

**Meeting the Demands of Modern Governance: The Administrative Thought of  
Supreme Court Justice Byron White**

John M. Aughenbaugh

A Dissertation submitted to the faculty of Virginia Polytechnic Institute and State  
University, in partial fulfillment of the requirements for the degree of Doctor of  
Philosophy in Public Administration and Public Affairs.

Dissertation Committee:  
John A. Rohr, Chairperson  
Larkin S. Dudley  
Karen M. Hult  
Gary L. Wamsley

30 June 2008  
Blacksburg, Virginia

Keywords: Byron White, Administrative Law, Regime Values, Constitutional  
Competence, and Judicialization of Administrative Processes

Copyright, 2008, John M. Aughenbaugh

# **Meeting the Demands of Modern Governance: The Administrative Thought of Supreme Court Justice Byron White**

John M. Aughenbaugh

## **Abstract**

This dissertation examines the administrative principles found in retired Supreme Court Justice Byron White's administrative law case opinions. The purposes of the dissertation are to explore and identify the dominant themes found in White's administrative law opinions and to discover what public administration can learn from a Supreme Court justice who took more than a passing interest in governance matters.

This study has the following research expectations:

- There is an identifiable White administrative law jurisprudence;
- Within this jurisprudence, there are principles that recognize and are sensitive to the demands of modern governance; and
- White's administrative thought can be translated and used by public administrators to guide and instruct their work.

The first part of the dissertation is descriptive as the dominant themes in White's administrative law jurisprudence are identified and examined. Standard case briefing analysis is used for this exploration.

The second half of the project is normative, wherein Rohr's "regime values" framework is used to explore what public administrators may learn from studying White's administrative law opinions. Moreover, this section of the dissertation will explore the extent to which White's conception of modern governance incorporates what scholars have referred to as the judicialization of the modern administrative state by the federal courts and what is White's conception of a constitutionally competent civil servant.

Dedicated to all civil servants who attempt to run a constitution

## ACKNOWLEDGEMENTS

For a project that took many years to complete, a number of thanks are due. First, I thank my committee members – Doctors Rohr, Dudley, Hult, and Wamsley. They all probably felt, at times, that I would never complete this last step in my doctoral education, but their continued support throughout assisted me greatly. In particular, my chairperson, Doctor Rohr, was always available whenever I came back to the project, and his charge that I never short-change the quality and rigor of my writing, though often frustrating, ensured that what follows is the best work I could do. Additionally, Doctor Hult deserves special mention, for it was her mentoring when I was a master’s student that led me to consider pursuit of a doctoral education. I will forever be in her debt for whatever good I do as a teacher and scholar.

A number of my colleagues in the doctoral program deserve mentioning, including now Doctors Shane, McCreary, Long, Stich, and Miller. We took classes together, complained of our lots in life, and supported each other through the process of completing our “little book reports.” While I may have eventually persisted, they certainly made the road an easier one to travel. Much obliged fellow travelers!

My current colleagues at the L. Douglas Wilder School at Virginia Commonwealth University have also been very supportive in my efforts to finally finish this project. Chris Saladino, Deborah Brock, Judy Twigg, Bill Newmann, Robyn Lacks, and Susan Gooden have been the most encouraging colleagues, exhibiting extraordinary patience the past few years while I have attempted to write the last few chapters of this project. Of note, Chris has been a very good friend in diverting my attention from administrative law matters to the simple joys of discussing the Yankees and the joys/pains of our shared love of teaching. I also thank Susan Gooden for bringing me to the attention of VCU, indirectly forcing me to jump off the career fence I had been straddling for years.

Last, my sincerest apologies to my family and friends who have had to endure years of me ruminating about Justice Byron White. They listened without (usually) complaint as I prattled on about White’s opinions and what they meant for public administration. Someday I hope to repay the friendship demonstrated by Mick Collins, Ryan Link, Chris Couples, Lisa Joyner, and Mark Johnson. And to my wife, Colleen Wilhelm, I only hope that the finished project was worth the lonely nights and weekends you had to suffer alone.

## TABLE OF CONTENTS

ABSTRACT .....	ii
DEDICATION .....	iii
ACKNOWLEDGEMENTS .....	iv
TABLE OF CONTENTS .....	v
LIST OF TABLES .....	vii
CHAPTER I: INTRODUCTION .....	1
A. Background of Study .....	1
B. Objectives and Purposes .....	3
C. Theoretical Grounding and Research Expectations .....	7
D. Research Design and Methodology .....	9
Case Selection .....	9
Research Design .....	12
Chapter Summary .....	16
CHAPTER II: THE LITERATURE .....	19
Introduction .....	19
White’s Jurisprudence .....	19
Legal Realism .....	24
Analytical Frameworks .....	28
Rohr’s Regime Values .....	28
Constitutional Competence .....	32
Judicialization of the Administrative Process .....	34
Chapter Summary .....	37
CHAPTER III: WHITE’S ADMINISTRATIVE LAW OPINIONS, PART I .....	39
Introduction .....	39
White as Constitutional Schoolmaster .....	40
Separation of Powers: Supporting Political Innovations .....	49
Official Immunity: The Reasonably Should Have Known Standard .....	59
Chapter Summary .....	70
CHAPTER IV: WHITE’S ADMINISTRATIVE LAW OPINIONS, PART II .....	74
Introduction .....	74

Administrative Due Process: A Balance of Competing Interests .....	75
Administrative Discretion .....	88
Administrative Searches: Flexible Standard of Reasonableness .....	95
Chapter Summary .....	103
 CHAPTER V: ANALYSIS .....	 107
Introduction .....	107
Regime Values .....	108
Constitutional Competence .....	123
Judicialization of the Administrative Process .....	127
A Final Note...on Legal Realism .....	131
 CHAPTER VI: CONCLUSION .....	 136
Introduction .....	136
A Revisiting: Purpose of Study and Research .....	137
Themes in White’s Administrative Law Jurisprudence .....	142
Limitations of Study .....	144
Future Research .....	146
 CASES CITED .....	 149
 WORKS REFERENCED .....	 151

## LIST OF TABLES

Table 1: Identifiable Themes in White’s Opinions, Chapter III .....	71
Table 2: Identifiable Themes in White’s Opinions, Chapter IV .....	104
Table 3: Identifiable Themes in Justice White’s Opinions .....	142

## **Chapter I: Introduction**

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. Oliver Wendell Holmes, Jr., 1881.

### A. Background of Study

In 1972, Jagdish Chadha, an alien in the United States on a student visa, was informed by the Immigration and Naturalization Service (INS) that he had to leave the country or be deported due to his visa having expired. After Chadha made various appeals within the agency, an INS administrative law judge granted Chadha's appeal to have his deportation order suspended, on the grounds that Chadha had no country to which he could return. As required by law, the U.S. Attorney General reported this recommendation to both Houses of Congress.

This immigration law also had a provision that allowed either House of Congress to veto the Attorney General's recommendation, which the House of Representatives did to Chadha and five other aliens. The INS once again began deportation proceedings against Chadha, which he contested administratively on the grounds that the House of Representatives' action (a legislative veto of an agency action) violated the Constitution's separation of powers doctrine. The INS dismissed Chadha's appeal, claiming it did not have the authority to hear such a challenge.

Chadha next took his claim to the federal courts, wherein eventually the Ninth Circuit Court of Appeals held for Chadha, stating that the legislative veto employed by the House of Representatives violated the separation of powers doctrine. As the Reagan administration (it was now 1981) refused to appeal the Ninth Circuit's ruling to the Supreme Court, the Supreme Court asked both Houses of Congress to represent the U.S.

federal government in challenging the Ninth Circuit's ruling. Ultimately, the Supreme Court held for Chadha, ruling the legislative veto did violate the separation of powers doctrine. The Court's majority opinion, written by Chief Justice Burger and joined by 5 other justices, held the veto was essentially legislative in purpose, and therefore it had to follow the bicameralism and presentment clauses of the Constitution. Bicameralism requires that all legislative acts be passed by both Houses of Congress, whereas presentment mandates that a bill passed by both Houses of Congress be presented to the President for approval or veto. As the legislative veto exercised in regard to Chadha was passed only by the House of Representatives and was never presented to the President, the Court's majority found the legislative veto fatally flawed.

Although *INS v. Chadha* (462 U.S. 919, 1983) was noteworthy for its constitutional holding (i.e. the unconstitutionality of the legislative veto), what many scholars found most remarkable was the dissenting opinion of Justice White. White, often noted for his pragmatic, no-frills opinions, wrote a dissenting opinion full of passion and vehemence. Rhetorically, he accused the majority of creating for Congress a Hobson's choice – either stop delegating authority to executive branch agencies and start writing time-consuming, detailed legislation, or delegate expansive authority to these agencies without any hope it could monitor how the authority was used.

Beyond the rhetoric, White made the following three substantive arguments:

1. The legislative veto was an “indispensable political invention” which preserved essential constitutional concepts by allowing Congress to hold the executive branch accountable while allowing the passage of necessary public policy to be created and administered by executive branch agencies;
2. The Constitution is silent on whether the legislative veto is valid, and therefore, the Court needs only to determine if the veto satisfies the spirit of the Constitution's separation of powers doctrine – which it does as the veto takes

effect only after both Houses of Congress and the President have approved its use in the original authorizing legislation;

3. The Court had already given constitutional approval to government actions that have the effect of lawmaking but did not comport with bicameralism or presentment – specifically, agency rulemaking associated with the modern administrative state.

White’s dissent struck many scholars, including this one, as heralding a different kind of jurisprudence for the Court to establish and maintain. In concrete terms, White seemed to be making a claim that the needs of modern governance require the federal courts to look beyond a strict reading of the Constitution’s language to gauge whether the innovations the executive and legislative branches are creating pass constitutional muster. White seemed to be challenging his judicial brethren to acknowledge the demands modern governance placed upon the political branches and then to implement a more nuanced interpretation of the Constitution to accommodate such demands. It was this challenge that led me to consider whether public administration could learn something from this Supreme Court Justice.

### B. Objectives and Purposes

The United States Supreme Court’s impact upon public administration, at all levels, has been widely noted over the years (Cooper, 2000; Rosenbloom, et al., 2000; Warren, 1997). With the rise of the administrative state in President Franklin D. Roosevelt’s New Deal, through the passage of the Administrative Procedures Act (1946), and other related changes in the nature of governance in the United States, the Court has been asked to decide how the essential values found in the Constitution are to be given life in today’s form(s) of governance.

This dissertation is based upon those efforts to understand the impact of the Supreme Court in shaping modern governance in the United States. More specifically, this dissertation examines an assumption I have about a particular Supreme Court Justice – retired Justice Byron White. The assumption is that Justice White has something valuable to contribute to public administration, both in theory and practice, through the administrative law opinions he wrote while on the Court. I trace this assumption to White’s dissenting opinions in *I.N.S. v. Chadha* (1983) and *Bowsher v. Synar* (1986).<sup>1</sup>

In both these cases, White wrote dissenting opinions that criticized the Court’s majority for employing a strict or “formalistic” notion of separation of powers to strike down innovations created by the political branches in the modern administrative state. After reading these opinions, I was struck by how White challenged the Court to recognize that governing in late Twentieth century America calls for a broader, more nuanced interpretation of the governmental structures in the Constitution. From this observation, then, I wondered if White’s challenge permeated his other administrative law opinions.

Testing this observation taps into the first purpose of my dissertation. Specifically, through examining this assumption about White’s administrative law opinions, I hope to identify certain dominant themes that characterize White’s writings in this regard. To test the validity of my initial observation that White has something important to say about modern U.S. governance, I shall examine his opinions on various topics in administrative law to see what, if any, connections exist, what themes are

---

<sup>1</sup> In *Bowsher v. Synar* (478 U.S. 714, 1986), the Court held that the assignment by Congress to the Comptroller General of certain functions under the Gramm-Rudman-Hollings Act of 1985 did violate the separation of powers doctrine in the Constitution.

elucidated or jettisoned depending on the circumstances, and what values White stressed in his administrative law jurisprudence.

The second purpose of this dissertation is to understand what American public administration may learn from a Justice, like White, who apparently took more than a passing interest in the work of government administration, and who, in his opinions and by his adherence to certain Court majorities, directly influenced the work of administrators. In this endeavor, then, I will attempt to cast White's administrative thought, to the extent possible, in the frameworks of those scholars who have demonstrated that there is much public administration could and should learn from the Supreme Court.

For instance, John Rohr (1989) writes of how it is critically important for administrators to be aware of the ethical norms demanded of them in their positions. Rohr labels these norms, "regime values," and defines them as the values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic (p. 68). These values rest upon three considerations: ethical norms should be derived from the salient values of the regime; these values are normative for American administrators because they take an oath to uphold the regime; and these values can be found in the public law of the regime.

Though these values can be discovered in various public law sources, Rohr prefers Supreme Court decisions, because they expose bureaucrats to several conflicting interpretations of American values through four interrelated characteristics. The four characteristics are institutional, dialectic, concrete, and pertinent. I shall explain all four

characteristics later (see chapter 2), but at present, I rely on one, dialectic, to show how White's opinions could have value for administrators.

When Rohr describes Supreme Court decisions as being dialectic, he is referring to how in any given Court decision, there may be multiple opinions – majority, concurring, dissenting (and sometimes, a little of all three!). The opinions offer the interested administrator opportunities to follow a dialogue or debate concerning issues that many of them face in common and upon which the law may have some bearing. In reading this dialogue, the administrator may reflect on his or her policy and legal constructions, learn different ways to approach dilemmas he or she may have encountered, and formulate responses for the future that comply with a Court ruling while understanding other considerations presented by those justices in the dissent.

The dialectic nature of Court decisions leads me to my second justification for claiming that White's administrative law opinions have something valuable to contribute to public administration. Various administrative law scholars, such as Phillip Cooper (2000) and Kenneth Warren (1997), have remarked that since the rise of the modern administrative state, there have been periods when the federal courts have tried to judicialize the administrative process, i.e. make these administrative processes more like those found in the courts. For instance, Donald Horowitz (1977, pp. 150 - 151) has discussed how administrative agencies are beginning to function as "second-class courts," wherein they are expected by federal courts to implement procedures that mirror rather closely those used by courts of law. He goes on to say that agency processes have become so much like those of the courts that it is often difficult to determine where agency action ends and judicial functions begin (pp. 150 - 151).

Warren (1988) has suggested that because the federal courts began to be less deferential to agency determinations in the late 1960s and early 1970s, agencies in response began to make processes more judicial in form and substance, with more hearings, appeals, and evidence on the record. Warren, summarizing other scholars on the subject, claims that because the federal courts began to find that Congress was delegating large amounts of unchecked authority to agencies and agencies were seen to be occasionally abusing such authority, the courts stepped in to require that a modicum of procedural safeguards, like those found in a court of law, be utilized by agencies. This judicialization of agency behavior has led to an extended debate among scholars and members of the federal courts; I shall discuss this subject more fully in Chapter 2 of this work.

In terms of this project then, what is the nature of this judicialization? Is this effort by the courts one whereby they hope to impose strict constitutional and judicial norms upon administrators who exercise discretion given them by Congress? Or is the judicialization more sophisticated, taking into account the particular demands placed upon administrators while also ensuring a modicum of constitutional protection for those who come into contact with the administrative apparatus of the state? For instance, when examining White's administrative law opinions, do we see a justice who tries to balance these competing interests? If so, what can public administration learn from these opinions both in theory and in practice?

### C. Theoretical Grounding and Research Expectations

In many ways, this project is rooted in the typical case opinion analysis tradition employed by various disciplines, but primarily in use by the legal profession. With case

analysis, the researcher “briefs” a case, and in so doing, attempts to get at its essential facts, the question or questions answered by the court, the holding of the court, the majority, concurring, and dissenting opinions, and the significance of the case holding and various opinions.

