

Byron White: The Football Player as Supreme Court Justice

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THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE
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HOW SHOULD LAWYERS understand Byron White? He served on the Supreme Court for a long time – from 1962 to 1993. But even scholars would be hard-pressed to identify a distinctive contribution White made to the Court’s jurisprudence: perhaps something about his position in civil rights cases, more obviously the feel for the real world of politics demonstrated in his opinions in separation of powers cases. But for thirty-one years of service that’s pretty thin. As Hutchinson puts it, “Byron White’s service on the Warren Court [and, I would add, thereafter] will not be remembered for his opinions for the Court” (p. 349).

Dennis Hutchinson’s splendid biography makes it clear that understanding White means treating the football field as the place where he was formed. Hutchinson gives us a detailed account of White’s career as a nation-

ally recognized scholar athlete at the University of Colorado and with the Detroit Lions in the professional National Football League. To my taste the account is overly detailed: In discussing White’s Supreme Court career Hutchinson avoids the trap of recounting case after case, in the “and then he wrote” mode, but in discussing White’s football career Hutchinson comes close to giving us a play-by-play account of White’s games, one after the other. But football’s formative effect becomes clear by the book’s conclusion.

One might think this odd, because, as Hutchinson makes clear through numerous anecdotes, White actively disliked people who identified him with the football player he had been. White didn’t like to be called “Whizzer,” and, in the incident that gives Hutchinson’s book its title, he replies, “I was,” to a waitress who asks him, “Aren’t you

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Whizzer White?" To see how football shaped White we have to eliminate other possibilities.

The first possibility, which others have suggested, is that White didn't develop a systematic approach to constitutional law because he accepted the skeptical teachings of his legal realist mentors at the Yale Law School of the 1940s. Hutchinson demolishes this claim by showing that White didn't take many courses from core legal realists, and never expressed any particular interest in their skepticism. His legal education was interrupted by his World War II service, and it appears that he did not treat law school as an important intellectual experience; it was more something that had to be done if he was to get on with the life he planned for himself.

Another possibility is that he was a John F. Kennedy, *New Frontier Democrat*. One gap in Hutchinson's work is his failure to offer a sustained account of White's attraction to Kennedy, but we can piece one together. White returned to Denver after his World War II service, and immediately became active in local politics. He was a Democrat, it appears, largely because that was Franklin Roosevelt's party, not because of passionate commitment to *any* element in the party's platforms. He had run across Kennedy briefly during his European travels while he was a Rhodes scholar, and then became more closely acquainted with him during the War, when White wrote part of the Navy's investigative report on the sinking of Kennedy's PT-109. He appears to have been attracted to Kennedy because they were men of the same generation who had shared many of the same experiences, not – again – because he was captured by Kennedy's vision of novel *New Frontier* policies.

White worked hard for Kennedy in the Democratic party primary campaigns and in the campaign against Richard Nixon, when he headed the Citizens for Kennedy group that generated support from Kennedy supporters who did not want to commit themselves to the

formal party organization. And he was a key figure in Robert Kennedy's Department of Justice, effectively running the department on a day-to-day basis while Robert Kennedy played a central role in the administration's general political operations.

One might attempt to spin something about White's jurisprudence out from this experience. The Kennedy administration had two components. First, much smaller at the time than it appears in retrospect, there were the elements that have come to be associated with the image of the administration as Camelot: the vision of public service invoked in Kennedy's inaugural address and in the creation of the Peace Corps, the similarly visionary sense of human possibility embodied in the administration's commitment to space flight. Nothing in White's association with the Kennedy administration connects him to the visionary elements here. Second, there was the administration's so-called pragmatism, most dramatically expressed in Kennedy's lukewarm response to the developing civil rights movement. Caught between pressures from African Americans, who were an important part of Kennedy's political constituency, and from Southern Senators, whose support was essential if the administration was to accomplish anything legislatively, the Kennedy administration temporized, doing as little in response to African American demands as it could get away with. This sort of non-ideological response to conflicting pressures was an important part of the Kennedy administration's political style.

