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## Remarks of Seth P. Waxman at the Memorial Observance for Justice Byron R. White, United States Supreme Court, Washington, D.C., November 18, 2002

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REMARKS OF SETH P. WAXMAN AT THE  
MEMORIAL OBSERVANCE FOR JUSTICE BYRON R.  
WHITE, UNITED STATES SUPREME COURT,  
WASHINGTON, D.C., NOVEMBER 18, 2002

*Seth P. Waxman*<sup>†</sup>

Members of the Court, members of the family, and friends of Justice White—

Alone among today’s speakers, I met Justice White only late in his life. Growing up in the law, my relationship with him was the one many kids today have with Michael Jordan—I wanted to be “like White”—like the kind of man he was. I still have that aspiration.

Like Byron White, I served in the Department of Justice and was altered forever by that honorable institution.<sup>1</sup> And—like Justice White, in my own lesser way, I strove within the walls of *this* institution to protect the authority of the national government. Those themes of Justice White’s remarkable career—his tenure in the national Executive<sup>2</sup> and his championing of the national Legislature<sup>3</sup>—have been marvelously captured in the remarks of my colleagues. It is perhaps fitting then, in this of all places, to conclude by reflecting on Justice White’s perspective on the national *judicial* power—on the role of the federal courts.

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1. From 1961 to 1962, Byron White served as deputy attorney general in the Department of Justice under the Kennedy administration. William E. Nelson, *Justice Byron R. White: A Liberal of 1960*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 139, 140-41 (Mark Tushnet ed., 1993) (detailing White’s position on the Kennedy team and his influence on the Department’s role in civil rights); see also Kenneth Jost, *The Legacy of Justice Byron White*, in *AM. BAR ASS’N, THE SUPREME COURT AND ITS JUSTICES* 209, 213 (Jesse H. Choper ed., 2001) (discussing White’s role and duties as deputy to Attorney General Robert Kennedy).

2. Jost, *supra* note 1, at 213; Nelson, *supra* note 1, at 140-41.

3. See PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* 202 (1999) (articulating White’s acknowledgment that Congress should have complete responsibility in responding to public administration problems); Jost, *supra* note 1, at 217-18 (noting White’s career theme of deference to Congress); Nelson, *supra* note 1, at 154 (describing White’s consistent efforts to uphold Congressional remedies for inequality and injustice in society).

Justice White is often spoken of as an apostle of judicial restraint.<sup>4</sup> That label is true, but incomplete. Justice White was certainly averse to the courts engaging in what he thought of as second-guessing legislative policy concerns.<sup>5</sup> That aversion was at its apex when the claim was grounded in substantive due process,<sup>6</sup> the First Amendment,<sup>7</sup> or the separation of powers.<sup>8</sup>

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4. Jost, *supra* note 1, at 211 (“He believed in judicial restraint . . .”); *see also* Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 462-63 (2000-2001) (listing Justice White among the Justices of the 20th Century who advocated judicial minimalism).

5. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) (stating that “the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable”). *See also* DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON F. WHITE* 397 (1998) (listing cases in which White advocated deferring to Congress’ legislative judgment).

6. Justice White cautioned in his dissent in *Moore v. City of East Cleveland* that: Although the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments . . . . . . . . . . That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in the 1930’s and 1940’s, the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation . . . .

*Moore*, 431 U.S. at 543-44 (White, J., dissenting).

7. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 689-90 (1972) (denying journalists a testimonial privilege to withhold the identity of their sources); *see also* HENRY J. ABRAHAM, “JUSTICES AND PRESIDENTS”: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 280 (3d ed. 1992) (contrasting White’s First Amendment jurisprudence with that of Justice Stewart); CARRINGTON, *supra* note 3, at 198-99 (summarizing some of Justice White’s First Amendment decisions); Nelson, *supra* note 1, at 151-52 (analyzing a distinction between Justice White’s votes and opinions in freedom-of-expression cases resulting from protests against racial discrimination and the Vietnam War, based primarily on whether political authority structures were threatened by the protests).