Such analysis, although used to reduce the extensive verbiage of many case rulings to their core elements, is valuable in terms of enabling an observer to perform an analysis within a case (comparing and contrasting majority versus dissenting opinions, for instance) and among several cases on a given subject over time. Accordingly, this kind of analysis should be a good fit for this project, especially in terms of placing White’s administrative thought within broader contexts – Court trends on certain administrative and constitutional issues and its applicability for administration.

Overall, this dissertation is descriptive in the sense that in Chapters 3 and 4 I shall explore and identify dominant themes in White’s administrative law jurisprudence. If my hypothesis about White is correct, that he has something important to contribute to public administration, then such an exploration will be necessary to support or negate this claim.

Further, this project is normative in that I am also claiming that White has something valuable to contribute to administrators in terms of offering guidance to them regarding their work and actions. How does one best ensure effective program implementation while also ensuring that a citizen’s due process rights are upheld? How does the country ensure that it has a corps of public servants unburdened by political campaign pressures while also protecting these servants’ First Amendment rights? What is the balance between desiring an efficient and effective government administration and those constitutional values that may impede such administrative imperatives?

Accordingly, I have the following research expectations:

- There is an identifiable White administrative law jurisprudence;
- Within this administrative law jurisprudence is a body of thought that recognizes and is sensitive to the distinctive nature of modern governance; and
- White's administrative law jurisprudence can be translated and used by public administrators to guide and inform their work.

#### D. Research Design and Methodology

##### *Case Selection*

To begin my discussion of case selection, let us first define administrative law. As Cooper (2000) concisely summarizes, there is much debate regarding a commonly accepted definition of administrative law. There are those, like Cooper, who prefer a broad definition; to wit, "The body of law that is concerned with actions by administrative agencies is known as administrative law" (Cooper, p. 5). Others, however, tend to favor a much narrower definition. Bernard Schwartz (1976, p. 2), for example, contends that a narrower definition is more appropriate, because the legal profession (those lawyers who operate within the realm of administrative law) can answer effectively the following questions only:

1. What powers may be vested in administrative agencies?
2. What are the limits of those powers?
3. What are the ways in which agencies are kept within these limits?

For the purposes of this dissertation, I will use Cooper's broader definition of administrative law. Since this dissertation is concerned with more than just how the legal profession can address the law as it pertains to administrative matters, Cooper's definition is more appropriate. For instance, Cooper's definition emphasizes how various

actors relate to and are affected by administrative processes, and this project attempts, in part, to understand how the interested public administrator may learn from the judicial opinions of a Justice, Byron White, who seemingly challenged his judicial brethren to take a more nuanced view of how the Constitution influences administration. Cooper's broad definition, in short, allows for both the procedural and substantive concerns that have become hallmarks of modern American governance.

From this definition of administrative law, I then gathered over 30 Supreme Court decisions concerning various issues in administrative law on which White wrote an opinion. The cases were selected from a review of administrative law texts widely used at both the graduate and undergraduate levels, various general and administrative law journals, and numerous conversations with various colleagues. From this effort, I created a list of the 60 most referenced administrative law cases during White's tenure on the Court, and from these, I have found at least 30 administrative law cases wherein White wrote an opinion, whether it be for the majority, in concurrence, or in dissent. These 30 cases span the length of White's tenure on the Court – 1967 (five years after his appointment to the bench in 1962) to 1989 (four years before his retirement from the Court). Of these 30 cases, I will focus on 20 cases<sup>2</sup>, which cover the following topics – administrative searches, administrative discretion, administrative due process, official immunity, separation of powers, and White as constitutional schoolmaster<sup>3</sup>.

---

<sup>2</sup> I chose these 20 cases for two reasons: 1. The 20 cases represent a wide array of issues without overwhelming the reader (i.e. too many cases or too many topics covered); and 2. Some cases could be classified as “administrative law” cases (see Cooper's definition earlier in Chapter 1), but did not concern any definable case or controversy that shed any discernible light on White's administrative law jurisprudence.

<sup>3</sup> The topic “White as Constitutional Schoolmaster” references how White used his opinion to review and propagate specific constitutional values as they relate to the modern administrative state, much as Chief

From these opinions, I will explore and identify the dominant themes in White's administrative jurisprudence. For instance, one of the themes that has appeared in a number of White's administrative law opinions is his contention that the Supreme Court needed to be more flexible in how it viewed political innovations that would somewhat alter the relationships between the branches of the federal government while assisting government to meet the demands placed on the modern administrative state.

As noted above (see page 4), the clearest representations of White's view that the basic governing structure found in the Constitution should be flexibly interpreted to accommodate changes that have occurred in society and government are seen in his dissenting opinions in *Chadha* (1983) and *Synar* (1986). In both these cases, White states clearly his contention that if a policy creation crafted by the political branches is not expressly prohibited by the Constitution and ensures some measure of accountability, then the Court should ratify the efforts of the other branches. While this principle is clear in White's dissents in *Chadha* and *Synar*, it also may be seen in his dissent in *Northern Pipeline* (1982),<sup>4</sup> as well as his decision to join the majority opinions in both *Morrison* (1988) and *Mistretta* (1989).<sup>5</sup>

Apparent throughout these opinions is White's claim that there are distinct demands placed upon governing institutions in late 20<sup>th</sup> century America, and such demands force the political branches to craft innovations that may not necessarily comply with the letter

---

Justice John Marshall has been called the Court's first republican schoolmaster as his opinions gave life to the country's young Constitution.

<sup>4</sup> In this case, White felt that bankruptcy judgeships created by Congress, although possessing some of the power reserved to Article III federal judges, were not expressly prohibited by the Constitution and were necessary to address late Twentieth century bankruptcy issues and caseloads.

<sup>5</sup> In *Morrison*, the Court upheld the constitutionality of the Independent Counsel position, and in *Mistretta*, the Court upheld the constitutionality of the United States Sentencing Commission.

of the Constitution. For White, the Supreme Court should not reject these innovations at first blush; rather, he argues the Court should look closely at whether the political branches have met the spirit of separation of powers – are there sufficient checks to maintain the constitutional balance envisioned by the framers?

In addition to the aforementioned theme, I have begun to ascertain various other themes that permeate White’s administrative law opinions. As my chapter summary indicates (see pages 16-18) and as mentioned above, my initial research suggests at least five other themes in his opinions: official immunity, administrative due process, White as a constitutional schoolmaster, administrative discretion, and administrative searches.

### *Research Design*

The theoretical grounding for this research is rooted in administrative law. Administrative law consists of both the laws and regulations passed and implemented by the political branches of government and the case law handed down on the same by the courts (see discussion of administrative law above on pages 9 –10). As the dissertation will examine the opinions of a Supreme Court justice, administrative processes at both the federal and state levels will be given exposure, but primarily to the extent they provide grist for the mill of Justice White’s administrative jurisprudence. In short, this dissertation is steeped in the administrative process dilemmas that have arisen since the rise of the administrative state and that have found their way to United States Supreme Court for resolution. These administrative process dilemmas, such as the constitutionality of administrative searches as components of a regulatory scheme, often pit the imperatives of administrators against the constitutional norms that protect

individuals and lead to the Supreme Court rendering a decision that settles any or all related disputes.

Moreover, this research assumes, like much of the body of research found in legal journals, that careful analysis of the written product of courts and judges can lead to conclusions that aid in understanding the impact the law may have on various persons or processes. Whether examining the Warren Court's impact on the development of civil rights in 1950s and 60s or dissecting the roots of Justice Scalia's jurisprudence, such a research tradition typically breaks down the decisions and opinions that are produced, analyzes the text of the opinion, makes connections with previous decisions and opinions, and explores the impact of the same in or across a specific area of the law. With this dissertation, I shall likewise – I will examine Justice White's administrative law opinions, carefully scrutinize their meaning, compare and contrast them to other opinions offered by his colleagues in various cases, make connections over time and precedent, and offer some conclusions as to what can be learned from these opinions.

As such, my dissertation will employ a descriptive research design, as I describe and categorize numerous administrative law opinions authored by Justice White. If one of my hypotheses is correct – that White has some discernible themes present in the body of his administrative jurisprudence – then this will be found only by a careful description and exploration of his opinions in this regard. As I discussed earlier, I shall attempt to determine this by employing the typical case briefing methodology, which will be represented in narrative form in the dissertation.

Throughout this introductory chapter, I have discussed an attempt to ascertain discernible themes in White's administrative law jurisprudence. What is meant by

discernible themes? No matter Justice Potter Stewart's claim that he knew obscenity when he saw it, the process I am employing in this work to identify themes in White's administrative law writings is somewhat more concrete than the one employed by Justice Stewart regarding obscenity. To wit, I looked for values, processes, admonitions, and principles that were constant throughout White's work. As discussed more fully below, employing the textual analysis common to briefing cases, I make connections to what White had said previously on a given topic, how he differed with his judicial brethren, and what values and norms White seemed to be advocating in his administrative law jurisprudence.

In the case study format I am using – case briefing – the emphasis is on the observer engaging in textual analysis of all of the opinions offered in a particular case. Within the cases I have collected and analyzed, there are various areas of administrative law that are represented; for instance, administrative due process, separation of powers, and administrative searches. Within these areas of administrative law, there are various jurisprudential themes or debates that dominate the opinions offered in the various cases.

During the 1980s, the Court offered rulings in a series of cases concerning separation of powers – for example, *Chadha*, *Synar*, *Olson*, and *Mistretta*. Throughout these cases, a researcher can identify common themes in the opinions, the jurisprudential camps on the Court, and how a particular justice, like White, develops a(n) (in)coherent body of thought on a particular subject. This process of textual analysis, making connections among cases, and establishing the development of jurisprudential thought of a particular justice is the foundation of my attempt to discern themes in White's administrative law jurisprudence.

After identifying themes in White's administrative law opinions, the remainder of this work will explore what important contributions White may have to offer to public administration. Here, my purpose is to demonstrate that White does have a valuable administrative law jurisprudence to offer public administration, especially in terms of providing guidance to administrators regarding their work and actions.

The second or normative phase of the project consists of two parts: 1. using Rohr's regime values, what can administrators learn from White's administrative law jurisprudence; and 2. how does White's administrative law jurisprudence conceptualize the judicialization of the administrative process and what is his notion of a constitutionally competent public administrator. With Rohr's regime values, as my earlier discussion indicates (see pages 5-6), I will attempt to explain what administrators can learn from the various themes contained in White's administrative law opinions.

First, I shall explain Rohr's regime values framework. After doing so, I shall then apply that framework to the body of White's administrative jurisprudence. I will employ the following method: 1. what is the nature of White's thought?; 2. what are the regime values, if any, found in that thought?; and 3. on both normative and practical levels, what may administrators learn from White? To wit, the intended audience here is the public administration community – the lessons for public administration will emerge from the thoughtful reader's reflection on White's administrative law opinions. My efforts on this account are intended to structure and refine that reflection.

Moreover, with this normative thrust I shall attempt to place White's administrative law jurisprudence within the body of literature that has claimed: 1. The federal courts have had, since the rise of the administrative state, periods wherein they

attempted to make administrative processes more like judicial proceedings; and 2. The Supreme Court now demands that administrators be constitutionally competent. With #1, I shall attempt to discern if White's administrative jurisprudence is congruent with the various efforts to judicialize administrative processes; if not, what are White's expectations of the administrative process? Concerning #2, I shall once again attempt to get at what kind of normative guidance White is providing to public administrators. In short, what is White's conceptualization of a constitutionally competent administrator?

### Chapter Summary

The remainder of this work is organized in the following manner. Chapter Two covers the literature that informs this project. Included in this review is the previous work that addresses White's jurisprudence while on the bench. There are certain dominant themes in the literature on White, embodying thoughts on his overall jurisprudential philosophy, his tendency towards being pragmatic (explained in Chapter 2), criticisms of his work, especially by the popular press and academe, and his personality. From these criticisms, I move into a discussion of legal realism, since some scholars have claimed that this school of legal thought is the root of White's jurisprudence. Then, I discuss the analytic frames I employ to analyze White's administrative law thought – Rohr's regime values, the notion of constitutional competence, and the judicialization of administrative processes.

Chapter Three presents the first portion of White's administrative law opinions that I shall brief and begin to explore in terms of themes, connections, and anomalies. Here, the topics covered begin with White as Constitutional Schoolmaster in the cases of *Red Lion Broadcasting* (1969), *CSC v. Letter Carriers* (1973), and *INS v. Lopez-Mendoza*

(1984). After examining this topic, I then discuss the issue of separation of powers, and in so doing, offer three cases on the subject – *Northern Pipeline* (1982), *INS v. Chadha* (1983), and *Bowsher v. Synar* (1986). The third line of cases discussed in Chapter Three concerns official immunity, an area of administrative law in which White had some impact. The cases addressed in that section include *Wood v. Strickland* (1975), *Butz v. Economou* (1978), *Nixon v. Fitzgerald* (1982), and *Canton v. Harris* (1989).

Chapter Four presents the second portion of White’s administrative law opinions examined in this project. The first topic is administrative due process, an issue that has permeated the Court’s work as the administrative state grew throughout the Twentieth century. The Court’s decisions in *Arnett v. Kennedy* (1974), *Goss v. Lopez* (1975), *Cleveland Board of Education v. Loudermill* (1985), and *Brock v. Roadway Express* (1987) will be discussed in this section. The remaining two topics covered in this chapter are administrative discretion and administrative searches. With the former, I will review *Delaware v. Prouse* (1979) and *Motor Vehicle Manufacturers’ Association* (1983). Concerning administrative searches, the four cases presented include *Camara v. Municipal Court* (1967), *See v. City of Seattle* (1967), *United States v. Biswell* (1972), and *Marshall v. Barlow’s* (1978).

Chapter Five provides the analysis of White’s administrative law opinions, through the three analytical frameworks discussed above. Here, I will emphasize what the interested public administrator may learn from White’s opinions, including the values emphasized, the dialogue between White and his colleagues on the Supreme Court, what suggestions White has for those who desire to be constitutionally competent in their public posts, and what White’s ideas are concerning the judicialization of the

administrative processes in the last 40-50 years. Chapter Six completes the work by offering conclusions on White's contributions to public administration and administrative law, lessons from these contributions for public administrators, and ideas for future areas of research on the subject.

## Chapter II: The Literature

**Jurisprudence:** 1. A system or body of law; 2. The science or philosophy of law. *Webster's New Collegiate Dictionary*. 1981.

### Introduction

While at a conference a few years back, a number of scholars questioned me about what public administration could possibly gain from a study of Justice White's administrative law opinions. For some, their questions betrayed disapproval of a number of White's opinions, whether his dissents in *Miranda v. Arizona* (1966) or *Roe v. Wade* (1973) or his majority opinion in *Bowers v. Hardwick* (1986). Others asked how White's administrative law jurisprudence would be analyzed, so that an interested party would be able to understand White's contributions to public administration practice and theory.

This chapter attempts to answer those questions. Specifically, I commence with an examination of the existing literature that addresses White's jurisprudence – doctrinal strands, writings, and common perceptions of his work on the Supreme Court. Then, I explain legal realism, as a small group of scholars have posited the notion that White's jurisprudence could be explained by his legal education at Yale University, where legal realism informed the curriculum. After reviewing legal realism and its possible application to White, I conclude with a review of the literature bearing on three frameworks – Rohr's regime values, constitutional competence, and the judicialization of the administrative process – that I use to analyze White's administrative law opinions in Chapter 5.

### White's Jurisprudence

I have examined over 40 sources that look at White's jurisprudence, trying to determine whether any of them paid close attention to White's administrative law

opinions or claimed White had a substantial impact on administrative law. In brief, I have yet to find any author making such substantive claims.

