D. Brandeis, who were willing to ignore precedent and alter doctrine in the interest of progressive social change."⁵⁹ And, like Brennan but unlike Frankfurter and Harlan, who believed in the liberty-enforcing roles of state and local government, Nelson argued that White was "a consistently ardent nationalist."⁶⁰

Nelson counters the conventional wisdom about White and makes his case for White as a rights protector with historical examples and case law.⁶¹ It must be noted that Nelson's essay was part of an edited volume on the

53. *Id.* at 143.

54. *Id.*

55. *Id.* at 140.

56. 376 U.S. 256 (1964).

57. 381 U.S. 479, 502 (1965) (White, J., concurring in the judgment).

58. 408 U.S. 238, 311 (1972) (White, J., concurring).

59. Nelson, *A Liberal of 1960*, *supra* note 45, at 144-45, 147.

60. *Id.* at 147.

61. *Id.* at 144, 147.

Warren Court, hence Nelson's focus on White's early years on the bench. Nelson, moreover, plainly stated his substantive disagreements with White's *Roe* dissent and *Bowers* opinion:

As [White] suggested in his *Bowers* majority opinion, the judiciary's recognition of antistatist, individual rights will not create a better world for the weak and powerless today any more than antistatist property rights jurisprudence did in the 1930s. Only the power of government can, in White's view, improve the world. While in my heart I disagree, I still must concede that Justice White may be right.⁶²

The anti-statism aside, Nelson portrayed White as a rights protector in the mold of the movement's patron saint, Justice Brennan. In a 2003 law review article, Nelson observed, "Justice [White], with some frequency, joined Justice Brennan and others in recognizing new constitutional rights, especially in race relations cases, and he never made a fetish out of his hesitancy about imposing his values to determine the nation's future direction."⁶³ Nelson was always comparing White to Brennan and trying to accentuate their similarities rather than their differences. For Nelson, Brennan was a rights protecting icon, "a heroic figure" to whom all judges should be compared.⁶⁴

Nelson drew similarities between White's and Brennan's jurisprudence and put White in the rights protector category—just as Nelson did in writing about Judge Weinfeld. Nelson's characterization of White is difficult to accept when one looks at the Justice's dissent in *Miranda v. Arizona*⁶⁵ as well as two of his notorious post-Warren Court opinions. The author of *Washington v. Davis* and *Bowers v. Hardwick*—at least from the perspective of someone born after the 1960s—was not a rights protector and looks much more like a judicial restraint holdout. That does not make White a bad guy. It just doesn't make him Bill Brennan.

B. White as Judicial Restraint Holdout

Nelson is too good a legal historian to place White solely in the rights protector category, and in other articles, he addressed some of White's more conservative Burger Court opinions such as *Washington v. Davis* and *Bowers v. Hardwick*. For Nelson, *Washington v. Davis*'s requirement of

62. *Id.* at 154.

63. Nelson, *His Legacy*, *supra* note 13, at 1301.

64. *See id.*

65. 384 U.S. 436, 526 (1966) (White, J., dissenting).

discriminatory intent was consistent with White's judicial deference.⁶⁶ Nelson, moreover, did not shy away from *Bowers* and argued that White's opinion was not *carte blanche* for majorities to write their prejudices into law.⁶⁷ Nelson noted:

I appreciate the difficulty that liberal scholars will have accepting some of Justice White's opinions, such as *Bowers v. Hardwick*. . . . I have suggested elsewhere, however, why that opinion should be read more narrowly than it typically is read. . . . Moreover, *Bowers* arguably demonstrates what Justice White so deeply believed—that the Court has never possessed the final word in determining how the American people will live: lesbians and gay men have made enormous strides since *Bowers* in gaining popular and legislative acceptance of their rights.⁶⁸

To Nelson, White was also a judicial restraint holdout: “Nothing emerges more clearly from Justice Byron R. White's twenty-five years on the bench than his persistent deference to policy judgments made by the legislative and executive branches of government.”⁶⁹ Nelson, however, reframes White's judicial restraint to make it more palatable and to disassociate it from Frankfurter, Harlan, and process theory.

