Western Justice

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Here is a land where life is written in water.[1]

Byron White was the second Supreme Court Justice born west of the hundredth meridian,[2] which defines the arid West.[3] He was raised, was educated, and worked in Colorado most of his life before appointment to the Court, and he vacationed in the West and retained other ties to the region throughout his years on the Court.[4] Did his work on the Court reflect his Western roots?

A regional perspective might relate to values that a Justice brings to all decisions. However, such a broad and amorphous influence is difficult to identify in any Justice (at least since the Civil War), and there is nothing about Justice White's record to suggest any regionalism in his general jurisprudence.

A different question is whether Justice White's connection to Colorado affected his work on cases uniquely associated with the West, either because he had direct personal knowledge of a case's subject, or because he took a personal interest in Western cases generally. White grew up in a small town dependent on irrigated agriculture and worked in the sugar beet fields, so he was intimately acquainted with the significance of Western water development.[5] And federal land ownership is a prominent part of any

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1. THOMAS HORNSBY FERRIL, TRIAL BY TIME 87 (1944) (reprinting texts from the "History of Water" murals in the rotunda of the Colorado State Capitol).

2. Earl Warren was the first. *See* Oyez Project, Northwestern Univ., *at* http://oyez.nwu.edu/justices (last visited Dec. 18, 2002). Joseph McKenna, George Sutherland, and William O. Douglas grew up in the West, and Stephen J. Field and Willis Van Devanter moved to the West as adults. *See id*. Sandra Day O'Connor and Anthony M. Kennedy, appointed after White, were born in the West. *See id*.

3. *See* Wallace Stegner, BEYOND THE HUNDREDTH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 218, 224 (1953) (noting that the arid West begins at the hundredth meridian).

4. *See* DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE 11-70, 223-59, 432-33 (1998).

5. *See id*. at 14-18.

Westerner's environment. Indeed, resistance to federal control of public lands and reservations is a constitutional viewpoint associated with some Westerners, popularized as the Sagebrush Rebellion.[6] As shown below, however, Justice White was no Sagebrush Rebel. By contrast, Chief Justice Rehnquist is a staunch supporter of states' rights in disputes over Western federal land, though his convictions trace to his Wisconsin boyhood, and he lived in the West but twenty years or so as a young adult.[7]

Moreover, with one peculiar exception discussed below,[8] there is no indication that Justice White claimed special insights in Western cases. His proportion of the Court's opinions in Western cases was not unusually high. This continued to be true in his last years on the Court when, as senior Justice in length of service, he could assign opinions to himself when the Chief Justice was in dissent. Nor did he author an unusually large number of concurrences or dissents in Western cases. These facts could be interpreted either as lack of any special concern for Western cases, or as a disciplined ethic of fair play that resisted allowing natural biases to influence his work. We cannot be sure, but it is unlikely that he had no special feeling for Western issues; some must have touched his heart.

As many have noted, Justice White abjured legal theory.[9] Hence his work, like the common law, must be evaluated on its results and particulars. Because he served during thirty-one years of vast growth in judicial power and activity, there is ample raw material. Scholars have examined his jurisprudence through the prism of famous cases, from liberal views on race to conservative votes on criminal procedure.[10] Some critics broadly accuse him of inconsistency.[11] Other scholars stress the pragmatism that caused him to pay careful attention to the facts of each case, to the consequences of the Court's decisions, and to achieving workable legal rules—qualities that subordinated consistency in abstract doctrine to his sense of justice in particular cases.[12]

6. *See* Johanna H. Wald & Elizabeth H. Temkin, *The Sagebrush Rebellion: The West Against Itself—Again*, 2 UCLA J. ENVTL. L. & POL'Y 187 (1982); Univ. Library, Univ. of Nev. Reno, A Guide to the Records of the Sagebrush Rebellion, *at* http://www.library.unr.edu/specoll/mss/85-04.html (last visited Dec. 18, 2002).

7. *See* Oyez Project, *supra* note 2, *at* http://oyez.org/justices/justices.cgi?justice_id=100&page=biography (last visited Jan. 30, 2003).

8. *See infra* text accompanying notes 32-37.

9. *See, e.g.*, David M. Ebel, *Byron R. White—a Justice Shaped by the West*, 71 U. COLO. L. REV. 1421, 1424 (2000).

10. *See, e.g.*, Lance Liebman, *Justice White and Affirmative Action*, 58 U. COLO. L. REV. 471 (1987).

11. *See* Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291, 295 n.18.

12. *See* DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT 92-93 (1992); William E. Nelson, *Justice Byron R. White: A Modern Federalist and a New Deal Liberal*, 1994 BYU L. Rev. 313, 318.