There were, however, some common themes in the literature regarding White's jurisprudence. For instance, some claim that White's jurisprudence lacked a comprehensive philosophy, focusing more upon case-by-case specifics and less on constructing a clear, consistent theory (Price, 1980; Goldman, 1996; Abraham, 1999; Kindred, 1995). Monroe Price represents the more positive take on White lacking a clear, overarching philosophy. Price said that this inconsistency represented a view that judges should not have programmed responses to the issues; rather, they should reach tentative and analytical answers to society's toughest issues (Price, 1980). As Henry Abraham notes, most scholars who labeled White as practical and independent have also characterized and/or criticized him for being blunt, unpredictable, and very cautious in breaking new jurisprudential ground (1999; p. 211). Dennis Hutchinson mirrors this view by stating that if there was one label to hang on White's jurisprudential philosophy it would be incrementalism – White decided issues one case at a time, writing in a self-effacing and opaque style, eschewing constitutional grounds when statutory construction would do the job at hand (1998; p. 359).

In terms of his writing style and impact, some commentators have claimed that White was functional; it accomplished the task with little rhetorical flourish or concern in persuading others that his thoughts were the best or most appropriate ones for the Court to take (Ibid; 363). In the same vein, some commentators contend that White's writing was efficient, characteristic of a justice who valued speed in his opinion-writing more than authoring sweeping answers to questions posed to the Court (Lazarus, 1998).

Others, such as Kay Kindred, contend that the upshot of White's "narrow approach to opinion writing" was that it limited his long term influence on the Court, as others on the Court were not likely to be persuaded by his tightly drawn writings (1995; p. 212).

Other scholars, such as Bernard Schwartz (1993) and Mary Ann Glendon (1994), emphasized how White was the ultimate lawyer-justice, a pragmatist who favored balancing competing interests before arriving at a decision. Schwartz, for instance, compared White favorably to Justice Potter Stewart, who sat on the Court for much of White's tenure and who was considered a member, like White, of the "swing center" on the Court during the 1970s. Both justices, according to Schwartz, defied classification and employed a lawyer-like approach to most cases, which meant that they tried to craft solutions that were not necessarily tied to an overarching judicial approach (Schwartz, 1993; p. 273).

William Nelson (1994) goes somewhat further than Glendon and Schwartz, contending that White was a "[President] Kennedy liberal," who emphasized pragmatic social reform and equality. According to Nelson, however, White engendered the most criticism for his insistence that in a democracy the people's elected representatives and not the unelected judiciary should create public policy. Kenneth Starr, writing before his controversial turn as Independent Counsel, expands on Nelson's view by stating that White showed a New Dealer's skepticism of the federal courts overturning legislation passed by the people's representatives, comparing him favorably to Justice Frankfurter (albeit without Frankfurter's law school professor's pretensions) (1993).

Those less generous in appraising White's work on the Court commented that he was inconsistent, mainly due to his case-by-case philosophy (*New York Times*, 1993), or that

he was hostile to certain minority or individual rights, for example the rights of those accused of crime (Gavin, 1988; Rosen, 1993; and Goldman, 1996). Jeffrey Rosen, at the time of White's retirement from the bench, wrote in the *New Republic* to then President Clinton that in selecting White's replacement, Clinton should avoid selecting another Justice like White who had no guiding philosophy, was antagonistic to various individual rights, and had grown increasingly conservative while on the Court. Tom Gavin, writing in 1988, led off his editorial for the *Denver Post* by claiming that White should be "recalled" from the bench, because his inconsistent judicial philosophy led to an apparent lack of respect for fundamental rights found in the Constitution – free speech, privacy in one's home, and rights of the accused.

The popular press and law review accounts were especially critical of White, for, as Hutchinson claimed, they both viewed him as a knave and a fool (1998; p. 382). With the popular press, White was skewered for his First Amendment speech and press opinions allegedly showing a marked antagonism toward the role of the press in a democracy (see Reston, *New York Times*; 1978).<sup>1</sup> Charles McCabe of the *San Francisco Chronicle* was literary in his criticism, alluding to *Les Miserables* when he claimed that White was Javert, doggedly chasing down the popular press as if it was Jean Valjean (1979). Moreover, academics were less than enthusiastic about White's non-doctrinaire votes and writings, inelegant opinions, and "wrong" votes in Court decisions on many controversial issues of the times – such as abortion, death penalty, and rights of the accused (Hutchinson, 1998; p. 384).

---

<sup>1</sup> See White's opinions in *Branzburg v. Hayes* (1972), where the Court refused to find a testimonial privilege for journalists, *Zurcher v. Stanford Daily* (1978), where White writing for the majority held that reasonable searches of newsrooms pursuant to search warrants did not violate the First Amendment, and *Herbert v. Lando* (1979), where White, again writing for the majority, held that the First Amendment did not prevent reasonable discovery requests for outtakes and other unpublished material in a libel suit.

Other critics tended to focus as much on White's personality and interactions with those outside the Court as they did on his jurisprudence. For instance, some argued that White had neither the skills nor the temperament to be an effective Justice (Cover, 1979). As Hutchinson, in his 1998 portrait of White, commented, many in the press and in academe seemed less willing to give White and his jurisprudence any quarter due to his less-than-warm relationship with the press and his lack of effort in courting academics regarding the merits of his views in any area of the law. Schwartz (1993) mirrors Hutchinson's point in this regard, remarking that White tended to be well-respected by his colleagues on the Court, especially for his conference work and efficiency in writing opinions, in contrast to the annoyance of the press with White's bluntness and non-nonsense manner.

Overall, I came away from the literature review assured that there had been little or no research committed to White's administrative law opinions and their potential impact on public administration. Although some scholars, such as Ides (1993), Stith (1993), and Nelson (1994), have attempted analyses of White's jurisprudence in terms of its New Deal and legal realism foundations, none has made a concentrated effort to explore the corpus of White's specific administrative law thought. Additionally, White's jurisprudential reputation centered upon his functional, incremental, and pragmatic tendencies, indicating that White did not create a body of work that was unified overall or within a specific area of the law. In short, he was often a "swing" vote during his tenure on the Court (Lewin, 1984), disappointing many within the liberal community who had hoped that a justice appointed by President Kennedy would provide more consistent support of civil rights and liberties (Nelson, 1994).

## Legal Realism

As noted above, some commentators have remarked that a possible foundation of White's jurisprudence was legal realism (Ides, 1993; Stith, 1993; and Nelson, 1994). I now examine what is meant by legal realism and how White may fit into this theory of legal jurisprudence.

The legal realist tradition states that the purpose of law should be concerned with developing social wants and needs while reducing social tensions and costs. In concrete terms, legal realism emphasizes law as experience, maintaining that it has to be more than just a set of legal principles to be applied blindly and without consideration of consequence (Cooper, 2000; p. 58). Arising at a time in United States' history when legal formalism was the dominant mode of legal thought (roughly from the late 1880s to the early 1900s), legal realism attacked head on formalism's contention that judges do not make law. Rather, legal realists argued that not only do judges make law, but that they should do so (p. 58).

The first group of influential legal scholars advocating legal realism, including Supreme Court Justice Oliver Wendell Homes, Jr., derided the claim that the law could be discovered through pure reason. Holmes said that discovering the meaning of law usually required that a judge apply his or her biases, experiences, and knowledge to a case and that to believe one could neutrally apply well-established legal rules to any or all cases was to ignore the human element of judging and the unique facts of every case (pp. 58-59).

Later legal realists, such as Roscoe Pound, Jerome Frank, and Glendon Schubert, expanded upon the work of their predecessors by emphasizing the processes in which law

is interpreted in the hope that by studying scientifically the methods in which law is made, we could better understand the non-rational components of legal decisions (Cooper, p. 59). These later works by the legal realists contained the following basic assumptions:

- Legal decisions are not rational;
- Judges have preferences and values that affect their decisions;
- Judges' decisions, especially on multi-member appellate courts, are affected by small group dynamics found in any collegial body;
- Strict legal principles should be eschewed in legal decision making; rather the judge is tasked with understanding the particular facts of a case and arriving at a decision that addresses those specific facts (Cooper; p. 59).

For some scholars, legal realism provided a needed wake-up call to the American legal profession, because it helped expose the contradictions inherent in almost any body of law – laws frequently contradict each other and many laws are written in such vague language that a judge could interpret them either broadly or narrowly depending upon his or her preferences (Hasnas, 1995; p. 46-47). Legal realism was also championed for its encouragement of focusing on the consequences of the law; legal decisions frequently have an impact on policy specifically and society generally, and to think otherwise was a logical fallacy (p. 47). Others have commented that legal realism led the way for the American legal profession to become more responsive to society's needs. By encouraging lawyers to emphasize policy implications in their case briefs, judges were led to the well of changing the law to improve society (see Feeley and Rubin; 2000).

This notion of responsive law, coined by Philippe Nonet and Philip Selznick (1978), takes into account that society has changed from the time of the founders and of the heyday of legal formalism. Using government administration as an example, Nonet

and Selznick contended that because modern governance is characterized by blurred lines of authority, complex spans of control, and ever-changing forms of accountability, the law must also change. New rights claims, challenges to government authority, and court cases designed to clarify the law should be seen as opportunities for judges to respond to and to correct the legal system for society's good (pp. 103-107). In short, the law being responsive allows for the kind of problem-solving required by modern society. Formal barriers found in original forms of accountability and separation of powers fall short of meeting the requirements society places upon the law today. Accordingly, if the law is to remain relevant today, it needs to meet those demands.

This brief explanation of legal realism is driven by the claim a few scholars have made about Justice White – that his jurisprudence may be explained by his education in the early 1940s at the Yale University School of Law, where a number of prominent legal realists scholars, including Underhill Moore and Arthur Corbin, taught. William Nelson, in particular, has claimed the White was such a disappointment to liberals because he was a legal realist. For Nelson, White's roots in legal realism led to his emphasis on answering narrow legal questions, searching for particular solutions, and bypassing bright line legal rules. Such a philosophy would put White in good company with Justices Brandeis and Holmes, but, according to Nelson, it also contributed to White being rather leery of judges substituting their policy preferences when the people's representatives had spoken (Nelson, p. 521). Accordingly, White ran afoul of many liberal legal scholars and the mainstream press, as his trepidation regarding judges substituting their policy preferences for that of the elected branches of government led him to dissent from the

Warren Court's criminal rights revolution in the 1960s and from the Court's confirmation of a woman's right to choose in *Roe v. Wade* (1973).

While Nelson and others, such as Allan Ides (1993, 1994), claim that White's pragmatism on the Court stemmed from his legal realist training, other scholars are more cautious. For instance, Hutchinson contends that we should not put too much stock in the effect White's law school education had on him because legal realists were not the only ones who taught at Yale University at that time (1998, p. 146). Hutchinson argues that other changes in the American legal landscape could have influenced White – the Supreme Court beginning to defer to President Roosevelt and Congress, policy consequences becoming part and parcel of major Supreme Court decisions, and the like. Additionally, he argues that White's experiences at Oxford, in the Navy during World War II, and as a high ranking member of President Kennedy's Justice Department could have had as much to do with his pragmatism on the Court as did his legal education (pp. 147, 150).

Additionally, Starr (1993) claims that legal realism had little to do with White's jurisprudence when he sat on the Court. Rather, Starr contends that White was the last New Deal Justice, who mirrored quite closely the attitudes of those Justices, such as Frankfurter and Jackson, appointed by President Roosevelt who were skeptical of judges' overturning legislation that aimed to improve society's lot (p. 37). Starr's perspective is that Justice White, like any good New Dealer, favored the political branches' attempts to solve society's problems, and deplored the unelected judiciary second-guessing their handiwork (p. 37).

Overall, I believe that much of White's jurisprudence may be explained by his formative experiences at law school (whether Yale or Oxford), in the Navy, and at the Justice Department. White's willingness to give the political branches room to try new approaches to long-standing issues (see *INS v. Chadha* or *Bowsher v. Synar*) suggests that Starr may be on point with his description of the roots of White's jurisprudence. Then again, Nonet and Selznick could be applicable to the roots of White's jurisprudence in that White's willingness to look anew at those inventions offered by the political branches (such as the legislative veto at issue in *INS v. Chadha*) was characteristic of a Justice demanding that the law be responsive.

That said, whether his jurisprudence is rooted in legal realism, his life experiences, or both, the one common characteristic that almost every commentator has noted about White's jurisprudence is that he eschewed doctrines and preferred to look at cases individually. Accordingly, White's votes in cases were hard to predict, occasionally ran counter to popular attitudes held by the academe and the press, and led to the conclusion in some quarters that he was a disappointment on the bench. For the purposes of this dissertation, however, the common wisdom regarding White and his jurisprudence provide a fresh canvas to explore whether White's work regarding administrative law has something valuable to contribute to public administration.

### Analytical Frameworks

#### *Rohr's Regime Values*

As discussed briefly in Chapter 1, one of the frameworks I will use to analyze White's administrative law opinions is John Rohr's regime values. In *Ethics for Bureaucrats* (1989), Rohr makes the claim that it is vitally important for public

administrators to be made aware of the ethical norms required of them in their daily public sector actions. Rohr labels such norms “regime values,” and defines them as “the values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic” (p. 68). For Rohr, the most critical component of public administration is the recognition and implementation of these regime values by those tasked with doing so – administrators.

Regime values are based upon three considerations (p. 68):

1. Ethical norms should be derived from the salient norms of the regime;
2. Regime values are normative for administrators, because they take an oath to uphold the Constitution; and
3. Regime values can be discovered in the public law of the regime.

For the purposes of this dissertation, it is this last consideration that is of relevance. Rohr mentions that in addition to public law, there are other indicators of regime values of which administrators may avail themselves, including literary works, scholarly interpretations of American history, speeches of outstanding politicians, and major Supreme Court decisions (p. 75). As Rohr demonstrates throughout *Ethics*, his preference is for Supreme Court decisions because these decisions expose administrators to conflicting interpretations of American values through their four, interrelated characteristics – institutional, dialectic, concrete, and pertinent (p. 77).

The *institutional characteristic* of Supreme Court decisions rests with the knowledge that they represent values that span an extended period of time and apply to all citizens of the country. Rohr states that bureaucrats must be able to distinguish between stable principles and passing fads when studying the values of the American regime. The Justices and their opinions are part of an institution that is well established,

allowing for the creation and nourishment of a corpus of jurisprudence that relies upon stated principles developed in previous opinions. However, as Rohr is quick to point out, Supreme Court decisions and opinions are occasionally contradictory and confusing, leading him to advise administrators that they must take into account the context in which the opinion is being offered. To wit, administrators have to be cognizant of how the Court is at times reinterpreting established principles in light of the new circumstances taking place in the United States (p. 78).

When Rohr refers to Supreme Court decisions as being *dialectic*, he is describing how in any given Court decision there may be multiple opinions – whether majority, concurring, or dissenting. The opinions offer the interested administrator opportunities to view a dialogue or debate concerning issues that many of them face in common and upon which the law may have some bearing. In reading this dialogue, the interested administrator may reflect upon his or her policy and legal constructions, learn different ways to approach dilemmas he or she may have encountered, and formulate responses for the future that comply with a Court ruling, while understanding other considerations presented by those in the Court’s dissent (pp. 80-81).

A third characteristic is that the opinions are *concrete*. What Rohr is getting at here is how Court opinions, no matter their discussion of abstract constitutional and legal notions, must provide an answer to a concrete question (p. 81). Supreme Court decisions, at least the most instructive ones, address specific questions, resolve ambiguity, and demonstrate what certain values (i.e. equal protection under the law) mean in the daily workings of government.