Nelson attributes White's judicial restraint to “his extraordinary analytical ability, and . . . his intellectual modesty.”⁷⁰ Nelson based his assessment not only on White's votes and opinions but also on Nelson's personal experiences as White's law clerk:

In my year as his law clerk, I never heard White claim that he had the final answer to a difficult legal problem or that his approach was superior to an alternative suggested by another. Instead, he always appeared to believe that competing approaches were equally valid (as well as equally flawed). When his judicial role compelled him to select one approach over another, he would typically base his selection, not on the intrinsic superiority of his choice, but instead on a pragmatic estimate as to how effective it would be, or, even more often, on a perception that another institutional actor was equally qualified to choose, and therefore, that all White should do was ratify that actor's choice.⁷¹

Nelson explains *Washington v. Davis* and *Bowers* as byproducts of White's “maturely developed Supreme Court jurisprudence” and “the analytical intelligence and intellectual modesty of Byron R. White, the man.”⁷²

66. William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347, 361-64 (1987) [hereinafter Nelson, *Deference*].

67. *Id.* at 360-61.

68. Nelson, *His Legacy*, *supra* note 13, at 1304 n.58.

69. Nelson, *Deference*, *supra* note 66, at 347.

70. *Id.* at 348.

71. *Id.* at 348-49.

72. *Id.* at 364.

In Nelson's view, White was too humble to be a process theorist or some new-fangled originalist. He was a man who was not wedded to any theory or ideological agenda. "White's legacy," Nelson wrote, "thus was not about articulating a philosophically consistent theory of law that others, especially legal academics, would notice."⁷³ Nelson attributed this quality in White to his "anti-elitism" and "lack of pretension."⁷⁴ White, according to Nelson, was a former sports star who disliked celebrity, wasn't into "self-aggrandizement," and thus was "the justice who never thought about himself."⁷⁵

During Nelson's clerkship, he asked the Justice about his judicial philosophy, White informed him that being a Supreme Court Justice was "'just a job."⁷⁶ Nonetheless, Nelson characterized White's jurisprudence in the same multi-categorical way that he used to characterize Judge Weinfeld's jurisprudence. Of White, Nelson wrote: "He had no agenda: he was a constitutional conservative who saw no major role for the Court in directing the course of the nation's social change."⁷⁷ A few pages later, Nelson wrote: "At the same time he was a constitutional conservative, Justice White was a political liberal who understood that the Constitution was a living document and that the nation changed over time."⁷⁸

Like today's most prominent judicial restraint holdout, Judge J. Harvie Wilkinson III, White, according to Nelson, would have dismissed all this "cosmic constitutional theory"⁷⁹—whether espoused by Bickel, Wechsler, Ely, Ed Meese, or anyone else—as hogwash.⁸⁰ In the end, it befitted White, just as it befits Wilkinson, to recognize the limits of judicial reasoning and problem-solving and to defer to the democratic political process to make the nation's policy choices. The post-realists would say that judicial restraint is only a mask for deep-seated political values and policy preferences. But, at least from the perspective of Bill Nelson and many 1960s-era liberals and rights protectors, White's non-theory of constitutional adjudi-

73. Nelson, *His Legacy*, *supra* note 13, at 1295.

74. *Id.* at 1293-94.

75. William E. Nelson, *In Memoriam: Byron R. White: The Justice Who "Never Thought about Himself,"* 116 HARV. L. REV. 9, 10 (2002) [hereinafter Nelson, *In Memoriam*].

76. *Id.*

77. Nelson, *His Legacy*, *supra* note 13, at 1298.

78. *Id.* at 1298.

79. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY (2012).

80. *But see* HUTCHINSON, *supra* note 45, at 447 (recounting that after Justice Douglas retired in 1975 White lamented that "it was too bad that Alexander Bickel died, because he would have made a good appointment to the Court. Bickel's emphasis on the 'countermajoritarian difficulty' of judicial review, particularly in *The Least Dangerous Branch*, was particularly compelling to White, as was Bickel's practical unpretentious presentation.").

cation, like Weinfeld's non-theory, was better than many of the alternatives—including legal process theory.