Other critiques identify consistent views regarding particular aspects of his work. He has been described as more cautious than his colleagues in exercising judicial power and more deferential to political outcomes.[13] But that account requires so many exceptions that it is at best a loose generalization.[14] More insightful analysts have argued that a consistent basis for many of Justice White's votes was deference to Congress—the view that Congress, not the Court or the states, is the nation's premier maker of policy.[15] Cases on uniquely Western issues were no part of the basis for that thesis, but they reinforce it. Among 146 decisions regarding water, public lands, or Indian rights,[16] sustaining congressional judgments is a consistent theme in relevant cases, with the balance evincing his pragmatist orientation.

I. WATER AND PUBLIC LANDS

When the Court addressed federal versus state authority over Western public land or water, Justice White always came down on the federal side of contested issues. Soon after his appointment, he joined the Court in sustaining the Department of the Interior's control over Colorado River water.[17] His votes favored federal authority in decisions about submerged land,[18] school land,[19] and mining on federal land.[20] When the Court rejected federal water claims to sustain fish and wild animals in national forests, Justice White joined the dissenters.[21] The same year, Justice Rehnquist steered a majority to a states' rights stance in a Reclamation Act conflict,

13. *See, e.g.*, David C. Frederick, *Justice White and the Virtues of Modesty*, 55 STAN. L. REV. 21 (2002); Allan Ides, *The Jurisprudence of Justice Byron White*, 103 YALE L.J. 419 (1993).

14. *See* William E. Nelson, *Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White*, 58 U. COLO. L. REV. 347, 445-69 (1987) (discussing instances in which Justice White voted on the activist side of the Court).

15. *See* Jonathan D. Varat, *Justice White and the Breadth and Allocation of Federal Authority*, 58 U. COLO. L. REV. 371 (1987); *see also* Nelson, *supra* note 12, at 329-30.

16. A full list is available from the author at richard.collins@colorado.edu. The list includes only decisions about the interior of the West, omitting those about the Pacific seacoast and those from Alaska or Hawaii. Cases in each of the named fields can arise outside the West, but most have uniquely Western connections and aspects. Because it was never issued, White's proposed concurring opinion in *Wyoming v. United States*, 492 U.S. 406 (1989), is not one of the 146. *See infra* text accompanying notes 32-37.

17. *See* Arizona v. California, 373 U.S. 546 (1963) (5-3 decision, White in the majority); discussion *infra* text accompanying notes 27-29.

18. *See* Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (7-1 decision, White in the majority), *overruled by* Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (6-3 decision, White in dissent); *see also* Utah v. United States, 482 U.S. 193 (1987) (5-4 decision, White in dissent) (holding that Utah, rather than the United States, owns the bed of Great Salt Lake).

19. Andrus v. Utah, 446 U.S. 500 (1980) (5-4 decision, White in the majority).

20. Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (5-4 decision, White in dissent) (holding that federal public domain mining laws did not preempt a state regulation).

21. United States v. New Mexico, 438 U.S. 696 (1978) (5-4 decision, White in dissent).

and Justice White wrote a spirited dissent favoring federal authority.[22] He joined the Court's judgment that curtailed state power to prevent use of state water rights in neighboring states.[23] And he wrote for the Court to decree a departure from the terms of an interstate water compact, provoking a vigorous states' rights dissent from Chief Justice Rehnquist.[24]

The most important and interesting water cases during Justice White's tenure concerned the water needs of federal and Indian lands. Some of these decisions divided the Court, such as those described in the prior paragraph, while others were decided unanimously.[25] Two others that divided the Court tested White's Western loyalty.

At the time of Justice White's appointment, every Western state had adopted the prior appropriation system of water law, which declares unused surface water available to the first taker and awards paramount rights to the first person to put water to a developed use.[26] The system had no place in it for inchoate rights, so needs of federal and Indian lands were disregarded. The Supreme Court crafted a significant federal exception to the prior appropriation system in its 1908 *Winters* decision, which held that federal statutes setting aside an Indian reservation implicitly reserved enough unappropriated water to carry out the reservation's purposes.[27] The thirstiest purpose was farming, which, in most of the West, requires significant quantities of water for irrigation. *Winters* declared Indian ownership of unused water, which was contrary to the first principle of the prior appropriation system. The amount reserved was not quantified or developed, in conflict with state law requirements.

Justice White joined the Court in time to sit on its second encounter with the issue. In 1952, Arizona had filed an original action in the Supreme Court against California, seeking judicial allocation of the states' shares of Colorado River water. The United States intervened and asserted federal water rights for five Indian reservations, a national forest, and other federal reservations. The Court's special master proposed to award federal water rights to both federal and Indian reservations and to solve the uncertain extent of Indian irrigation rights by quantifying the rights as sufficient water for all of the reservations' practicably irrigable acreage, whether or not land was presently being irrigated. With Justice White in the majority,

22. California v. United States, 438 U.S. 645, 679 (1978) (6-3 decision, White in dissent).

23. Sporhase v. Nebraska, 458 U.S. 941 (1982) (7-2 decision, White in the majority). A Colorado statute was at the center of the dispute.