The concreteness of Court decisions is even more obvious when one looks at the public administration situations in which they are applied today. For instance, an issue of long standing contention among public administration professionals and scholars concerns the discretion that has been afforded by the legislative branch to those in the executive. With increasing numbers of policy problems and the complexity of those problems, Congress has delegated large amounts of discretion to administrative agencies to apply their expertise to solve these problems. However, it has been difficult to place necessary accountability measures upon the exercise of this discretion. Additionally, as new situations arise with the exercise of administrative discretion, Court decisions on similar situations may be used by administrators to guide their behavior.

The final characteristic that Rohr describes is that of Court decisions being *pertinent*. Rohr states that most political issues of the day find their way to the Court, with the Court frequently offering multiple decisions on a given issue over time. This cluster of opinions can prove to be instructive for the interested administrator, as he or she may be able to view how an issue has developed in society, how the Court has espoused constitutional values applied to the issue over time, and how then he or she may be able to apply to the work they do.

As Rohr makes clear, that particular American trait of turning most issues, whether political or otherwise, into legal disputes means that the Court is ideally situated in our constitutional framework to educate interested parties on what are the relevant regime values (p. 82). And due to many of these pertinent issues being present in clusters of cases, such as abortion or school prayer, the interested administrator can watch the

public argument on the Court address all of the relevant issues and determine which values are most important (p. 83).

So, why use Rohr's regime values framework in analyzing White's administrative law jurisprudence? The benefit of Rohr's framework to this work lies with how it encourages administrators to understand fully the values of the American people by reading and becoming aware of the regime values pronounced by the Court. In this project specifically, administrators can be instructed by immersing themselves in the regime values offered by Justice White in his administrative law opinions.

#### *Constitutional Competence*

Constitutional competence is the second lens that I use in this project to analyze Justice White's administrative law opinions. The notion of constitutional competence refers to the Supreme Court's majority opinion in *Harlow v. Fitzgerald* (457 U.S. 818-819), wherein the Court held that all public administrators have to be constitutionally competent in their posts and that ignorance of the law is not a defense for violating the rights of others.

Rosenbloom, Carroll, and Carroll develop this admonition throughout a small text entitled *Constitutional Competence for Public Managers: Cases and Commentaries*. Much like Rohr's claim in *Ethics for Bureaucrats* that administrators should be aware of regime values because they take an oath to uphold the Constitution, Rosenbloom, et al., also place the foundation of their text on the Constitution, and Article VI underscores this point (Rosenbloom, et al., xv). It is in Article VI that states, "the Senators and Representatives, ... the Members of the several State Legislatures, and all executive and

judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution...”

From this constitutional charge, Rosenbloom, et al. discuss how constitutional values frequently run head long into values that have developed among public managers in the United States. For instance, administrative efficiency at times conflicts with due process of law (found in the Fifth and Fourteenth Amendments), and public administrators must resolve this conflict, knowing full well that constitutional values trump administrative ones (Rosenbloom, et al., p. xvi). As Rosenbloom, et al. make clear, even if administrators ignore these constitutional values, “public managers should not be expected to be supported by the American people unless it [public administration] internalizes these values and respects constitutional rights” (xvii).

More than gaining the support of the American public, today’s administrators, according to Rosenbloom, et al. have to be aware of how violating the Constitution, or statutes based upon it, could lead them to being sued individually. As will be discussed in the next section of this chapter, Rosenbloom, et al. point to the increased judicialization of administrative processes since the 1950s as yet another reason for administrators to be constitutionally competent. The authors list three changes in constitutional doctrine since the 1950s that highlight the increased judicialization of the work administrators do:

1. The Supreme Court’s ruling in *Brown v. Board of Education* (1954) eliminated the “separate but equal” interpretation of the Fourteenth Amendment’s Equal Protection Clause, thus making a long list of discriminatory government practices unconstitutional (Rosenbloom, et al, p. 44);
2. In the 1960s, federal courts began to view government employment, benefits, and contracts as property (and not privileges), and if the government wanted to

withdraw such property, it had to follow due process (as required by the Fifth and Fourteenth Amendments) (p. 44); and

3. The federal courts resurrected its unconstitutional conditions doctrine, which forbids the government from requiring an individual to give up a constitutional right to receive a government benefit (p. 45).

The above changes have continued during the past decade, as the Court has addressed the various movements occurring within public administration. Whether it is contracting out, privatization of formerly public activities, or the various private-public hybrids that have arisen in the New Public Management movement, the Supreme Court has continued to insist that these new arrangements include constitutional values that protect employees, citizens, and beneficiaries of numerous government services (p. 46).

As applied to this dissertation, constitutional competence is a lens from which I shall demonstrate Justice White's ideas of what constitutes constitutionally competent administration. For example, White's majority opinion in *Cleveland Board of Education v. Loudermill* (1985) suggests that he is quite willing to undertake the difficult task of balancing both the rights of government employees (who must be given a pre-termination hearing) versus the imperatives of efficient administration (the hearing does not have to be a full-blown trial like those in criminal courts of law). White's opinion in *Loudermill* points out to the constitutionally competent administrator that he or she cannot lean too much toward managerial values, because administrators do not operate in a legal vacuum. Rather, administrators have to balance both sets of values, trying to find solutions that allow for both values to be appreciated, but within discernible limits.

#### *Judicialization of the Administrative Process*

Administrative law scholars, like Cooper (2000) and Warren (1996), have remarked that since the rise of the modern administrative state, there have been periods where the federal courts have tried to judicialize the administrative process – that is, make these administrative processes more like those found in the courts. For instance Horowitz (1977, pp. 150-1) has discussed how administrative agencies are beginning to function as “second-class courts,” wherein they are expected by federal courts to implement procedures that mirror rather closely those used by courts of law. He goes on to say that agency processes have become so much like those of the courts that it is often difficult to determine where agency action ends and judicial functions begin (p. 151).

Warren (1996) has suggested that because the federal courts began to be less deferential to agency determinations in the late 1960s and early 1970s, agencies in response began to make processes more court like, with more hearings, appeals, evidence on the record, and the like. Warren, summarizing other scholars on the subject, claims that because the federal courts began to find that Congress was delegating large amounts of unchecked authority to agencies and agencies were seen to be occasionally abusing such authority, the courts stepped in to require that procedural safeguards, such as those found in a court of law, be utilized by agencies (p. 422).

This judicialization of agency behavior has led to an extended debate among scholars and members of the federal courts. For instance, the District of Columbia Circuit Court of Appeals in the 1960s and early 1970s gained the reputation of being stringent in monitoring the activities of federal government agencies. As D.C. Circuit Court of Appeals Judge Skelly Wright made clear, the job of the federal courts is to make sure that the intent of Congress does not get lost in the halls of the federal

bureaucracy (*Calvert Cliffs v. AEC*, 1972). The full flavor of this distrust of agency activity may be seen in Justice Douglas's dissenting opinion in *Sierra Club v. Morton* (405 U.S. 727, 1972), wherein the Justice indicated that the courts had to force regulatory agencies to be more judicial in their procedures because agencies had developed a reputation for having cozy relations with those who are to be regulated. Implicit in this contention was the notion that it was not good enough for the federal courts to defer to agency expertise, because large administrative departments had grown to favor the "haves" (big business, well-heeled interest groups, etc.), while ignoring the "have-nots" (the poor, minorities, and those not represented by well-established interest groups) (Warren, 1996, p. 423).

Others, however, are quite concerned about the judicialization of the administrative process. For example, some have argued that the federal courts should be concerned only about administrators maintaining basic constitutional rights, and that by judicializing the administrative process the courts are eliminating the political give and take that should be part and parcel of any political process (Ely, 1980; pp. 181- 183). Others have claimed that Congress has known full well that over the years it was giving administrative agencies discretion without much guidance – policy, constitutional, or otherwise. Such delegation of authority then raises the question of whether the federal courts should be interjecting themselves into the process, unless there are obvious violations of constitutional rights (Bork, 1990; p. 81).

As recently as 1984, the Supreme Court seemingly weighed in on this debate with its ruling in *Chevron v. Natural Resources Defense Council* (104 S.Ct. 2778). The Court held that the federal courts should allow agency interpretation of statute and defer

to agency discretion unless the administrative action is expressly prohibited by statute. However, the issue still has some life, because, as Merrill (1992) concluded, the federal courts were imposing more stringent standards on agency behavior post-*Chevron* than they did pre-*Chevron*. This tendency seems to be reinforced by the Supreme Court's somewhat puzzling decision in *United States v. Mead* (533 U.S. 1, 2001).<sup>2</sup>

In terms of this dissertation then, certain questions arise. For instance, what is the nature of this judicialization? Is this effort by the courts one whereby they hope to impose strict constitutional and judicial norms upon administrators who exercise discretion given them by the Congress? Or is the judicialization more sophisticated, taking into account the particular demands placed upon administrators while also ensuring a modicum of constitutional protection for those who come into contact with the administrative apparatus of the state? For instance, when examining White's administrative law opinions, do we see a justice who tries to balance these competing interests? If so, what can public administration learn from these opinions both in theory and in practice?

### Chapter Summary

This chapter began with a discussion of the literature that addressed Justice White's tenure on the Supreme Court. In attempting to determine whether any of the literature spoke to White's jurisprudence, and in particular, to his thoughts on administrative law, it is apparent that very few commentators attribute any significant

---

<sup>2</sup> In *U.S. v. Mead*, Justice Souter's majority opinion held that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law. A Customs Service ruling letter does not have the force of law as it was not issued via notice and comment or adjudication, and thus, is not deserving of *Chevron* deference. However, under *Skidmore v. Swift & Co.* (323 U.S. 134, 1944), a Customs ruling letter is entitled to "respect" from the federal courts based on its persuasiveness. As Justice Scalia makes clear in his dissent, why the Court decided to further qualify *Chevron* deference with a return to *Skidmore* is quite puzzling and may only muddy the waters of when federal courts should or should not show deference to agency interpretation of statutes.

doctrine or philosophy to Justice White. Most have described White as pragmatic, lawyer-like, and devoid of any overarching judicial philosophy. Those less kind describe White as a disappointment, inconsistent, hostile to certain civil rights, and hardly a judicial craftsman. Yet, for the purposes of this project, it is plain that none of the literature concerning Justice White speaks of any special focus or singular jurisprudence coming from White regarding public administration. Accordingly, the rest of this work will aim, in part, to fill this gap in the literature regarding Justice White.

To do this, I also developed in this chapter the analytical lenses I will employ to examine White's administrative law opinions. In particular, I explained Rohr's concept of regime values and how these values may be found in Supreme Court opinions. In this project, I will be examining the regime values found in Justice White's administrative law opinions and how these values may be applicable to public administration.

Additionally, I also explained the notion of constitutional competence and how I shall explore within White's administrative law opinions his notion of the constitutionally competent public administrator. The last analytical framework I developed in this chapter concerns the idea of judicialization, that is how the federal courts during the past few decades have attempted to make the administrative process more like those employed by the courts. Finally, I concluded my discussion of this analytical lens by discussing how it may be applicable in examining the import of White's administrative law jurisprudence to public administration.

### Chapter III: White's Administrative Law Opinions, Part I

The problem in any case is to **arrive at a balance** (emphasis added) between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees. Justice Byron White, *CSC v. Letter Carriers*, 413 U.S. 548 (1973).

#### Introduction

In the following pages, I will explore three types of Justice White's administrative law opinions. The first set deals with Justice White acting as a constitutional schoolmaster, wherein he offers instruction on the application of constitutional norms and values in modern governance contexts. In *Red Lion Broadcasting*, a case concerning the constitutionality of the Federal Communication Commission's (FCC) fairness doctrine, White carefully explains the difficult balancing act that federal courts must undertake in weighing the interests of the public (as represented by the FCC) versus the First Amendment rights of radio broadcasters.

In *CSC v. Letter Carriers*, White's majority opinion answers in the affirmative the question of whether the Hatch Act, a New Deal law designed to curb potential partisan influences on federal government employees, was constitutional. As in *Red Lion Broadcasting*, White's *Letter Carriers*' opinion employs a balancing test to get at the competing interests in the case, and in the process offers public administration a tutorial on the competing values at stake as the government attempts to ensure the appearance of impartiality amongst civil servants in the modern administrative state.

The final case in this section is *INS v. Lopez-Mendoza*, which concerns the applicability of the exclusionary rule in the context of a civil deportation order. Here, we find White writing a dissenting opinion, contending that if the purpose of the

exclusionary rule is to deter unlawful public agent behavior while in the pursuit of evidence in a case, then it should not matter if the case is criminal or civil.

The second set of cases revolves around the central theme of whether innovations created by the political branches to satisfy the demands of modern governance comply with the constitutional doctrine of separation of powers. In a series of cases decided in the early to mid-1980s, White dissented from the Supreme Court's rulings that held such innovations violated this doctrine. White's dissents in these cases, including *INS v. Chadha* and *Bowsher v. Synar*, emphasized how the Court needed to employ a more nuanced, looser interpretation of the separation of powers doctrine to judge the constitutionality of these political innovations crafted to address modern governance problems.

The final type of White's opinions this chapter examines centers on official immunity cases the Supreme Court addressed during the 1970s and 1980s. In these cases, White had a significant impact on the Court's jurisprudence, authoring two standards – reasonably should have known and deliberate indifference – that the Court adopted to guide its work when deciding whether public officials and governmental units may be immune from suits alleging violation of civil rights. The cases discussed in this section include *Wood v. Strickland*, *Butz v. Economou*, *Nixon v. Fitzgerald*, and *Canton v. Harris*.

#### White as a Constitutional Schoolmaster

Early evidence of White as a constitutional schoolmaster may be seen in *Red Lion Broadcasting Co. v. FCC* (395 U.S. 367, 1969) and its companion case *U.S. v. Radio Television News Director Association*. Red Lion Broadcasting owned a radio station in Pennsylvania that was found to have violated the FCC's fairness doctrine. This doctrine

was designed to ensure equal time on broadcast stations for political candidates and opposing views on political issues. Red Lion Broadcasting was found in violation of the doctrine when it ran a personal attack on Fred Cook (who had written a book on Senator Goldwater, calling him an extremist), and then failed to provide a transcript to Cook or give him air time to respond. Red Lion Broadcasting challenged the doctrine on First Amendment grounds, claiming the doctrine infringed upon its freedom of press rights. Ultimately the Court of Appeals for the District of Columbia held for the FCC.

As the *Red Lion Broadcasting* litigation was moving through the federal courts, the FCC began the rule making process to make the personal attack section of the fairness doctrine more precise and enforceable. The Radio Television News Director Association challenged these rules on the grounds that they violated the freedom of the press; specifically, that the rules placed unconstitutional limits upon what the press may or may not air. The Seventh Circuit Court of Appeals found in favor of the News Director Association. The United States Supreme Court took both cases to address the conflict among the appellate courts, and more specifically to address whether the FCC's fairness doctrine and the subsequent clarifying rules violated the freedom of the press in the First Amendment. The Court, by an 8-0 vote, found in favor of the FCC.

Justice White's majority opinion centered on two lines of thought. First, he looked to the history of the FCC's authorizing legislation and that of the fairness doctrine to gauge whether the FCC was implementing congressional intent. White contended that versions of the fairness doctrine had accompanied the licensing and regulation of the radio waves since the beginning of the FCC. Additionally, Congress placed the doctrine in the FCC's authorizing legislation in 1959, ratifying what had been administrative

practice for nearly 30 years. Congress made clear in 1959 that the FCC's fairness doctrine and related regulations were appropriate, as long as they did not infringe upon First Amendment rights. Here, Justice White emphasized that it was beyond the scope of judicial review to overturn such clear legislative intent and agency construction of that intent.