Hutchinson rightly avoids attaching the trendy label *pragmatic* to White's work on the Supreme Court. *Realistic* might be a more accurate term. White approached legal problems with a sense that the courts were only one of the nation's institutions for governing, that they were not always the best ones to deal with specific problems, and that constitutional decisions ought to have some connection to

the real conditions of political and everyday life. (I don't want to overstate this, however; White's position on the abortion issue seems systematically insensitive to real-world considerations even though a person sensitive to such considerations might nonetheless have come to the same conclusions that White drew from his more rigid framework.)

White's jurisprudential realism might be connected to part of the Kennedy administration's political legacy. Hutchinson discusses White's important dissent in the *Chadha* case (1983) invalidating the legislative veto. While others have praised the opinion for its understanding of the functional utility of the legislative veto in an era of substantial delegation of power to the executive branch, Hutchinson is more qualified. He argues that White's opinion had formalist elements as well, particularly in its unwillingness to examine the way in which the legislative veto was actually being used, both in *Chadha's* case and more generally. I'm not convinced that Hutchinson is right here. One might have taken a realistic position favoring legislative vetoes in general while noting that in *Chadha's* case the legislative veto had functioned as the equivalent of an adverse adjudication in a particular individual's case, which ought to be barred by considerations akin to those expressed by the Bill of Attainder clause. (Justice Lewis F. Powell's position in *Chadha* took roughly this form.) But one might defend White's refusal to provide a more differentiated functional account of various types of legislative vetoes on the ground that he was dissenting from a decision that would invalidate them all, and that the force of his functional approach would have been weakened had it been expressed in a mere concurring opinion.

Beyond the details of *Chadha*, however, Hutchinson's narrative approach obscures the depth of White's realism in separation of powers cases. To avoid the "and then he wrote" problem, Hutchinson chooses to provide

snapshots of three Supreme Court terms – 1971, 1981, and 1991. Clearly some sort of narrative strategy that truncates White's years on the Court was essential in a work directed to an audience beyond the legal academy's specialists on the Supreme Court, and Hutchinson's strategy is not unreasonable. But it does have its costs. Lots of important things happened during those terms, but the episodic nature of Hutchinson's account makes it difficult for him to show deep continuities in White's work.

One of those continuities is this: White almost always rejected separation-of-powers challenges to legislative innovations. The reason may be that he had a reasonably good sense of how politics worked at the national level. He may have thought that Congress rarely innovated without good reason, although sometimes those reasons might not be transparent to judges, and that the kinds of doctrinal limits judges could devise to enforce separation-of-powers restrictions were unlikely to work well overall. My guess is that something like this accounts for White's position in separation-of-powers cases, and that his experience in national politics lies behind it. There's nothing in Hutchinson's work to contradict this account, but his narrative strategy makes it difficult for me to be confident that it's right.

Hutchinson's approach also makes it difficult for him to capture another important contribution White made to the Court. During his tenure the Court became more conservative. In the area of constitutional criminal procedure this was a move White favored. The direction was right, but what of the pace? Liberals feared a sharp acceleration of change in the immediate aftermath of President Richard Nixon's four appointments to the Court, and again after President Ronald Reagan's appointees appeared to have accumulated into a critical mass. But, though conservative change occurred, it happened at a far

more measured pace than liberals feared – and some conservatives hoped.

One important reason was Byron White. He could hardly be accused of being a bleeding heart liberal on criminal procedure. But he repeatedly cautioned his conservative colleagues to move slowly. The most public and dramatic expression was his concurring opinion in *South Carolina v. Gathers* (1989), which implied that he favored overruling *Booth v. Maryland* (1987), the origin of the ban on victim-impact testimony in capital cases. The opinion was odd because there were four dissenters in *Gathers*, who would have become a majority for overruling *Booth* had White joined them. White played a similar role when he saw his conservative colleagues getting enthusiastic about overruling Warren Court precedents. As he put it in an internal Court memorandum in 1982, “I have been strongly opposed to the notion that the dissenting Justices in a particular case should feel free to consider overruling that case as soon as a new Justice with similar views arrives on the scene. ... If that were the usual policy, the law would be in a shambles and the Court’s authority severely damaged.” His views appear to have had some influence.¹