24. Oklahoma v. New Mexico, 501 U.S. 221 (1991) (5-4 decision, White in the majority); *id*. at 242 (Rehnquist, C.J., dissenting).

25. *See* Cappaert v. United States, 426 U.S. 128 (1976) (sustaining federal water rights for a national monument); United States v. District Court, 401 U.S. 520 (1971) (sustaining state court jurisdiction over federal water rights under a federal statute).

26. *See* A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT 105-10 (5th ed. 2002).

27. Winters v. United States, 207 U.S. 564 (1908).

the Court accepted the master's solutions to these issues in a 1963 decision, rejecting vigorous state arguments against the awards to the Indian reservations.[28] Two dissenters on other issues joined the Court on allocations to federal reservations, "though not without some misgivings regarding the amounts of water allocated to the Indian Reservations."[29]

The Court retained jurisdiction, and the case came before the Justices again in 1983, after the Indian tribes sought to intervene in the action and claim additional water. Justice White wrote for a divided Court to allow intervention but to deny most of the additional water claims.[30] His opinion rested on res judicata and emphasized the values of finality and predictability regarding water rights: "Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country."[31]

In 1989, another case concerning the quantification of Indian water rights reached the Court. The Justices reviewed a Wyoming state court adjudication of rights in the Big Horn River system, which includes the Wind River Indian Reservation. The state courts rejected many Indian claims, but the Reservation's award under the practicably irrigable acreage standard was sizeable, and the state's petition to the Supreme Court attacked the doctrine. As a formal and public matter, the judgment was affirmed by an equally divided Court.[32] Justice Marshall's files later revealed, however, that the Court had been ready to reverse until Justice O'Connor recused herself. She authored the Court's proposed opinion, then discovered a conflict of interest. Justice White voted to grant certiorari and to join her opinion, and he wrote a proposed concurrence.[33] The proposed judgment would have sharply restricted Indian water rights by requiring

28. Arizona v. California, 373 U.S. 546, 597-600 (1963). The case was first argued prior to Justice White's appointment but reargued thereafter.

29. *Id*. at 603.

30. Arizona v. California, 460 U.S. 605 (1983).

31. *Id*. at 620. The dissenters would have allowed the additional claims. *See also* Nevada v. United States, 463 U.S. 110 (1983) (holding unanimously that res judicata barred the reopening of a water-rights decree that disregarded Indian rights).

32. Wyoming v. United States, 492 U.S. 406 (1989).

33. *See* Second Draft Opinion of the Court, *Wyoming* (No. 88-309) (O'Connor, J.) (unpublished document, on file in Library of Congress, Manuscript Division, Papers of Justice Thurgood Marshall, Box 478) [hereinafter Second Draft Opinion of the Court], *reprinted in* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683, 725-40 (1997); Second Draft Concurring Opinion of Justice White, *Wyoming* (No. 88-309) (unpublished document, on file in Library of Congress, Manuscript Division, Papers of Justice Thurgood Marshall, Box 478); Sandra Day O'Connor, Memorandum to the Conference (June 22, 1989) (unpublished document, on file in Library of Congress, Manuscript Division, Papers of Justice Thurgood Marshall, Box 478) (recusing herself).

proof of the "*reasonable likelihood*" that future Indian irrigation projects would "*actually* be built."[34]

There was an important formal difference between the 1983 judgment in *Arizona v. California* and the proposed reversal in *Wyoming*. Justice White's invocation of finality in the former decision was based on res judicata, while the tribes' reliance claims in *Wyoming* depended on stare decisis. However, precedent had considerable force in the context of *Wyoming*. Property rights were at stake, and the practicably irrigable acreage standard had been thoroughly tested and analyzed in the original decision in *Arizona v. California* and had been the basis for many lawsuits and bargains thereafter. The 1963 decision had specifically rejected state arguments that Indian rights should be reduced if events later showed the water was not needed.[35] As Justice Brennan's proposed dissent showed, the O'Connor opinion was substantially inconsistent with this and other quite particular rulings in the prior case.[36]

The proposed opinions of Justices White and O'Connor appear to claim special knowledge of Western water law. This is the only opinion of Justice White's that did so, and, of course, it was never issued. The opinions also illustrate a drawback of relying too much on perceived consequences of a decision. They predicted that unless reversed, the Wyoming judgment would cause waste of water. That was an educated guess, and a subsequent Wyoming decision implies that the guess was mistaken.[37]

II. TRIBAL SOVEREIGNTY

When Justice White joined the Court, tribal sovereignty of Indian nations had just begun a modern renaissance. In mostly unanimous decisions, the Court held that nineteenth-century judgments recognizing tribes' sovereignty over their members in Indian country had not been undermined by lack of use or vast social change.[38] The principal issue litigated was immunity of reservation Indians from state authority, and the

34. Second Draft Opinion of the Court, *supra* note 33, at 17, *reprinted in* Mergen & Liu, *supra* note 33, at 738.

35. *See* Arizona v. California, 373 U.S. 546, 595-601 (1963). Justice White's 1983 opinion explicitly acknowledged this. *Arizona*, 460 U.S. at 609, 615-17.