The second thrust of White's majority opinion was whether the doctrine violated the First Amendment (through Congress's qualifier in the 1959 authorizing legislation). White began this part of his opinion by discussing how the Court has to balance competing interests when the government aims to curtail constitutional rights. In this case, the Court had to balance the needs of the government representing the listening public versus the First Amendment rights of broadcasters. In this balancing, the Court found that the rights of the listeners trumped the rights of the broadcasters. In explaining why listeners' rights prevailed, White went back to why the FCC was created: in particular, because broadcast frequencies are scarce, the government has every authority to ensure that broadcasters, like Red Lion Broadcasting in this case, do not engage in private censorship of opposing views. Moreover, White deemed as speculative Red Lion Broadcasting's claim that the fairness doctrine would lead to broadcasters not airing controversial issues and editorials.

The case typically is characterized in textbooks and by scholars as a First Amendment, freedom of the press case, with White's majority opinion severely criticized for being anti-press (especially the broadcast press, as the print media is not bound by the fairness doctrine). What many commentators have ignored is that White offered a very good example of the Court engaging in a balancing of competing interests – the

government's interest in regulating the airwaves on behalf of the public versus the constitutional rights of the broadcast press. In doing so, White presents a tutorial regarding the meaning of a constitutional right in the modern administrative state. For instance, White seems to be looking more at the purpose of the First Amendment rather than its words. By looking at the purpose of the First Amendment, White is advocating a normative strain in this Amendment leaning toward the public interest, which contrasts with others, like current Justice Anthony Kennedy, who argue that the words of the First Amendment are meant to further the development of the individual.<sup>1</sup>

Additionally, White's discussion of the proper form of judicial review of agency interpretations of legislative intent is a precursor to the Court's decision in *Chevron v. Natural Resources Defense Council* (1984). In *Red Lion Broadcasting*, White stated it is beyond the scope of proper judicial review for the courts to overturn agency interpretation of clear congressional intent; thus, since Congress had given approval to the fairness doctrine in the 1959 authorizing legislation, the FCC's attempt to promulgate rules to implement that intent should not be reversed by federal courts reviewing such rules. In *Chevron*, Justice Stevens, writing for the majority (of which White was a member), stated that if legislative intent is clear, the federal courts should ascertain if an agency correctly interpreted Congress's intent. Otherwise, if congressional intent is unclear, then the federal courts should defer to reasonable agency interpretation of the statute (even if a court feels that the agency interpretation should be different or could be improved). In short, not only did White's majority opinion discuss the meaning of the

---

<sup>1</sup> See Jeffrey Rosen's article in *The New Yorker* (November 11, 1996: 82 - 90), where Kennedy is quoted as telling a law school class that free speech is also a component of personal autonomy; "It's part of your expression of yourself, it's part of your being able to identify yourself as a person."

First Amendment in the modern administrative state, but his opinion also expounded upon the proper nature of judicial review when Congress delegates authority to agencies to implement public policy.

White's work as a constitutional schoolmaster is probably best seen in the case of *CSC v. Letter Carriers* (413 U.S. 548, 1973). This case concerned various federal employees (including the postal workers' union) and local political party committees challenging the Hatch Act's prohibition against federal workers taking an active part in political campaigns as a violation of their First Amendment rights of free speech. The federal district court upheld the workers' challenge, saying the Supreme Court's ruling in *Mitchell* (1947) left open the possibility that a constitutional challenge to the law's definition of political activity as vague and overbroad could successfully be brought (and was in this case).<sup>2</sup>

The Civil Service Commission (CSC) appealed the lower court's ruling to the Supreme Court, with the Court taking the case to answer the question of whether the Hatch Act's definition of political activity was overbroad and/or vague, and thus, in violation of the First Amendment rights of federal government workers. The Court by a 6-3 vote overturned the lower court, with Justice White writing the majority's opinion.

First, White affirms the Court's ruling in *Mitchell*, making clear that federal employees could be prohibited from engaging in a host of political speech activities. Such prohibited activities included holding office in a political party, working at voting

---

<sup>2</sup> In *United Public Workers v. Mitchell* (330 U.S. 75, 1947), a government employee labor union and various federal government employees challenged the Hatch Act on various constitutional grounds, including the Fifth Amendment, alleging that the ban on federal employees taking part in political campaigns was vague and arbitrary. However, according to the majority in *CSC v. Letter Carriers*, the Supreme Court in *Mitchell* was quite clear that there was nothing vague or arbitrary about the ban on government employees taking part in political campaigns.

polls, acting as party paymaster, actively participating in party fundraising, and campaigning as a party candidate for elective office. Next, White tackles the specific claim of the government employees – that the definition of political activity was vague and overbroad. White states that the CSC definition and regulation of political activity were based directly on the language of the 1940 amendments to the Hatch Act, and therefore, the CSC could not be accused of violating congressional intent. Moreover, White contends that a person exercising common sense could easily understand the CSC’s definition of political activity, especially as the activities in question are typically ones associated with partisan campaigning.

The remainder of White’s opinion was noteworthy for its explanation of the laudable purposes of the Hatch Act. Commencing with a discussion of how all branches of the federal government have to balance the First Amendment political speech rights of government employees against the legitimate interest of government to pursue efficiency in its operations, White carefully describes the four exemplary purposes Congress attempted to achieve with the passage of the Hatch Act:

1. A great end of government, the impartial execution of laws, is guaranteed by limiting some, but not all, political speech of government employees;
2. It is essential that government workers appear to be avoiding the partisan implementation of law if confidence in the United States system of governance is to be maintained;
3. The initial impetus of the Hatch Act, that the growing federal bureaucracy not become a political machine for the executive branch, was still relevant today; and
4. The Hatch Act also provides protection to government employees, who could be pressured to perform partisan activities to retain their jobs.

The dissent, written by Justice Douglas and joined by Justices Brennan and Marshall, focused upon two avenues of thought. First, Justice Douglas contended that unlike the majority, he did not believe that the CSC's definition of political activity was clear, and as such, a number of activities that had no plausible connection to government employees' jobs had been prohibited by the CSC. Second, because the Court had clearly determined that government employment is not a privilege (*Perry v. Sindermann*, 498 U.S. 593, 1972), the government cannot condition employment on a person ceding constitutional rights. In this case, Douglas claimed that the Court was ratifying a regulatory scheme that made continued federal government employment conditioned upon an employee surrendering his or her political speech rights found in the First Amendment.

White's majority opinion reads much like an instructional manual on good governance from the turn of the 20th century. In it, his instruction concerns not legal issues per se; rather, his tutoring is a good example of how the law may lead to important normative guidance to bureaucrats. This guidance highlights the delicate balance between the desire to have civil servants be free of even the appearance of partisan influence versus the constitutional imperative that protects all citizens' political speech rights. In contrast, Justice Douglas's dissenting opinion offers the discerning reader a worthwhile counterpoint to White's opinion in that Douglas attempts to demonstrate how years of CSC regulations had led to an unwieldy list of activities that allegedly were related to partisan activity (and thus were prohibited). As a result, there was not much a federal government employee could do off the job that was not forbidden by the Hatch Act.

The third and final case concerning White as a constitutional schoolmaster is *INS v. Lopez-Mendoza* (468 U.S. 1031, 1984; hereafter referred to as *Lopez-Mendoza*). Lopez-Mendoza and another Mexican citizen, Sandoval-Sanchez, were arrested for the purposes of a deportation hearing. When arrested, both had evidence of and made statements acknowledging their illegal entry to the United States. Both claimed during the subsequent deportation hearing that evidence of and related statements about their illegal entry had to be suppressed, as both the evidence and statements were fruit of an unlawful arrest and search. An administrative law judge and the Board of Immigration Appeals rejected the claim and deported both individuals. Sandoval-Sanchez's appeal reached the appellate court first, with the court ruling that the exclusionary rule<sup>3</sup> prohibited evidence of his illegal entry. The appellate court sent Lopez-Mendoza's case back to the Immigration and Nationalization Service to reconsider its ruling in light of the court's action concerning Sandoval-Sanchez.

When the *Lopez-Mendoza* case reached the Supreme Court, the Court addressed the issue of whether an admission of unlawful presence in the United States made subsequent to an allegedly unlawful arrest must be excluded in a civil deportation hearing. The Court, in a 5-4 vote, held that the exclusionary rule need not apply in a civil deportation hearing. Justice O'Connor, writing for the majority, begins her opinion by distinguishing between a deportation hearing and a criminal trial. For the majority, a deportation hearing is a purely civil action and is not designed to punish past

---

<sup>3</sup> In short, the exclusionary rule states that evidence secured by illegal means and bad faith cannot be introduced in a criminal trial. The rule is founded on Fourth (protection against unreasonable searches and seizures), Fifth (due process), and Fourteenth Amendments (Fourth and Fifth applied to the states). The rule was first expounded by the Supreme Court in *Mapp v. Ohio* (367 U.S. 643, 1961).

transgressions but to end continued violation of immigration law. As such, certain criminal trial protections, like the exclusionary rule, do not apply to deportation actions.

The heart of O'Connor's majority opinion, however, rests with her discussion of the purpose of the exclusionary rule. According to the majority, a long line of Court precedents, including *Janis* (1976),<sup>4</sup> suggests that the federal courts must determine if the application of the exclusionary rule would act as a deterrent to future unconstitutional behavior by government agents. If not, then the exclusionary should not be applied. In this case, O'Connor determines that because there were other accountability checks in the deportation process, the application of the exclusionary rule would not be a deterrent to unlawful action by government officials, and therefore should not be binding in this case.

All four Justices in the dissent – Brennan, Marshall, Stevens, and White – wrote opinions explaining their views. Justices Brennan, Marshall, and Stevens stressed that the foundation of the exclusionary rule does not reside in its deterrent effect on unconstitutional behavior of government agents; rather they contend that the rule's foundation is in the Fourth Amendment's prohibition against warrantless searches. White, though, takes a different tack. He argues that unless the Court is willing to abandon the exclusionary rule for all hearing and trial proceedings, it would be inconsistent to expect one thing from government agents engaging in criminal investigations but another from government officials implementing immigration law. Highlighting the deterrent purposes of the rule, White states that the exclusionary rule should be applied in any/all deportation proceedings when evidence has been obtained by

---

<sup>4</sup> In *U.S. v. Janis* (428 U.S. 433), the Supreme Court held that reviewing courts, when trying to determine if the exclusionary rule applies to a particular case, should engage in a balancing act of weighing the likely social benefits of excluding unlawfully obtained versus whether excluding such evidence would deter future illegal evidence activities by government agents.

deliberate violations of the Fourth Amendment or by conduct a reasonably competent officer should know is contrary to the law or the Constitution.

For many scholars, the *Lopez-Mendoza* case illustrates the continued debate on the Court regarding the foundation, purpose, and application of the exclusionary rule. For instance, those in the Court majority emphasized that the purpose of exclusionary rule was its deterrent effect on unlawful government behavior; if a court determines that deterrent effect is not present or is addressed by other checks on government action, then the exclusionary rule should not be applied. Three of the four Court members in dissent argue otherwise, basing the exclusionary rule squarely on the Fourth Amendment, and thus making clear that the rule's deterrent effect has no bearing on its applicability. Justice White, though, seems to adopt more of a middle ground, demonstrating once again a belief that modern governance requires the federal courts to assume a more nuanced view of administrative behavior. And White is just as demanding of administrators as he is of the courts – bureaucrats should have knowledge of constitutional basics and should not be able to enjoy any rewards for ignoring those basics.

### Separation of Powers: Supporting Political Innovations to Meet the Demands of Modern Governance

There has been much debate regarding the meaning of separation of powers among the federal branches of government in the modern administrative state. At issue is the how the political branches have attempted to accommodate the policy needs of modern society. For instance, what does separation of powers permit when Congress tries to hold administrators accountable when they are implementing delegated authority?

Or, what kinds of arrangements are permissible when Congress and the president attempt to rid the federal government of a seemingly intractable budget deficit problem? Or, may Congress create new federal bankruptcy courts in each federal court district to address a backlog of bankruptcy cases, when those courts are occupied by judges who do not have life time appointment as required by Article III of the Constitution? In brief, as the political branches have tried various innovations to address policy issues of the day, how do these inventions comport with the separation of powers doctrine found in the Constitution?

In 1982, the Supreme Court issued a ruling in the case of *Northern Pipeline Construction Company v. Marathon Pipe Line Company* (458 U.S. 50, 1982; referred to as *Northern Pipeline*). The case originated with Congress in 1978 adding a bankruptcy court in each United States judicial district as an adjunct to the federal district court. Bankruptcy court judges were appointed to renewable 14-year terms, received salaries set by statute, and could be removed by the district court only for cause. The Northern Pipeline Company filed for bankruptcy in one of these bankruptcy courts, with a related filing claiming that part of the reason why it was filing for bankruptcy was due to Marathon Pipe Line Company not honoring contracts the two parties had signed. Marathon sought dismissal of the latter suit, arguing that the creation of the new bankruptcy courts violated separation of powers by conferring Article III judicial power on courts operated by judges without life tenure and protection against salary reduction. Marathon's contention was founded on the idea that judges without life tenure and protection against salary reduction would not have the judicial independence central to the courts established in Article III of the Constitution. The bankruptcy court hearing the

Northern Pipeline Company case dismissed Marathon's motion, but a federal district court granted Marathon's dismissal motion.

In holding that the congressional assignment of bankruptcy jurisdiction to judges in the 1978 law violates Article III of the Constitution, Justice Brennan's majority opinion first established that no constitutional language or Court precedent supports the notion that bankruptcy courts lie outside of Article III of the Constitution. After establishing that bankruptcy courts should fall within the scope of Article III, Brennan then states that Article III requires that the United States judicial power be exercised by judges who have life tenure and protection against salary diminution (judicial independence); the judges in the new bankruptcy courts had neither. Beyond the Article III concerns, Justice Brennan also makes clear that though Congress's intent was commendable, that of reducing the growing bankruptcy caseload, Congress only had the authority to create adjunct judicial bodies to adjudicate disputes over rights it creates (for example, administrative law judges adjudicating agency claims). As bankruptcy claims arise from either state or federal constitutional rights, Congress could only create bankruptcy courts that complied explicitly with the Constitution when a federal bankruptcy right claim was filed.

Justice White, writing in the dissent, contends the majority could have issued a less comprehensive ruling, one that would have held the new bankruptcy judges were not permitted to hear appeals from state courts but were allowed to hear federal bankruptcy cases. Doing this, White suggests, would have maintained congressional authority to establish those institutions needed to enact federal bankruptcy policy. White also accuses the majority of ignoring the reality of bankruptcy filings in the United States – very few

state bankruptcy claims are appealed to federal bankruptcy courts on the grounds that the United States Constitution was violated. For White, then, there was little danger that adjunct federal bankruptcy courts, like those created in the 1978 law, would be usurping the authority of Article III courts.

The last point White offers in his *Northern Pipeline* dissent further develops a theme we will see in a number of his opinions during the 1980s. White demonstrates how the Supreme Court has already approved of innovative solutions the political branches created during the rise of the modern administrative state and therefore should be as willing to consider like solutions brought forth during the period of the 1960s – 1980s. In this case, White argues that there is little difference between the work of constitutionally based Article III courts and the work Congress may assign to Article I courts. Accordingly, White offers that unless the Court wants to reexamine all Article I courts, like administrative agencies tasked with adjudication, then the Court should take a less doctrinaire approach to the bankruptcy courts at question in this case.

As we will see more clearly in White's dissents in *Chadha* (1983) and *Bowsher v. Synar* (1986), his dissent in this case begins to establish a line of thinking wherein he challenges the Court to resist a formalistic interpretation of the separation of powers doctrine. With *Northern Pipeline* specifically, White attempts to cast a light on how the Court has already approved of Congress creating adjudicative functions in Article I bodies that mirror in many ways the functions performed by Article III courts. White seems to be pushing his colleagues to look closely at an innovation created by the political branches and determine if the Constitution expressly forbids a practice or if the political branches are operating within the spirit of separation of powers.