Nelson saw White's judicial restraint as a virtue and has argued that today's popular constitutionalists—a group that I have compared to the Thayerians and process theorists because of their shared faith in the democratic political process to protect people's rights and to interpret the Constitution⁸¹—should reconsider White's jurisprudence. "Justice White, more than any other member of the Court over the last four decades, agreed with them. Perhaps, he should be their hero."⁸²

Indeed, Nelson recently suggested that Byron White's presence on the current Supreme Court would not be such a bad thing.⁸³ Nelson's comment reflects the current Court's political polarization and Nelson's attraction to non-ideological, multi-categorical approaches to judging. It also suggests that, like many of today's popular constitutionalists, Nelson is coming back around to the virtues of process theory.

IV. JUDICIAL REPUTATION

Most scholars (and I am as guilty of this as anyone⁸⁴) who write about judicial reputation challenge the conventional wisdom in one of two ways: the judge is either under-appreciated or over-appreciated; the judge is never just "meh."⁸⁵

Part of the reason why Nelson wrote so eloquently about Weinfeld and White and worked so hard to compare them favorably with Justice Brennan stemmed from Nelson's belief that Weinfeld and White had been underappreciated. He argued that they were underappreciated for several reasons: the N.Y.U. law and Yale law graduates were not products of the dominant Harvard Law School tradition; they did not espouse grand theories of constitutional interpretation and if anything were anti-theory; and they were too personally and/or judicially modest to be considered great judges.⁸⁶ The

81. Brad Snyder, *Frankfurter and Popular Constitutionalism*, 45 U.C. DAVIS L. REV. 343, 349 (2013).

82. Nelson, *His Legacy*, *supra* note 13, at 1304.

83. Nelson comment, Nov. 7, 2013, Bill Nelson Tribute, Miami, Florida.

84. See text accompanying *infra* notes 91-93.

85. I owe this insight to David Schleicher.

86. See, e.g., Nelson, *Law Finder*, *supra* note 28, at 1006 ("Some, like Judge Weinfeld, will attempt to extend old law to resolve new problems. Others, like Justice Douglas, will seek radical alternatives to old law and its replacement with something entirely new."); Nelson, *In Memoriam*, *supra* note 75, at 9-10 ("Justice White, in the minds of the intellectual leaders of Harvard Law School at the time, was not a Justice of great consequence because in a decade on the Court he had not yet laid claim to such a distinctive point of view. . . . One's duty in any job, White believed, was to work hard to the best of one's ability and to serve one's employer well. He had no interest in using his job to make himself into a celebrity, either in the present or in the historical future. He wanted only to serve his

foils for Nelson, when it comes to judicial modesty, were Holmes and Frankfurter.

Holmes's judicial reputation, Nelson argues, was the product of Frankfurter's mythmaking.⁸⁷ There is a lot of truth to this⁸⁸—but it does not tell the whole story. Holmes is famous because he was a thrice-wounded Civil War hero, one of the nation's greatest jurisprudential philosophers in contesting formalism in *The Common Law* and promoting pragmatism in "The Path of the Law," and one of the nation's greatest stylists whose epigrams are quoted in the U.S. Reports, in public discourse, and in popular culture.⁸⁹ Judicial greatness, as Judge Richard Posner argues, is often a product of being able to turn a phrase—something true of Marshall, Holmes, Cardozo, and Jackson (not to mention Posner himself).⁹⁰

Frankfurter's judicial reputation, Nelson argues, was the product of Frankfurter's outsized ego, belief in his own historical self-importance, and willingness to suck up to other great men. There is some truth to this view as well, but it does not give Frankfurter his due. As Nelson has acknowledged, Frankfurter was arguably the leading progressive lawyer of the twentieth century. He led the attack against the *Lochner* line of cases before

employers, the American people, as effectively as he could."); *see also id.* at 9 n.4 ("My understanding of the views of the Harvard faculty come from my inquiries as a student about what my preferences for Justices should be during the clerkship application process. Uniformly, Harvard law professors ranked Justice Harlan as the most outstanding member of the 1970 Court. Next, in a group, came Justices Black, Brennan, and Stewart. White was ranked in the middle of the Court or below.").