36. *See* Second Draft Dissenting Opinion of Justice Brennan, *Wyoming* (No. 88-309) (unpublished document, on file in Library of Congress, Manuscript Division, Papers of Justice Thurgood Marshall, Box 478), *reprinted in* Mergen & Liu, *supra* note 33, at 741-60. Justice Brennan articulated the degree to which the proposed judgment would have overturned settled rules of Indian property rights. *See id*. at 742-57.

37. *See In re* Gen. Adjudication of All Rights To Use Water in the Big Horn River Sys., 835 P.2d 273 (Wyo. 1992).

38. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 1, 58-60 (1987).

Court held that state law could not apply unless Congress clearly consented.[39]

When tribes attempted to govern nonmembers in their territory and to bar state jurisdiction over them, the Court rejected many claims in decisions that divided the Justices. In contests between tribal governments and nonmember defendants, the Court held that tribes have no authority to punish nonmembers criminally[40] and that their civil jurisdiction is limited to persons who have entered into consensual relations with Indians or their tribes.[41] The Court's most important decisions sustaining tribal authority upheld tribal power to tax non-Indian lessees of tribal mineral interests.[42]

The Court's focus on consensual transactions between Indians and non-Indians made it a crucial issue whether these transactions are immune from state jurisdiction. Justice White wrote the Court's opinions in two centrally important decisions that reflected his pragmatic approach. The first was a 1980 ruling on Indian "smoke shops," which sought to sell cigarettes free of state tax. The Court upheld the state tax and required Indian sellers to collect and remit it, characterizing the tribes' case as "marketing their tax exemption to nonmembers."[43] But Justice White's opinion stated that it would be another matter if the transactions involved value generated on the reservation; courts should balance state, tribal, and federal interests to determine which transactions are immune from state authority.[44] This dictum later became the logic for a series of holdings that immunized transactions involving the harvesting and sale of tribal timber,[45] the construction of a tribal school,[46] and commercial hunting and fishing on tribal land.[47]

Justice White's second opinion on reservation commerce between Indians and non-Indians had, in retrospect, very great influence. The Court held that federal statutes did not authorize California to regulate tribal gambling enterprises on reservations.[48] The next year, Congress reacted by

39. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973).

40. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

41. Montana v. United States, 450 U.S. 544 (1981). The Montana opinion said that tribes also have jurisdiction over non-Indians when their "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," but this dictum has had no practical application to date.

42. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Justice White joined the majority in each decision cited in this paragraph but did not write for the Court in any of them.

43. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980).

44. *Id*. at 158.

45. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

46. Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982).

47. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

48. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (6-3 decision).

passing the Indian Gaming Regulatory Act,[49] which governs the many tribal gaming enterprises established under it, including Foxwoods, the casino reported to be the nation's most profitable.[50] The Court's decision had a major influence on the statute's terms, and the statute has generated widespread gaming enterprises in Indian country. Some find this development a moral dilemma, but the enterprises have provided substantial income to previously impoverished communities.

Justice White's policy to defer to Congress was of less relevance in the decisions discussed in this Part. Rather, the Indian reservation commerce cases well illustrate Justice White's pragmatism and his preference for workable rules and for justice in particular cases. His rulings on state jurisdiction over reservation commerce pleased neither the members of the conservative wing of the Court, who would have sustained state jurisdiction in almost every case, nor the liberals, who would have immunized most transactions. His balancing test was a quintessentially flexible rule to support particularized decisions.

CONCLUSION

Justice White's decisions in Western cases reinforce prior analyses of his jurisprudence that emphasized deference to Congress and a pragmatic search for workable rules and particularized justice. He did not treat Western cases as his special preserve. That would have been out of character for one who shunned manipulation and guile in all his life's pursuits.[51]

49. 18 U.S.C. §§ 1166-1168 (2000); 25 U.S.C. §§ 2701-2721 (2000).

50. *See* Pat Doyle, *Exercising Tribal Sovereignty in the Face of New Conflicts*, STAR TRIB. (Minneapolis), July 23, 1995, at A1.

51. The statement in the text is a strong theme throughout Professor Hutchinson's biography. *See* HUTCHINSON, *supra* note 4.