White's contention regarding the most appropriate manner to interpret separation of powers in the modern administrative era is best seen in the case of *INS v. Chadha* (462 U.S. 919, 1983; hereafter referred to as *Chadha*). Jagdish Chadha, an alien in the United States on a student visa, was notified that he had to leave the country or be deported when his visa expired in 1972. After various administrative appeals, an Immigration and Naturalization Service (INS) administrative law judge granted Chadha's appeal to have his deportation order suspended, and the Attorney General reported this suspension to both Houses of Congress, as required by law. This law gave either chamber of Congress the authority to veto the Attorney General's recommendation, which the House of Representative did regarding Chadha and five other aliens. The INS resumed deportation proceedings against Chadha, which he challenged on the grounds that the House's action (a legislative veto of an agency action) violated the Constitution's separation of powers doctrine. The INS dismissed Chadha's appeal on the grounds it had no authority to hear such a claim. Eventually, Chadha's challenge landed in the Ninth Circuit Court of Appeals, which held that the legislative veto in this case violated separation of powers.

When *Chadha* came before the Supreme Court, the Court held that the legislative veto in the Immigration and Nationality Act violated the separation of powers doctrine in the Constitution. The substance of Chief Justice Burger's majority opinion begins with an assumption – the veto in the INS authorizing statute was, in effect, legislative in purpose. Burger's claim is that the House's veto in this case had the effect of law regarding immigration policy, as the "House took action that had the purpose and effect of altering the rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch" (955).

Therefore, the veto had to comply with the process in the Constitution concerning the passage of legislation. In particular, proposed legislation has to pass both Houses of Congress (bicameralism), and then, be presented to the President for approval (presentment). Because neither bicameralism nor presentment occurred, Burger found that the one House legislative veto in *Chadha* violated the Constitution.

There were two dissents in this case. Justice Rehnquist's dissent focused on the issue of severability – he did not believe Congress intended this section of the INS law containing the veto to be severable from the rest of the law, and therefore, the Court had to find the whole law unconstitutional or nothing at all. Justice White also provided a dissent in this case, which commenced, at least by White's standards, on a very biting note. Accusing the Court of issuing a sweeping opinion when it could have used far narrower grounds to hold the one House veto unconstitutional,<sup>3</sup> White claims the majority gives Congress a Hobson's choice – either stop delegating authority to agencies and start writing time-consuming, detailed legislation, or continue delegating huge expanses of authority to agencies without any hope of controlling the exercise of the authority.

Substantively, White criticizes the majority's description of the legislative veto as merely efficient, convenient, and useful. Rather, White argues that the veto is an indispensable political invention that preserves essential constitutional values, like accountability, by allowing Congress to hold the executive branch responsible while at the same time allowing for the passage and implementation of necessary public policy.

---

<sup>3</sup> Initially, many commentators, like Justice White, feared that the *Chadha* decision would be the death-knell for the legislative veto. However, as others have documented (Fisher, 1985; Craig, 1988; Schwartz, 1991; and Ripley and Franklin, 1991), the legislative veto is alive and well, as Congress has passed over 100 laws since the *Chadha* decision with language that has the effect of a legislative veto.

White also takes the majority to task for ignoring how the Constitution is silent about the legislative veto; as such, the Court, in his eyes, should only require that the veto, or any other political branch invention, comply with the spirit of the separation of powers doctrine. In this case, the veto does meet the spirit of the Constitution, because the veto only occurred after both Houses of Congress and the President approved its use in the INS authorizing legislation. White's final point of disagreement with the majority's opinion centers upon how the Court had already given its approval of government actions that have the effect of lawmaking but do not fulfill the bicameralism and presentment requirements of the Constitution – namely, all of the rulemaking associated with the modern administrative state.

The contrast between Burger's majority and White's dissenting opinions could hardly be starker regarding the doctrine of separation of powers. Burger and the majority seem to have a strict constructionist view of the doctrine – separate powers with very little sharing of these powers. White, on the other hand, seems to be stressing a loose construction of the doctrine, tending to the concept of separate *and* shared powers between the branches of the federal government.<sup>6</sup> Beyond his notion of separation of powers, many commentators (Hutchinson, 1998, pp. 397-400) have remarked that White's dissenting opinion in *Chadha* is the epitome of his jurisprudence. In the opinion, one finds White eschewing grand theories, taking a balanced approach to a case, and championing the need for the Court to understand how the Constitution may permit

---

<sup>6</sup> As will be developed in Chapter 5, White's view that the separation of powers doctrine should be read to mean separate but shared powers can be placed within the context of *Federalist 51*, where Publius attempts to explain what the founders envisioned with the unique separating and sharing of powers found in the federal government.

innovations, like the legislative veto, so that the political branches may attempt to address the demands placed on government in the 20th century.

Three years after the Court decided *Chadha*, it looked at the constitutionality of the Gramm-Rudman-Hollings Act of 1985 in the case of *Bowsher v. Synar* (478 U.S. 714, 1986). The Gramm-Rudman-Hollings Act was passed in an attempt to eradicate the federal government's budget deficits within a period of five years. If the government's proposed budget in a given year surpassed a predetermined deficit cap, one section of the law gave the Comptroller General the authority, after reading reports from the Congressional Budget Office and the Office of Management and Budget, to report conclusions regarding across-the-board spending cuts to the President, who was to follow such conclusions without change. Members of Congress and the National Treasury Employees Union challenged the law on the grounds that, by giving the Comptroller General the executive branch function of reporting the spending cuts, the Gramm-Rudman-Hollings Act violated separation of powers because only Congress could remove the Comptroller General from office (thus, making the position a legislative one). After the lower federal courts found for Synar, a congressperson representing those in Congress challenging the law, Comptroller General Bowsher appealed to Supreme Court.

The Court took the case to answer the following: Is the assignment to the Comptroller General of certain executive functions in the Gramm-Rudman-Hollings Act of 1985 a violation of the separation of powers doctrine? The Court, by a 7-2 vote, answered yes to that question, with Chief Justice Burger once again writing for the majority. Relying upon a part of his majority opinion analysis in *Chadha*, Burger states that each of the branches of the federal government has specific functions that are not

shared with the other branches, and in particular, the Constitution does not permit the Congress to execute the law. From that constitutional foundation, Burger then proceeds to establish that the Comptroller General is not an independent officer; because the Comptroller General may be removed only by Congress, he or she is subservient to Congress. However, in the Gramm-Rudman-Hollings Act the Comptroller General plainly executes the law, as he makes independent judgments as to what spending cuts are to be made, with the President merely ratifying the cuts through a sequestration order. The result, according to the Court majority, is that an officer of the legislative branch executes a budget deficit law in obvious violation of the Constitution's separation of powers doctrine.

Justice White's dissent in this case continues a number of themes that he offered in both *Northern Pipe Line* and *Chadha*. First, White criticizes the Court for once again employing a distressingly formalistic view of separation of powers to strike down a novel and far-reaching legislative response to a thorny policy issue (here, growing budget deficits). Next, White takes us back in time to Justice Robert Jackson's concurring opinion in *Youngstown Sheet and Tube Company v. Sawyer* (343 U.S. 579, 1952), the steel seizure case. In this case, Jackson stated in his concurrence that the Constitution not only diffuses federal government power to secure liberty, but also contemplates that practice will integrate the dispersed powers into a government that works. Accordingly, White emphasizes that the Court's majority in *Bowsher v. Synar* is employing an interpretation of separation of powers that curtails any branch of government from accumulating too much power (for example, Congress) at the expense of guaranteeing the

federal government does not work in practice (for example, not addressing the growing budget deficit problem).

White's dissenting opinion then shifts into a discussion of the particular facts in *Bowsher v. Synar*. Drawing upon the Court's holdings in *Humphrey's Executor* (295 U.S. 602, 1935) and *Wiener* (357 U.S. 349, 1958), White reminds the Court that it has permitted Congress in the past to give officers not removable by the President the authority to execute the laws. On this point, White takes pains to show that the Court has been convinced that Congress has found it "necessary and proper" to give federal government officers independent of the President the authority to execute laws in the hope that such "independent" officers will be free of any influence, whether partisan, administrative, or legislative, in the implementation of policy. Moreover, White concludes his opinion by attempting to refute the claim that the Comptroller General may be removed solely by the Congress. Rather, White claims, the Comptroller General may only be removed by a joint resolution, which requires approval by both Houses of Congress (bicameralism) and approval by the President (presentment).<sup>7</sup>

Although White came up short in the aforementioned case battles, by the end of the 1980s White's interpretation of separation of powers won the day. This may be seen in the Court's ruling in *Morrison v. Olson* (1988) and *Mistretta* (1989), where the Court upheld the constitutionality of the independent counsel (*Morrison*) and the United States

---

<sup>7</sup> White's claim here contradicts the accepted wisdom regarding which branch of the federal government, whether the executive or legislative, may remove the Comptroller General. White's claim is that in 1920, when Congress first attempted to authorize the Comptroller General position, President Woodrow Wilson vetoed the legislation because Congress would have had the sole authority to remove the Comptroller General position via a concurrent resolution, which does not require presidential approval. However, the next year, Congress passed the Budget and Accounting Act, which said that the Comptroller General could be removed by a joint resolution of Congress. According to White, a joint resolution requires bicameralism and presentment to the President (*United States v. California*, 332 U.S. 19,28; 1947).

sentencing commission (*Mistretta*). In both cases, the Court was asked to determine if new institutional arrangements created to address corruption in the executive branch (*Morrison*) and inconsistent sentencing among the federal courts (*Mistretta*) violated the Constitution's separation of powers doctrine. Although White did not write the majority opinion in either of these cases, his views from *Northern Pipe Line*, *Chadha*, and *Synar* marked sections of the Court's opinions in both *Morrison* and *Mistretta*. In particular, White's contention that the Court should show some respect for innovations created by the political branches, as long as these innovations complied with the spirit of separation of powers, carried the day on the Court.

#### Official Immunity: The Reasonably Should Have Known Standard

Official immunity is an area of administrative law in which Justice White showed acute interest throughout his tenure on the Supreme Court. From *Wood v. Strickland* (1975) to *Canton v. Harris* (1989), White helped navigate the Court through the stormy seas of when government officials may claim that they are immune from liability for their conduct while on the job. In particular, White helped craft a standard of review, the reasonably should have known standard, to help the federal courts and administrators understand that government officials have the responsibility to know the relevant case law, statutes, and constitutional provisions that affect their work.

The first Supreme Court case where White develops the reasonably should have known standard was *Wood v. Strickland* (420 U.S. 308, 1975). Strickland and other high school students were expelled from their high school by Wood and various other school officials for violating the school's regulations regarding the use and possession of alcoholic beverages. Bringing suit under 42 U.S.C. 1983, a post Civil War law that

allows government officials to be sued for actions that violate an individual's civil rights, Strickland claimed that the expulsion process violated his constitutional right to due process. At the district court level, Wood was cleared of wrongdoing, as the court said that absent proof of malice, public officials were immune from damages. An appellate court overturned the district court's ruling, saying that Strickland's substantive due process rights had been violated. The key element of the appellate court's ruling was its review of the evidence upon which school officials based their expulsion decision. The appellate court found that because there was little or no evidence that Strickland and others possessed alcohol, their due process rights had been violated and school officials could be sued for this violation.

Wood appealed to the Supreme Court, asking the Court to address whether the appellate court's application of due process and its standard of official immunity were correct. On the issue of the appropriate standard of official immunity, the Court was split 5-4, with Justice White writing for the majority. White traces a qualified, good-faith official immunity for government officials back to the country's common law tradition, saying that 42 U.S.C. 1983 ratified this common law understanding of official immunity. According to White, this understanding of official immunity takes into account the multiple roles played by most administrators – policy makers, implementers, and adjudicators – and is designed to offer some protection for the risks asked of administrators by the political branches.

However, White sides with the appellate court in saying that public officials are not immune from liability when they *knew or reasonably should have known* their actions violated the constitutional rights of citizens (whether high school students or others).

Although White sides with the appellate court regarding the proper interpretation of official immunity, he does distinguish his position from the lower court by emphasizing that a compensatory award should be granted only when a reviewing court or jury can clearly establish that public officials acted with an impermissible motivation or a clear disregard for the student's constitutional rights.

Justice Powell, joined by three other Justices, disagrees with White on the standard of official immunity. For Powell, White's reasonably should have known standard would require public school officials to know existing case law and every constitutional right a student possesses. If school officials do not have this extensive knowledge, then they could be deemed to have acted with actual malice – leaving little substance to the doctrine of qualified immunity. Powell was further perplexed by White's standard because he claimed that if the Court could not state with any clarity what the existing case law was, how could the Court expect public school officials to determine its meaning?

In contrast to the Court's division concerning the official immunity standard, the full Court did back White on the issue of whether the appellate court's application of due process was correct. Once again returning to 42 U.S.C. 1983, White claims the law does not allow a party to relitigate evidentiary questions in federal court, unless it can be shown that a specific constitutional right was violated. In this case, White finds that the appellate court had no business reviewing the evidence considered by school officials, as the discretion utilized by school officials was well within their purview and the process afforded the students was more than adequate to satisfy any constitutional due process requirements.

White's reasonably should have known standard becomes the Court's controlling precedent on questions of official immunity for the next 15 years (save presidential immunity claims, see *Nixon v. Fitzgerald*, 457 U.S. 731, 1982), as seen most prominently in *Harlow v. Fitzgerald* (457 U.S. 819, 1982). As some scholars approvingly noted (Warren, 1996; Rosenbloom, 1980), White's reasonably known standard provided some clarity as to what was expected of public officials (notwithstanding Powell's dissent) and to what individuals making 42 U.S.C. 1983 claims needed to demonstrate to reviewing courts concerning administrators not deserving of immunity.

However, others criticized White for a "subjective" element in his opinion (Cooper, 2000; p. 543). In particular, *Wood* instructs courts to allow compensatory awards only when they can clearly establish that officials acted with an *impermissible motivation*. It is one thing for a court to hold that public official could be sued because he or she reasonably should have known that his or her action violated an individual's civil rights, but it is quite another to ask courts to also engage in an examination of what a person's motivation may have been. The former is an objective standard that is both instructive for the administrator and comparable for a reviewing court. The latter is subjective, and may be impossible for a reviewing court to ascertain. No matter, as the Court by the early 1980s dispensed with this subjective element of the *Wood* majority opinion in *Harlow v. Fitzgerald* (1982).

White's majority opinion in *Wood* is also noteworthy for its extensive discussion of the multiple roles public officials are asked to perform and how the legal concept of immunity is designed to offer protection for how officials exercise these roles. This discussion is classic White – acknowledging the difficulties attached to public service in

late twentieth century United States but also making clear that despite these difficulties public officials have a responsibility to know the applicable case law and constitutional dictates. It is a theme in White's jurisprudence that I will revisit in the next three official immunity cases discussed in this chapter.

In 1978, the Supreme Court addressed the issue of immunity for federal government officials (in contrast to state officials in *Wood v. Strickland*) in *Butz v. Economou* (438 U.S. 478; hereafter referred to as *Economou*). After the Agriculture Department unsuccessfully tried to revoke Economou's registration as a commodity dealer, Economou sued Agriculture Department Secretary Butz and others in his Department, claiming that they brought registration revocation proceedings in retaliation for criticisms Economou had levied previously against the Agriculture Department. A district court ruled in favor of Butz, claiming that federal officials had official immunity arising from any discretionary acts within their authority. An appellate court reversed the district court, saying that federal officials, like their state counterparts, had only qualified immunity.