87. Nelson, *In Memoriam, supra* note 75, at 10 ("Justice White was never into self-aggrandizement. He simply was not interested in crafting his historical reputation in the fashion that Frankfurter had crafted the reputation of Holmes and had tried to craft his own.") (citing I. Scott Messinger, *Legitimizing Liberalism: The New Deal Image-Makers and Oliver Wendell Holmes, Jr.*, 20 J. SUP. CT. HIST. 57, 58-63, 65-68 (1995); G. Edward White et al., *Biographies of Titans: Holmes, Brandies, and Other Obsessions*, 70 N.Y.U. L. REV. 677, 678 (1995) (Nelson: "I think Holmes was simply a mistake. I think he was not a great judge for all the reasons that people have alluded to. I think that the canonization of Holmes was something that was artificially achieved by Frankfurter. Indeed I think it was achieved for good reasons. But then I have to add only one footnote: I think Holmes probably is the titanic scholar in American legal history. The Common Law remains even today when it's one-hundred-plus years old a truly great book, and some of his later articles, like 'The Path of the Law,' are truly seminal articles. Perhaps what Holmes is getting canonized for is less what he did on the bench and more what he did off the bench.").

88. Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 677 (2012) ("Instead of trying to amend the Constitution or to seek judicial constitutional change, the House of Truth attacked the Court by canonizing Holmes. The House's progressives enjoyed Holmes's company and admired his intellect, but they also used him for their own political gain. The House of Truth created the image of Holmes as an oracle and viewed his dissents as trump cards that legitimized their political and constitutional vision.").

89. For the best intellectual biography of Holmes, see G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993).

90. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 83-84 (2003) ("A disproportionate number of our most celebrated judges have been distinguished rhetoricians and are celebrated for their rhetorical process. Marshall is one; others include Holmes, Cardozo, Jackson, and Hand. Many would add to this list Brandeis and Black.").

the Supreme Court and in law reviews; he fought against the Red Scare, helped turned Sacco Vanzetti into a *cause celebre*, and helped found the ACLU and the *New Republic*; and he taught one of the first courses on administrative law and was the architect of the administrative state that came to fruition during the New Deal.⁹¹ As a justice, he was one of four leading voices (along with Black, Douglas, and Jackson) who charted a new path for the Court after the New Deal constitutional crisis, who played a critical role in the Court's biggest moral triumph (*Brown v. Board of Education*), and who espoused a more limited institutional role for the Court in opinions such as his *Baker v. Carr* dissent.⁹² Frankfurter's jurisprudence informs today's constitutional debate about backlash, popular constitutionalism, and judicial supremacy.⁹³ Although Frankfurter's judicial reputation suffered during the 1980s and 1990s because of negative scholarship by rights protectors and Warren Court preservationists and he could not turn a phrase as well as his judicial idols Holmes and Brandeis, Frankfurter earned his spot in the judicial pantheon based on his accomplishments and the power of his ideas. A good argument could be made, however, that Frankfurter was a great legal thinker but that Black, Douglas, or Jackson were greater justices.

Perhaps legal historians (myself included) are too preoccupied with judicial greatness. About judicial biography, Linda Przybyszewski wrote,:

Simply being influential isn't enough of a justification in the eyes of authors; they don't want their judges to have just been influential; they want them to be great. . . . If biographers can't make a plausible claim to their subject's greatness, they flail around. . . . Greatness is used to solve the dilemma of judicial biography by bridging the gap between historical contingency and ideal law.⁹⁴

Przybyszewski's critique initially appeared in her review of Gerald Gunther's *Learned Hand* biography; she made similar observations as Richard Posner did in his harsh review of Gunther's book⁹⁵—legal historians feel compelled to make an argument for judicial greatness even when it is not always there.

91. Snyder, *supra* note 81. For the best book on Frankfurter's pre-judicial career, see MICHAEL E. PARRISH: *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* (1982).

92. Snyder, *supra* note 81, at 355-67.

93. *Id.* at 367-68.

94. Linda Przybyszewski, *The Dilemma of Judicial Biography Or Who Cares Who is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 *LAW & SOC. INQUIRY* 135, 137-138 (1996). See also LINDA PRZYBYSZEWSKI, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 1-9, 13 (1999) (making a similar argument about the obsession with "greatness" among judicial biographers).

95. Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 511 (1994).

In writing about Weinfeld and White out of admiration but also a sense of duty, Nelson may have felt compelled to make a case for their greatness because that's what legal historians do when they write about judges. Indeed, Nelson makes an eloquent case that Weinfeld and White are underappreciated. Despite Nelson's best efforts, I am extremely skeptical whether one hundred years from now either Weinfeld or White will be considered a judge of historical importance. Neither judge left an enduring doctrinal, historical, or theoretical legacy.