8. *See* *Bowsher v. Synar*, 478 U.S. 714, 759-76 (1986) (White, J., dissenting) (criticizing the Court’s interpretation of separation of powers in striking down the Gramm-Rudman-Hollings Act); *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting) (arguing that the Court should not have used Article I requirements to invalidate all legislative vetoes; rather, the Court should use the more narrow separation-of-powers doctrine as a ground for invalidating, if necessary, the veto on a case-by-case basis).

But Justice White did not shrink from extending constitutional guarantees to new areas. He embraced the effort to give women real Equal Protection;<sup>9</sup> he fashioned a vigorous standard of rational-basis review in *City of Cleburne v. Cleburne Living Center, Inc.*;<sup>10</sup> he authored *Edwards v. Arizona*,<sup>11</sup> extending *Miranda v. Arizona*,<sup>12</sup> from which he had dissented;<sup>13</sup> and he wrote the Court's opinion in *Coker v. Georgia*,<sup>14</sup> striking down capital punishment for rape.<sup>15</sup>

The pattern, then, is a nuanced one: judicial restraint, but only from going "too far." Where Justice White thought federal guarantees were at stake, he did not hesitate to act.<sup>16</sup> In his view, the courts were fully empowered to remedy an injury to a federal right.<sup>17</sup>

Consider one of his most remarkable decisions, *Missouri v. Jenkins*,<sup>18</sup> which held that a federal court had the authority to disregard a state-

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9. See generally *N.Y. State Club Ass'n Inc. v. City of New York*, 487 U.S. 1 (1988) (upholding an amendment to New York City's Human Rights Law, which prohibited discrimination against women and minorities in private clubs found to be public in nature); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (finding that Missouri's workers' compensation laws, denying a widower benefits on his wife's work-related death, violated the woman's Equal Protection rights because the amount her spouse would receive from her work-related death would be less than the benefits payable to the spouse of a deceased male worker).

10. 473 U.S. 432, 446 (1985) (refusing to recognize the mentally retarded as a quasi-suspect class, Justice White maintained that they should nonetheless be protected from invidious discrimination by requiring the State to demonstrate that the legislation distinguishing between the mentally retarded and others is "rationally related to a legitimate governmental purpose").

11. 451 U.S. 477 (1981) (prohibiting the use of the suspect's confession at trial because it was obtained when police re-initiated contact with the suspect after he had invoked his Fifth Amendment right to counsel, but before counsel was provided).

12. 384 U.S. 436 (1966) (requiring that suspects be informed of their rights before police initiate custodial interrogation).

13. *Id.* at 526 (White, J., dissenting).

14. 433 U.S. 584 (1977) (holding that a sentence of death for the crime of rape violated the Eighth Amendment's prohibition against cruel and unusual punishment because it constituted grossly disproportionate and excessive punishment).

15. *Id.* at 592.

16. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, Justice White authored the Court's opinion holding that the Sixth Amendment's guarantee of a jury trial in a criminal case extended to the states via the Fourteenth Amendment. *Id.* at 149. The Court recognized that trial by jury was a fundamental right in the American system of criminal justice, and therefore the states were required to provide a jury trial to criminal defendants. See *id.* at 148-49.

17. See, e.g., *Palmer v. Thompson*, 403 U.S. 217, 240-71 (1971) (White, J., dissenting) (arguing that the closure of public pools in the city of Jackson, Mississippi, in response to a court desegregation ruling, violated the Equal Protection Clause of the Fourteenth Amendment and that the judicial system should provide remedial action).