Butz appealed the appellate court's ruling, asking the Supreme Court to decide if federal officials have unqualified immunity for discretionary acts arising from their positions. A divided Court held, 5-4, that federal officials do not have unqualified immunity. Justice White, writing for the majority, begins his opinion by addressing the relevant case law (*Spalding v. Vilas*, 161 U.S. 483, 1896 and *Barr v. Mateo*, 360 U.S. 564, 1959) and a portion of Justice Rehnquist's dissenting opinion. Rehnquist claims that both of these rulings give federal officials unqualified immunity for actions specifically

authorized in statute. Accordingly then, federal officials should have unqualified immunity from discretionary actions flowing from delegated authority in statute.

According to White, neither *Spalding* nor *Barr* grants federal officials unqualified immunity from liability for damages when they knowingly violate an individual's constitutional rights when implementing relevant statutes. If these Court precedents state that administrators may be liable when they plainly violate their statutory authority, according to White, it is incongruous to believe federal government officials have absolute immunity when exercising discretionary authority.

White then examines the congressional intent informing 42 U.S.C. 1983. A question that remained for the Court was whether or not 42 U.S.C. 1983 was applicable to federal as well as state officials (as *Wood v. Strickland* clearly established, 42 U.S.C. 1983 definitely applied to state officials). Engaging in statutory construction, Justice White concludes that, because Congress has not indicated otherwise, federal officials should receive the same level of immunity (qualified) as state administrators have when violating individual rights.

As White makes apparent, the Court was not saying that federal officials should be held liable for mere mistakes, but there is nothing in the Constitution, federal law, or Court precedent that supports the idea that federal government administrators may violate, with impunity, the Constitution when they should have known their actions did not comply with constitutional mandates. White concludes the majority opinion by carving out an exemption for those executive branch officials, like administrative law judges, who should have unqualified immunity because of the quasi-judicial functions they perform.

Justice Rehnquist, writing for Chief Justice Burger and Justices Stewart and Stevens, concurs with White regarding certain federal administrators receiving unqualified immunity, but Rehnquist would grant all executive branch officials at the federal level unqualified immunity. Contending that the majority misinterpreted *Spalding*, Rehnquist claims that Court precedent held that all federal officials should receive absolute immunity, even when their actions are unconstitutional. Rehnquist's contention is that White's majority opinion focuses upon the wrong part of the equation – a reviewing court should not be concerned with whether a public official should have known that his or her behavior violated individual rights. Rather, a reviewing court should endeavor to determine if an official's behavior was part of his or her discharge of duties imposed by law; if so, whether the behavior was in violation of the Constitution is irrelevant, as the official deserves unqualified immunity.

The contrast between White and Rehnquist regarding official immunity for federal government employees is quite evident. Whereas White displays his typical balancing of administrative imperatives versus constitutional rights, Rehnquist showcases a completely different view of the purpose of official immunity. For Rehnquist, the purpose of official immunity is to shield the public official from lawsuits that may arise from the performance of his or her official duties. White shares that concern, but only to the extent that federal statute or the Constitution permits. White's majority opinions in this case and in *Wood v. Strickland* demonstrate to the interested reader that there are limits to how far public officials may go in the discharge of their duties before their immunity ends. Even though White proves to be a supporter of deferring to administrative discretion (he joins the Court's opinion in *Chevron*, 1984) and sympathetic

to the needs of modern governance (see the previous discussions of *Chadha* and *Synar*), he is rather leery of placing government officials above the law.

White's leanings on this matter are most obvious in the case of *Nixon v. Fitzgerald* (457 U.S. 731, 1982). In this case, Ernest Fitzgerald was a Defense Department employee who testified in 1968 before a House of Representatives' subcommittee about cost overruns in the Department of Defense. When Richard Nixon became President, Fitzgerald was fired, ostensibly as part of a reorganization of the Defense Department. Fitzgerald filed a claim with the Civil Service Commission (CSC), contending he was terminated as retaliation for his congressional testimony. CSC dismissed the claim, but it did say Fitzgerald had demonstrated to a certain extent that personal reasons, i.e. his congressional testimony, might have contributed to his termination. Fitzgerald filed suit in federal district court, with the district court finding that Fitzgerald had triable causes for action under two federal statutes and the First Amendment. Moreover, the district court held that Nixon could not claim absolute presidential immunity. An appellate court also rejected Nixon's claim of absolute presidential immunity.

The Supreme Court took the case to answer one question, "does the president have absolute immunity relating to his actions performed in his official capacities?" In a close decision, the Court by 5-4 vote held that the president does have absolute immunity relating to his actions occurring in the performance of his official duties. Justice Powell, writing for the majority, states the president is deserving of absolute official immunity for the following reasons:

- Presidential immunity is a functionally mandated incident of his unique office based on the concept of separation of powers and historical precedent;

- Reviewing courts must be hesitant to consider jurisdiction in these types of cases, as any trial/hearing would severely impact a president exercising his constitutional authority and functions;
- Judicial action may be needed when a reviewing court can determine that broad public interest would be served and that the exercise of jurisdiction may be warranted – in this case, neither apply;
- Presidential immunity extends to all acts within the outer perimeter of his duties; and
- Absolute immunity does not leave the country without remedies to counteract presidential immunity -- impeachment, press scrutiny, congressional oversight, possible reelection bid, unblemished prestige necessary to accomplish job duties, and his/her place in history all work to curb presidential malfeasance.

Whereas Justice Powell's majority opinion emphasized both functional and positional justifications, Chief Justice Burger in his concurring opinion emphasizes that presidential immunity flows from the separation of powers doctrine, and in particular, that the position needs protection from frivolous lawsuits that would harm a president's ability to perform the duties of the office. Justice White, joined by Justices Brennan, Marshall, and Blackmun, launches his dissent with an attack on the majority seemingly giving Congress no option, save the grave step of impeachment, to remedy presidential misconduct.

White follows his opening salvo by contending that the majority gives too much weight to the position of the presidency; in contrast, he would emphasize whether certain presidential functions deserve immunity. Otherwise, giving the position blanket immunity reeks of the "King" doing no wrong. White's final point is that the majority seems to be eschewing the common law notion that in immunity cases a court should weigh whether an official should have known that his/her actions violated another's

constitutional rights. Instead, according to White, the majority is apparently advocating a double standard, at least for presidents, in that reviewing courts should look at the potential damage a suit would cause the office, with the result being that the alleged victim may never be given an opportunity to be made whole again. White claims that there should one standard for all public officials – should the public official have reasonably known that his or her behavior violated constitutional rights of others?

In the companion case, *Harlow v. Fitzgerald* (457 U.S. 800, 1982), the Supreme Court granted merely qualified immunity (of the *Wood* and *Butz* variety) to the White House aides that Fitzgerald also charged with violating his civil rights. White signed, without offering his own opinion, Powell’s majority opinion. It is noteworthy that Powell’s majority opinion in *Harlow* states that “...a reasonably competent official should know that law governing his conduct,” and that most public officials (save the president) may be liable for transgressing “clearly established statutory or constitutional rights of which a reasonable person would have known” (borrowing liberally from White’s majority opinions in *Wood* and *Butz*). After the rulings in *Nixon v. Fitzgerald* and *Harlow v. Fitzgerald*, the accepted conclusion among most commentators was that the Court had set up a two-tier system regarding official immunity – absolute immunity for presidents and qualified immunity for every other public official. Again, the contrast between White and a majority of the Court is unmistakable – whereas White would base immunity either on function or the reasonably should have known standard, a majority of the Court would grant a large exception for the president.

At the end of the 1980s, the Supreme Court heard the case of *Canton v. Harris* (489 U.S. 378, 1989). The Canton, Ohio police arrested Harris, and though she fell down

and was incoherent, the police did not seek medical attention for her. After her release, Harris sued the police in federal district court under 42 U.S.C. 1983, alleging the police violated her Fourteenth Amendment right to due process by not seeking medical attention for her while she was in police custody. The district court ruled for Harris, as did the appellate court, on the grounds that under that circuit court's precedent the government could be sued under 42 U.S.C. 1983 if the petitioner can show that due to a lack of training government officials had to know such failure to train its employees would lead to a person's civil rights being violated.<sup>8</sup>

The Supreme Court took the case to answer the following question: Can a municipality ever be held liable under 42 U.S.C. 1983 for constitutional violations resulting from its failure to train its employees? The Court answered in the affirmative, under specific conditions, as called for in 42 U.S.C. 1983. Writing for the majority (6-3), Justice White first addresses Canton's primary argument – only when a policy or law is infirmed may a person sue under 42 U.S.C. 1983. White claims a reviewing court should determine whether a government's failure to train its officials amounts to a *deliberate indifference* to the constitutional rights of individuals with whom the government comes into contact. If so, then such deliberate indifference is a triable offense under 42 U.S.C. 1983.

White, then, offers specific criteria to be used by the lower courts to determine if such deliberate indifference occurred, including:

1. Is the government's program or training adequate to the tasks its employees must perform?

---

<sup>8</sup> The appellate court remanded the case to the district court over concerns about jury instructions and the jury's verdict not clearly stating reasons for why it found for Harris. Eventually, Harris won on remand, the appellate court affirmed, and Canton filed certiorari with the Supreme Court.

2. If not, can inadequate training justifiably be said to represent the government's policy?

3. Is the identified inadequacy closely related to the alleged injury?

Justice O'Connor provided a concurring opinion regarding the deliberate indifference standard offered by Justice White. However, in applying the standard to the particular facts of this case, O'Connor disagrees with White and would hold that Canton did not engage in deliberate indifference to Harris's civil rights, because she found that the government's training was adequate but the implementation was not.

The Court's ruling in this case, according to White, builds upon its decision in *Monell v. New York Department of Social Services* (436 U.S. 658, 1978), where the Court held that a municipality could be found in violation of 42 U.S.C. 1983 only when the municipality caused the violation at hand. White claims in *Canton v. Harris* that the Court is only extending the logic of the *Monell* ruling by telling local governments that intentional inaction is not an excuse for violating an individual's civil rights. The deliberate indifference standard is much like White's reasonably should have known standard – if the Court demands government officials to know the constitutional rights of those with whom they come into contact, why should government units be asked less? Still, White is not declaring open season on government, as the criteria he instructs the federal courts to use are not necessarily intended to disfavor municipalities. Not only are the criteria meant for the federal courts, but public administration also would be well-served by incorporating them into analyses of proposed training processes and manuals.

### Chapter Summary

This chapter is the first of two that describe Justice White’s opinions in a number of administrative law cases. These cases were broadly categorized around particular subjects, including White as a constitutional schoolmaster, White’s admonition that the separation of powers doctrine should be interpreted so that the needs of modern governance are met, and the standards the Justice authored to guide constitutional review of official immunity claims. Table 1 highlights certain themes that arise in White’s jurisprudence in these cases.

**Table 1: Identifiable Themes in White’s Opinions Discussed in Chapter III**

<b>Supreme Court Case</b>	<b>Theme or Essence of White’s Jurisprudence</b>	<b>Secondary Themes or Issues in White’s Opinion</b>
<i>Red Lion Broadcasting</i> (1969)	Balancing of Competing Interests	Normative Strain in First Amendment Leaning toward the Public Interest
<i>CSC v. Letter Carriers</i> (1973)	Balancing of Competing Interests	Great End of Government Is the Impartial Execution of Laws
<i>Lopez-Mendoza</i> (1984)	Exclusionary Rule Should Apply to both Criminal & Civil Proceedings	Bureaucrats Should Have Knowledge of Constitutional Basics & Cannot Benefit from Ignoring Those Basics
<i>Northern Pipeline</i> (1982)	New Bankruptcy Courts Much Like other Court-Approved Political Innovations	Are the Political Branches Meeting the Spirit of Separation of Powers?
<i>Chadha</i> (1983)	Legislative Veto Complies with the Spirit of Separation of Powers (SOP)	Court Has Adopted a Distressingly Formalistic Interpretation of SOP
<i>Bowsher v. Synar</i> (1986)	Separation of Powers Is Separate and Shared Powers	Court Majority’s Strict Interpretation of SOP Hinders Modern Governance
<i>Wood v. Strickland</i> (1975)	Reasonably Should Have Known Standard Applicable to State Officials	Official Immunity Offers Protection for the Public Official Acting in Multiple Roles
<i>Butz v. Economou</i> (1977)	Reasonably Should Have Known Standard Applicable to Federal Government Officials	Same Standard for State & Federal Officials
<i>Nixon v. Fitzgerald</i> (1982)	Same Standard for All Public Officials	Court’s Exception for President Takes Official Immunity Away from Common Law Notion of Concept
<i>Canton v. Harris</i> (1989)	Deliberate Indifference Standard RE Government Immunity	What Is Required of Government in Training Its Employees

Among the themes that dominate White's opinions in these cases is the idea that modern governance requires the federal courts to weigh the interests the government is trying to further with its actions versus the individual right(s) being claimed. In other words, White is suggesting that the Constitution has to be read in the context of the changes and needs characteristic of the times and not necessarily of those when the Constitution was written. For instance, *Red Lion Broadcasting* concerned a dispute the founders could not have envisioned – the regulation of the radio waves on behalf of the public and how that complies with the freedom of press found in the First Amendment. White's solution does not inevitably favor one side of the issue or the other; rather, he says that the courts have to find a balance between these competing interests to make the Constitution work today.

Another theme in these cases is White's contention that the Court should be leery of employing a strict interpretation of the separation of powers doctrine to hold political innovations, like the legislative veto, unconstitutional. White's interpretation of this doctrine is akin to his advocacy of balancing competing interests – the needs of modern society require interpreters of the Constitution to avoid being slaves to a strict, formalistic view of key constitutional values. Instead, modern society requires that the courts, and if I dare say administrators, legislators, and the public, ask if government innovations comply with the spirit of these values. In short, does the use of the comptroller general as part of a deficit reduction scheme conform to the meaning of separation of powers envisioned by the framers? Does the legislative veto ensure the accountability the founders deemed an essential norm of the Constitution? And does the creation of Article I bankruptcy judges violate the specific powers given to Congress in the Constitution?

A third theme found in White's opinions in this chapter centers on his assertion that there are limits to the immunity that public officials may claim. White authored two standards – reasonably should have known and deliberate indifference – that helped the Court provide some guidance to public officials and governmental units regarding what was expected of them in their interactions with the public. Building upon the common law notion of official immunity, White makes clear that public officials have to know how constitutional norms and values are applicable to the work they do. Additionally, he stresses to governmental units that deliberate indifference to constitutional rights is a triable offense under 42 U.S.C. 1983, and that intentional inaction will not garner the protective blanket of immunity.

## Chapter IV: White's Administrative Law Opinions, Part II

The principle that under the Due Process Clause an individual must be given an opportunity for a hearing before he is deprived of any significant property interest requires 'some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Justice Byron White, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

### Introduction

In this chapter, I continue my exploration of Justice White's administrative law opinions. The first set of opinions concerns the issue of due process in the administrative context. As the modern administrative state developed in the twentieth century, some began to question what process the government had to provide when it removed government benefits or terminated government employment. The Fifth Amendment's due process clause requires that the government provide a process for response whenever it takes an individual's life, liberty, or property, but does this mean the same kind of evidentiary hearing that one finds in a criminal trial? Part of the dilemma found in these cases is how the Supreme Court balances the imperatives of the modern administrative state, like managerial efficiency and flexibility, against the need to protect individual rights. Taking its cues from Justice White's opinions, the Court eventually settled upon requiring a pre-termination hearing to check for administrative mistakes, but this hearing does not have to be a full-blown evidentiary affair. The cases examined in this section include *Arnett v. Kennedy*, *Goss v. Lopez*, *Cleveland Board of Education v. Loudermill*, and *Brock v. Roadway Express, Inc.*

The second set of cases centers upon an issue that many have deemed the most ethically problematic in the modern administrative state – that of administrative discretion. In a regime where political power is to be checked by regular elections, how does the regime allow for significant power to be delegated to government officials who

are not controlled by the electorate? This question has taken on more importance as the political branches delegated more authority to administrators during the twentieth century. The specific cases I explore in this section are *Delaware v. Prouse* and *Motor Vehicle Manufacturers Association v. State Farm Mutual*.