Weinfeld was an excellent trial judge. He may have been great for reasons that most historians are uninterested in or unable to document. As Nelson and other Weinfeld clerks have observed, Weinfeld brought dignity to the courtroom and promoted respect and admiration for the federal judicial system.⁹⁶ Parties, counsel, and jurors left his courtroom believing that the system worked. But the nature of his job on the lowest rung of the Article III ladder will make it difficult for him to achieve enduring historical importance. He wrote few opinions that have ended up in law school casebooks and, unlike Learned Hand, was not interested in legal or constitutional theory. In many ways, Weinfeld suffers from the same fate that befell his good friend Henry Friendly, whose service on the Second Circuit (despite Friendly's prolific and learned law review articles) largely insulated him from weighing in on the most pressing constitutional issues of the day.⁹⁷ An even better analogy might be Weinfeld's friend and admirer Charles Wyzanski Jr., another outstanding federal trial judge whom history regrettably seems to have forgotten.⁹⁸ Friendly and Wyzanski, however, benefited by being Frankfurter protégés and sons of Harvard; Weinfeld lacked this pedigree and compensated for it by working his way into the upper echelon of the federal judiciary.

Most of Weinfeld's contributions will not make it into the history books—his work ethic, his judgment, his reputation at the time, his dignified courtroom, his progressive values, his excellent law clerks (including his early hiring of women and students who did not attend Yale or Harvard), his mentoring skills, and his part in raising the public profile of N.Y.U. Law School. Fortunately for Weinfeld, Nelson has admirably preserved the judge's contributions.

96. NELSON, IN PURSUIT, *supra* note 10, at 154-55; John G. Koeltl & Frank M. Tuerkheimer, *Judge Weinfeld and the Criminal Law: The Koegh-Kahaner Trial—A Case Study in Criminal Justice*, 50 N.Y.U. L. REV. 1008 (1975).

97. Snyder, *supra* note 42, at 1206-08.

98. NELSON, IN PURSUIT, *supra* note 10, at 113, 120.

White, by contrast, had every opportunity to become a historic judicial figure. He served on the Supreme Court for thirty-one years. He possessed excellent health and, according to Nelson, a first-rate legal mind. But White was hampered by a dour and sometimes mean-spirited personality that endeared him to few of his colleagues—the anti-Brennan when it came to charm. White was caught in the cross currents of rights protection and originalism and was not enamored with either camp. He was not interested in his place in history because for him being a Supreme Court Justice was not a calling but just a job. Among his contemporaries, others, including Warren, Brennan, O'Connor, Rehnquist, and Scalia, will overshadow him. The constitutional casebooks will remember White for his dissent in *Roe* and his majority opinions in *Washington v. Davis* and *Bowers v. Hardwick*. It is unlikely that he will achieve judicial greatness—even though he was the last Justice committed to judicial restraint and deference to the political process. The problem was that, according to Nelson, White was so anti-theory (and even anti-intellectual) that the Justice was unwilling to advance his jurisprudential beliefs.

CONCLUSION

Bill Nelson's clerkships with Edward Weinfeld and Byron White were intellectually liberating experiences. They steeled Nelson for the theoretical and political maelstrom that greeted him in the legal academy during the 1970s and 1980s. He navigated the minefields of legal theory. He showed that he could fight the intellectual fights—between process theory and Warren Court rights protection, Warren Court rights protection and CLS, law and economics and CLS, originalism and living constitutionalism. But Weinfeld and White taught Nelson not to get caught up in these theoretical battles and to compartmentalize his political beliefs from his professional successes. They taught him that there was another way. Nelson's clerkships didn't politicize him as much as they de-politicized him.

Nelson's scholarship about Weinfeld and White overflows with admiration for and devotion to both men. Nelson tries hard to turn them into rights protectors, to draw similarities between their jurisprudence and Justice Brennan's jurisprudence that Nelson so obviously admires. Nelson also reframes Weinfeld's and White's judicial restraint so that it looks nothing like the pretentious process theory that Nelson had rejected at N.Y.U. Law School and at Harvard. Nelson wanted others to see Weinfeld and White as Nelson saw them—as influential mentors, great men, and underappreciated judges. To Nelson, they were judicially modest in the ways that judges should be.