18. 495 U.S. 33 (1990).

imposed ceiling on property taxes in order to fully fund a desegregation decree.<sup>19</sup> The lower court's order was assailed on the ground that federal courts have no power to raise taxes.<sup>20</sup> But Justice White saw the issue differently. The only question, in his view, was whether a State could disable itself from complying with the federal constitution by enacting a budget cap and then pleading poverty.<sup>21</sup> To Justice White, the answer under the Supremacy Clause was clearly no, and a federal court was fully empowered to provide that answer, and to order the State to comply.<sup>22</sup>

The sources on which Justice White relied in *Jenkins* are revealing. First, he looked to the one-person, one-vote cases, which had invalidated several state constitutional provisions providing for the apportionment of state legislative bodies.<sup>23</sup> Second, he relied on the old "coupon cases" of the 1880s, in which the federal courts had invalidated the States' efforts to evade payment on their bonds.<sup>24</sup> To Justice White, the principles were exactly the same: no matter how enshrined a rule was in state law, if the

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19. *Id.* at 57. The Court found that the district court's action of directly imposing a tax increase was an abuse of its equitable discretion. *Id.* at 37, 50. Nevertheless, the Court reasoned that the district court *could* have required the Kansas City, Missouri School District (KCMSD) to levy property taxes at the rate necessary to fund the desegregation remedy and concurrently enjoin the operation of any state law that would have prevented the district from taking such action. *Id.* at 51. The Court found that a local government, which possesses taxing authority, may be ordered by a court to levy taxes in excess of any limit established by state statute where there is reason stemming from the Constitution for ignoring the statutory limitation. *Id.* at 57. *See also* Christopher W. Nelson, Comment, *Missouri v. Jenkins: Judicial Taxation and the Funding of School Desegregation*, 26 *NEW ENG. L. REV.* 529, 529-30 (1991) (discussing the significance of the Court's holding and its implications on the equitable powers of the federal courts).

20. *Jenkins*, 495 U.S. at 37.

21. *See id.* at 53-54 (noting the procedural history of the case and the inconsistent positions taken by the State: first, attempting to avoid any allocation of the costs imposed by the court, and second, arguing that the court should assign the costs to the State rather than interfere with state law by allowing KCMSD to collect the money via increased taxes).

22. *Id.* at 57. Justice White wrote:

Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them.

*Id.*

23. *Id.* at 55 (citing *N.Y. City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

24. *Jenkins*, 495 U.S. at 55-57, 56 n.20; *see also* Nelson, *supra* note 19, at 557-58 (detailing the Court's reliance on the "bond obligation" decisions).

rule violated a federal guarantee, it had to be “disestablished” by the federal courts.<sup>25</sup>

*Missouri v. Jenkins* illustrates Justice White’s belief that *all three branches* of the national government should possess fully adequate powers with which to accomplish their constitutionally delegated tasks.<sup>26</sup> For Justice White, as for earlier nationalists like Chief Justice Marshall<sup>27</sup> and Justice Story,<sup>28</sup> the fundamental issue of constitutional law was the task of constituting a national government competent to meet the challenges of a changing society.<sup>29</sup> Included within that governmental power is the authority of the federal courts to get the job done.

Consider *Jenkins* in connection with three of Justice White’s famous dissents.<sup>30</sup> He is not known as a great dissenter<sup>31</sup>—toward the end of his career, he probably dissented less frequently than any other Justice.<sup>32</sup>

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25. See *Jenkins*, 495 U.S. at 55 (rejecting the State’s Tenth Amendment argument and upholding the power of federal courts to “disestablish” local government laws that are contrary to the Fourteenth Amendment).

26. See *id.* (noting that the federal courts have the equitable power to establish and enforce remedies necessary in meeting the requirements of the Fourteenth Amendment); see also Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 760 (1992) (summarizing the Court’s decision in *Jenkins* as allowing federal courts to use remedies that may contravene state laws, if necessary to comply with the Constitution).

27. Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1134, 1137, 1172 (2001) (characterizing Chief Justice Marshall and his Court’s opinions as nationalist); H. Jefferson Powell, *Reimagining the Marshall Court*, 87 MICH. L. REV. 1527, 1532 (1989) (analyzing the nature of the Marshall Court’s nationalism).

28. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 841 (1998) (describing Justice Joseph Story as “ultranationalist”); Klarman, *supra* note 27, at 1172 (asserting that Justice Story’s nationalist philosophy surpassed Chief Justice Marshall’s in intensity).

29. See Jost, *supra* note 1, at 211 (describing White’s approach in utilizing the Court’s authority to support policies adopted by the other branches of the federal government); see also Nelson, *supra* note 1, at 147 (articulating examples of White’s nationalist views).

30. *Nixon v. Fitzgerald*, 457 U.S. 731, 764 (1982) (White, J., dissenting); *Milliken v. Bradley*, 418 U.S. 717, 762 (1974) (White, J., dissenting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (White, J., dissenting).

31. DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 311 (5th ed. 2000) (showing a table of the comparison of dissent rates among Justices, and listing the “great dissenters,” notably omitting Justice White).

32. HUTCHINSON, *supra* note 5, at 355 (stating that “[d]uring his tenure on the Supreme Court of the United States, White wrote 1,275 opinions—495 opinions of the Court, 249 concurring opinions, and 572 dissents (354 from decisions on the merits or as to jurisdiction, 218 from denials of certiorari)”). Perhaps in contrast to dissenting opinions on the merits, Hutchinson describes Justice White’s vigorous writing of dissents from denials of certiorari, and points out that publication of such dissents in the *U.S. Reports* dropped off dramatically after White’s retirement from the Court in 1993. *Id.* at 400-01;

But when they came, his dissents were powerful, and many of the most powerful ones would have vindicated the authority of the federal courts.<sup>33</sup>

His first major dissent was in *Banco Nacional de Cuba v. Sabbatino*.<sup>34</sup> In that case, the Court concluded that federal courts may not adjudicate whether a foreign government's "act of state" violates international law.<sup>35</sup> To Justice White, this was an abdication of the authority of the federal courts to do what they are supposed to do—determine and announce the law.<sup>36</sup> He readily acknowledged the President's foreign affairs authority;<sup>37</sup> indeed, he would have deferred to a formal request by the State Department seeking non-adjudication.<sup>38</sup> But his dissent shows that he believed that when the issue was declaring and enforcing international law, the federal courts are very much the equal of the other branches of government.<sup>39</sup>

Consider too Justice White's dissent in *Milliken v. Bradley*,<sup>40</sup> in which the Court held that federal courts have no authority to issue a multi-district order to remedy segregation within a single school district.<sup>41</sup> Had *Milliken* gone the other way, the entire recent history of American public education might well have been different.

In Justice White's view, the Court in *Milliken* "cripple[d] the ability of the judiciary"<sup>42</sup> to remedy violations of constitutional rights by means of what he saw as an arbitrary rule—a strict dictate that remedies in school

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see also O'BRIEN, *supra* note 31, at 213-14 (tracking Justice White's publication of dissents from denials of certiorari).

33. See *e.g.*, *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377-79 (1978) (White, J., dissenting). In *Kroger*, the Court reversed an Eighth Circuit holding that the district court lacked power to hear the plaintiff's lawsuit because true diversity of citizenship was absent. See *id.* at 377. Justice White disagreed with the majority, and would have granted the district court the power to entertain the case because the non-federal claim arose out of a "common nucleus of operative fact" with a federal claim. *Id.* at 378-79 (White, J., dissenting) (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). White maintained that the plaintiff was only asserting a claim against someone who was already a party to the suit, and therefore ancillary jurisdiction should be recognized as providing power for the district court's review. *Id.* at 382.

34. 376 U.S. 398 (1964).

35. *Id.* at 427-28, 439 (holding that the act of state doctrine precludes federal courts from examining foreign sovereigns' actions to determine whether a violation of international law has occurred).

36. *Id.* at 439-41, 450-51 (White, J., dissenting).