By focusing only on selected terms, Hutchinson also obscures another continuity – or, perhaps, makes it more difficult to identify a real change in White’s position. Hutchinson writes of White’s position in affirmative action cases, which took a wavering course that White reconciled at the end of his judicial career. White voted to uphold affirmative action in *Bakke* (1978) and then in *Fullilove* (1980), but appeared to have qualms in rejecting other affirmative action programs in *Wygant* (1986) and later cases. And then, just at the end of his service, he surprised Justice Sandra Day O’Connor by going along with Justice

William Brennan’s position upholding a federal affirmative action program in *Metro Broadcasting* (1990). If we confine our attention to affirmative action cases, we might construct a doctrine making sense of White’s position: affirmative action programs adopted by the national government were presumptively constitutional, and affirmative action programs that merely denied unidentified individuals an opportunity to compete for a government benefit or position were also presumptively constitutional, but programs depriving identifiable individuals of such opportunities were presumptively unconstitutional.

That doctrine makes sense of White’s position, and is arguably defensible. But we would miss something important about White’s work if all we did was attempt to come up with some doctrinal reconciliation of his votes. Affirmative action became the central civil rights issue by the end of White’s tenure, but desegregation had been far more important at its outset. Perhaps affected by his central role in the Kennedy administration’s confrontation with Alabama’s governor during the attempt to desegregate that state’s university, White was a firm supporter of desegregation efforts until the last years of his tenure. Most notable, perhaps, was his desperate effort to find a way to authorize district judges to order desegregation remedies that covered both central cities and their suburbs. The Court’s first confrontation with this problem occurred in a Richmond, Virginia, case from which Justice Powell was recused (*Richmond School Board v. Bradley*, 1973). After an initial vote in which the Court was evenly divided, White got Justice Harry Blackmun to hold off from a final vote while White cobbled together a theory under which interdistrict remedies could be developed more easily than the other Nixon appointees wanted. White’s theory was unper-

1 Mark V. Tushnet, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961-1991* at 55 (1997).


suasive and his effort unsuccessful, but the very fact that he tried so hard is significant.² He was reasonably sympathetic to civil rights claims, and his approach to affirmative action appears in a different light when seen together with his behavior in other civil rights cases.

Having said all this, however, I still share the general assessment of White's work: Echoing Winston Churchill, we might say that White's jurisprudence lacks a theme. His opinions are, in Hutchinson's words, "intentionally opaque and self-effacing" (p. 359). Sometimes his dissents were "rhetorically personalized statements" (p. 374) weakened, in Hutchinson's view by "self-indulgen[ce]" (p. 374) and "bluster" (p. 348), while his opinions for the Court "adopted a faceless, restless style that resolved the case and drew as little attention to themselves as possible" (p. 374). Why might a person as talented as White adopt such an approach to his work? Legal realism won't explain it, nor will the New Frontier or pragmatism. What then might account for White's jurisprudence? Football.

Hutchinson rightly gives his final chapter the title, "Service as a Legacy." He shows that White's career, including his Supreme Court service, flowed from his sense of public duty: When your country asks you to do something, White believed, you do it, even if your personal preference might be to do something else. Being a high official in the Department of Justice or a Supreme Court justice was not, for White, anything special; those jobs were what

a person did, not who he was. Hutchinson repeatedly describes White as reticent, both in person and in his opinions. At least as to his Supreme Court work, I think that the word *detached* better captures White's attitude. He cared about getting the work done, but he wasn't deeply invested in it.

White did not have to rest his sense of who he was on the positions he occupied. At the end of his work Hutchinson quotes an unidentified old friend of White, who says that White "sacrificed a lot, at least in terms of worldly things, to be a public servant." But, even more eloquently, the friend says, "he was famous as a young man, you know" (p. 456). Having been famous as a young man, White knew thereafter who he was. Despite White's distaste for being reminded that he used to be Whizzer White, his experiences as a young man decisively shaped his approach to his work later in life, which makes the title Hutchinson gives to the book entirely appropriate.

In the 1950s, sociologist (and lawyer) David Reisman described and praised the "inner-directed" personality. He could have been writing of Byron White. But Reisman's term doesn't fully convey the sense of self that comes through in Hutchinson's biography. Put simply, Byron White did not have to be a Supreme Court justice to think that he had accomplished something in his life. Of how many of his colleagues on the Court when he retired could that be said? 

² *Id.* at 85-86.