37. *Id.* at 461 (recognizing the foreign affairs authority of the executive).

38. *Id.* at 462, 468.

39. See *id.* at 467-68, 470.

40. 418 U.S. 717 (1974).

41. *Id.* at 745, 752-53.

42. *Id.* at 762 (White, J., dissenting).

cases must stop at the district line.<sup>43</sup> As with *Jenkins*, the issue for Justice White was whether a State could absolve itself of compliance with a constitutional mandate through a maneuver executed through state law—devolving authority for public education to local governments, with district lines drawn by state law.<sup>44</sup>

Consider finally Justice White's dissent in *Nixon v. Fitzgerald*,<sup>45</sup> in which the Court held that the President is immune from damages liability for his official acts.<sup>46</sup> The majority opinion is grounded in policy concerns<sup>47</sup> to which Byron White, a friend of Presidents, was intuitively sympathetic.<sup>48</sup> But to him, *Fitzgerald* was a deviation from *Marbury v. Madison*<sup>49</sup> just as *Sabbatino* was—a retreat from the power and duty of federal courts to announce, apply, and enforce the law.<sup>50</sup> Particularly alarming, Justice White found, was the Court's suggestion that the Constitution itself might require absolute immunity.<sup>51</sup> That was exactly

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43. *Id.* at 762-63 (White, J., dissenting).

44. *See id.* at 763 ("The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts.")

45. 457 U.S. 731 (1982).

46. *Id.* at 749 (concluding that the President (or former President in this case) is covered by absolute immunity from liability for damages resulting from his official actions).

47. *Id.* at 751-53 (arguing that private lawsuits would divert the President's energies from his duties and therefore pose risks to the effective functioning of the government, as well as the existence of a strong public interest in the President's ability to take official action without fearing vulnerability to civil damages).

48. Justice White was close friends with John F. Kennedy. ABRAHAM, *supra* note 7, at 279. The two men met in London, while White was attending Oxford, both served as PT boat officers in the Navy, and President Kennedy appointed White as deputy attorney general, and later as Justice to the Supreme Court. *Id.*

49. 5 U.S. (1 Cranch) 137 (1803). Justice White points out in *Fitzgerald* that the Court ignored *Marbury's* instruction that whether the legality of a head of a department's action would be reviewable by a court would "depend on the nature of [the] act." *Fitzgerald*, 457 U.S. at 766 (White, J., dissenting) (quoting *Marbury*, 5 U.S. at 165). White expressed concern with the Court's refusal to determine the immunity issue based on a distinction among categories of Presidential action, as called for in *Marbury*. *Fitzgerald*, 457 U.S. at 766.

50. *See Fitzgerald*, 457 U.S. at 797 (expressing dismay that the Court "casually" tosses away its role of judicial review, and thereby the role of lower courts, in ensuring protection of the law to all individuals).

51. *Id.* at 765 ("The Court intimates that its decision is grounded in the Constitution. If that is the case, Congress cannot provide a remedy against Presidential misconduct and the criminal laws of the United States are wholly inapplicable to the President. I find this approach completely unacceptable."). *See generally id.* at 770-83 (rejecting the majority's twin justifications for absolute immunity: an "incidental power" of the President, and the separation of powers doctrine).



the kind of broad, crippling, assertedly constitutional rule to which Justice White was most allergic.<sup>52</sup>

Profoundly concerned with reinforcing the power of the national government, Justice White was most careful to include the judicial branch, as well as its political counterparts, within his protective embrace. For those of us who honor him today in this building, that care finds a signal place in the pantheon of his legacy.

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52. See e.g., *Roe v. Wade*, 410 U.S. 113, 221-22 (1973) (White, J., dissenting) (arguing that the Court crafted a constitutional rule without any textual or historical support, White lamented: “[a]s an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court”); see also *Miranda v. Arizona*, 384 U.S. 436, 531-32 (1966) (White, J., dissenting). White cautioned:

Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

*Id.*