The last set of cases examined in this chapter deals with the subject of administrative searches. At issue here is whether government officials performing searches related to regulatory schemes (in contrast to searches conducted in furtherance of criminal statutes) have to comply strictly with the language of the Fourth Amendment. Once again, White's opinions help guide the Court's effort in clarifying its case law on the subject. In particular, White advocates that courts require warrants for administrative searches, but with a flexible probable cause standard that is to take into account the nature of the regulatory policy and to provide a check on government action that clearly violated the Fourth Amendment. The cases discussed in this section are *Camara v. Municipal Court*, *See v. City of Seattle*, *United States v. Biswell*, and *Marshall v. Barlow's, Inc.*

#### Administrative Due Process: A Balance of Competing Interests

The first of the administrative due process cases I examine is *Arnett v. Kennedy* (416 U.S. 134, 1974; herein after referred to as *Arnett*). In this case, Kennedy, a non-probationary employee of the federal government, was terminated from his position for making false and defamatory remarks about his boss and co-workers in the Office of Economic Opportunity. Although he had a right under Civil Service Commission regulations to have access to the record of the reasons why he was being dismissed and to reply to these charges, Kennedy instead filed suit in federal court challenging the Lloyd-

LaFollette Act. This law established the hiring and firing policies covering all federal government employees. Kennedy's challenge claimed that the statute and related Civil Service Commission regulations violated his First Amendment right to free speech and his Fifth Amendment right of due process. The district court sided with Kennedy, holding the Lloyd-LaFollette Act violated his due process rights by not affording him a pre-termination hearing. Moreover, the court held the Act infringed upon his free speech rights by not giving clear guidelines as to what speech could lead to losing one's job.

The Supreme Court agreed to hear *Arnett* to answer the question of whether the Lloyd-LaFollette Act's provisions regarding the termination process and impermissible speech violated Kennedy's due process and free speech rights. In a close vote (5-4), the Court ruled against Kennedy. Justice Rehnquist, writing for a plurality<sup>4</sup> (joined by Chief Justice Burger and Justice Stewart), begins his opinion by emphasizing how non-probationary employees of the federal government are fully aware that when they take such positions, they can be fired only for cause and that there are limitations to what steps they can take to challenge their terminations. As such, based on the Court's ruling in *Board of Regents v. Roth* (408 U.S. 564, 1972),<sup>5</sup> neither the Act nor the Fifth Amendment's due process clause require any more process be afforded a government employee than what was given Kennedy.

Justice Rehnquist continues by saying that the post-termination hearing afforded Kennedy adequate protection of his liberty interest found in the Fifth Amendment, with

---

<sup>4</sup> A plurality opinion is one with which a majority of the judges on a court concur in the result but not in the reasoning of a single opinion. In *Arnett* (5 – 4 vote), Rehnquist's opinion was joined by Chief Justice Burger and Justice Stewart. Justice Powell wrote an opinion, joined by Justice Blackmun, that concurred with Rehnquist's in part and with the overall result.

<sup>5</sup> In *Board of Regents v. Roth*, the Court held Roth did not have a liberty or property right in his university teaching position, and thus, did not deserve due process protection when his employment was terminated without the cause being stated.

the possible professional and personal stigmatization due to administrative charges made in error causing minimal damage to one's individual rights. Rehnquist also dispenses with Kennedy's First Amendment claim by using Justice White's majority opinion in *Letter Carriers* (regarding the constitutionality of the Hatch Act), claiming that Civil Service Commission regulations defining unacceptable speech that could lead to dismissal are as specific and as feasible as administratively possible in a setting where various political and administrative imperatives abound.

Justice Powell reached the same result as did Rehnquist, but for different reasons. For Powell, Rehnquist misstates the Court's *Roth* and *Sindermann* rulings; those rulings make clear that once a person has a liberty interest in a job, due process protections take hold. There may be flexibility in the process due (e.g. whether a pre- or post-termination hearing is required), but the party granting the liberty interest (in this case, the federal government) does not have flexibility via statutory construction in providing due process. Powell, however, believes that the process afforded Kennedy met constitutional standards; according to him, the Constitution's due process requirement is satisfied because Kennedy had the opportunity to respond before his termination (albeit without a trial-like hearing), and then he had access to a trial-like hearing post-termination.

Justice White, writing in dissent, does agree with Rehnquist that the Lloyd-LaFollette Act is not vague regarding what is or is not impermissible speech, and as such, is in compliance with the First Amendment. However, White does dispute significant aspects of Rehnquist's plurality opinion. Specifically, White contends that a long line of Court precedents and the common law origins of due process make clear that when a

person's liberty is taken by the state, due process has to be afforded *before* the liberty is finally removed from the person. The question is what process is due?

Justice White argues that Congress may decide the "cause" leading to the dismissal of a federal government employee, but settling when due process should be given requires the Court to balance competing interests, including the following:

#### State Interests

- Removing poorly performing employees;
- Creating and maintaining a good work environment; and
- Not expending public monies on disruptive, non-performing workers.

#### Employee Interests

- Not being mistakenly terminated;
- Protecting one's reputation; and
- Keeping one's job pending a termination hearing.

According to White, in this case the government's burden in providing a pre-termination hearing is minimal, and as such, the plurality wrongly decides in favor of the government. White continues that the plurality ignores another issue that Kennedy raised, that of Arnett being one of the committee members who decided that Kennedy should be dismissed. As Arnett was one of the targets of Kennedy's remarks, White reminds the Court that due process assumes the trier of fact will be an impartial judge, which could not be guaranteed in this case.

Justice Marshall also wrote a dissent in this case to take both Rehnquist and White to task for their reasonings. Rehnquist ran afoul of Marshall by claiming that a person's liberty interest originates statutorily. Marshall states that much of the Court's recent case law suggests otherwise, that a person's liberty interest is firmly rooted in the Constitution, and if the state grants any liberty or property to a person, then the full

measure of the Constitution's due process clause applies. Marshall also finds fault with White's "balancing interests" approach, claiming that the liberty interest at question in this case is of such magnitude that the Court should not get bogged down with balancing acts. Here, due process demands a pre-termination, trial-type hearing.

The Court's division in this case marks a period where members of the Court struggled mightily to provide clear guidance as to what due process means in the administrative setting. Whereas *Roth* and *Sindermann* suggested the Court was going down the road of offering pre-termination, trial-type hearing protection (with lawyers, cross-examination of witnesses, etc.) per the due process clause, with *Arnett* the Court seemed to be heading in a different direction. Additionally, there was a continued polarization on the Court as to what is required of the courts in determining what process is due in the administrative setting. White and Powell clearly state that the job of the courts in these types of cases is to weigh competing interests, with the result of such efforts determined by the case facts. Rehnquist and others in the dissent (Justices Marshall, Douglas, and Brennan) reject such a weighing of competing interests, but their results end up being widely divergent.

Within a year of the *Arnett* ruling, the context of high school punishment provided the Court another opportunity to deliberate upon the matter of administrative due process. In *Goss v. Lopez* (419 U.S. 565, 1975), Lopez and eight other Ohio public high school students had been suspended from school for up to ten days. The misconduct ranged from students disrupting classes as a form of protest to damage in a school lunchroom fight involving 75 students. Lopez and the other students challenged the suspensions on the grounds they were issued without a pre-implementation hearing in violation of the

due process clause of the Fourteenth Amendment. A district court agreed, saying that the students' Fourteenth Amendment rights had been violated because school officials suspended them without a hearing prior to suspension or within a reasonable time afterward.

The Supreme Court agreed with the lower court, with Justice White writing for the majority. White begins his opinion by addressing the school officials' primary point of contention – the students had no due process rights to claim. White and the Court majority (Justices Douglas, Brennan, Stewart, and Marshall) decide otherwise. White stresses that the state of Ohio created a right to free public education for all of its residents, and because it did so, Ohio could not remove that right, even for misconduct, without offering fundamentally fair procedures prior to dismissal to determine whether the misconduct occurred.

White is painstaking in his explanation of how the high school students had both a property and liberty interest in a high school education. The students' property interest lies in the benefits they could lose by not being in class, such as teaching and learning. The students' liberty interests rest with the mark left by the suspension – e.g. damaging their reputations, interfering with future educational and employment opportunities, etc. In the same opinion, though, White also emphasizes that the school had legitimate administrative and curricular interests that a reviewing court could not ignore. Notwithstanding those interests, White cautions that local school systems could not ignore the property and liberty interests of students, which the country's various state legislatures created by offering free public education for all of their young people.

White also offers school officials ample guidance as to what process is due to students when a potential suspension is ten days or less. First, a student must be given oral or written notice of the charges, and if the student denies the charges, an explanation of the evidence school officials have and an opportunity to present his or her version of the events in dispute. Second, school officials should give notice of charges and provide a student a hearing before the student's removal from school. However, if a pre-suspension hearing is not feasible – because the student's presence endangers property or other students or threatens the academic process – the notice and hearing should occur as soon as possible after the suspension begins.

Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist in dissent, first criticizes White for ignoring that a student's right to due process, as part of the free education created by Ohio, is part of a statutory scheme that also provided school officials the authority to discipline students. Powell claims that Court precedent, including *Roth*, makes clear that the “due process clause ... comes into play only when the State subjects a student to a severe detriment or grievous loss.” For Powell, a school suspension of ten days or less does not reach that threshold.

Relying upon *Tinker v. Des Moines School District* (393 U.S. 507, 1969), Powell then emphasizes that the Court historically has shown great deference to local authorities in how they manage their school systems. A key component of this deference is the Court's recognition that American law tends to treat school-age children differently than adults, and in particular, how local school systems have the responsibility to educate America's youth. Powell concludes his dissent by employing the standard “slippery slope” argument – the Court's ruling in this case will open a long list of school

discretionary decisions to due process challenges. Powell mentions teachers grading exams or giving failing grades, coaches excluding student athletes from teams, or school administrators placing students in certain tracks (general, vocational, or college-preparatory) as examples of discretionary school activities that could be grounds for students filing due process claims.

Notwithstanding Powell's likely exaggeration concerning the number of school activities that could be challenged on due process claims, the Court's division on administrative due process is plainly highlighted by the majority and dissenting opinions in this case. White, once again, is advocating a position where a government benefit, in this case free public education, cannot be abridged unless due process is offered. And yet again, White goes to some length to explain to school administrators what process they must provide to students when their property and liberty rights are taken by the state. Powell, on the other hand, seems to be taking a position that school children have less due process protection than do adults. Specifically, Powell is concerned that the Court is moving into an area of public policy – school administration – that it had historically shown great hesitancy in entering or applying the Constitution's due process clause.

The Court divide regarding administrative due process became much smaller by the mid-1980s. In *Cleveland Board of Education v. Loudermill* (470 U.S. 532, 1985), the Cleveland Board of Education hired Loudermill as a security guard; on his employment application, Loudermill stated he had never been convicted of a felony. After the Board found out he had been convicted of a felony, the Board fired him for cause (dishonesty). According to Ohio law, Loudermill could be fired only for cause, and then, he had to be given a post-termination administrative review.

After the Ohio Civil Service Commission upheld the dismissal, Loudermill, ignoring the Ohio state courts, filed suit in federal court, claiming that his due process rights had been violated as he had no opportunity to respond to charges before his dismissal and because the Commission took too long (nine months) to review his appeal of the dismissal. A district court disagreed with Loudermill on both points, but an appellate court reversed the lower court on the issue of the pre-termination hearing (but left intact the lower court's ruling that the post-dismissal hearing delay passed constitutional muster).

The Supreme Court took the case to decide if the Ohio termination process was in compliance with the due process requirements of the Fourteenth Amendment. The Court majority held that the lack of a pre-termination hearing violated the due process clause, but the delay in holding a post-termination appeal hearing was constitutional. Justice White wrote for the majority, and he begins his reasoning by stating that once Ohio created the security position and granted Loudermill employment, then Loudermill had a property right to the position. Furthermore, White boldly states that the Court was repudiating its approach announced in Justice Rehnquist's majority opinion in *Arnett*. According to White, the Court is declaring to all levels of government that government employment, once granted, becomes a property right that cannot be deprived by the government unless it offers due process. The only question that remains is what process is due?

Taking the opportunity to provide instruction for both the lower courts and public administrators, White says that the pre-termination hearing need not resolve the truthfulness of the government's charge; rather, the purpose of the pre-termination

hearing is to act as an initial check against administrative mistakes. In other words, the pre-termination hearing is to offer the employee notice of the charge and an opportunity to respond – it does not need to be like a criminal trial. This part of White’s opinion is based on *Matthews v. Eldridge* (424 U.S. 343, 1976), wherein the Court said the government had to provide something less than a full evidentiary hearing prior to adverse administrative action (in *Matthews*, it was in the context of a denial of government benefits). White concludes his opinion by remarking that the lengthy post-termination hearing Ohio gave Loudermill was constitutional, because, in part, the reason for the elapsed time was the thoroughness of the Commission’s review.

Justice Marshall offers a concurring opinion, as he claimed that the due process clause requires that before a person loses his or her job, he or she should be given a full evidentiary hearing – including the opportunity to cross examine witnesses and provide his or her own witnesses and evidence. Justice Brennan, concurring and dissenting in part, agrees with White that a pre-termination hearing was necessary, but he differs on the grounds that White should have provided specifics necessary for the hearing. Moreover, Brennan suggests that White needs to make clear to the lower courts that 9-month delays in post-termination hearings may not always be constitutional.

Rehnquist dissents from the majority opinion, emphasizing that he stands by the plurality opinion he authored in *Arnett* that in part gave much deference to the legislature to determine the nature of the property right and what process was due. He also faults the majority for not giving clear guidance as to what process is due in these cases, claiming that the balancing test advocated in this case, *Matthews v. Eldridge*, and *Goldberg v.*

*Kelly* (397 U.S. 254, 1970) basically leaves due process to the subjective views of the Court's members.

White's opinion in *Loudermill* seems to draw heavily from and is largely consistent with the Court's ruling in *Matthews*. From stating plainly that a civil service job is one's property (like government benefits in *Matthews*), the Court states that a pre-termination hearing is required, but not of the full evidentiary type that Marshall and Brennan would like. As seen with previous White administrative law opinions that I have examined, White offers a middle ground approach in *Loudermill* between the extremes on the Court – between Rehnquist's limited, post-termination hearing approach and Marshall's full evidentiary pre-termination hearing position. For White, the purpose of the pre-termination hearing is not to determine once and for all that the dismissal from government employment was correct, but whether or not the administrative decision was reasonable (to act as a check of accountability). White's approach here is similar to what we have seen in other contexts – trying to ensure that there are opportunities to hold administrators accountable for their decisions, but allowing administrators some flexibility to perform their duties.

The last case in this discussion of administrative due process is *Brock v. Roadway Express, Inc.* (481 U.S. 252, 1987). Jerry Hufstetler was an employee of Roadway Express (a national trucking company), and he alleged that he was fired in retaliation for making complaints about Roadway's truck safety. Under Section 405 of the Surface Transportation Act of 1982, truck companies covered by the law, like Roadway, could not fire employees who believed trucks they were directed to drive were unsafe or because they reported such safety violations. If an employee made such a claim to the

Department of Labor and the claim was being investigated, the employee was to be reinstated.

After the Labor Department investigation, the trucking company could ask for a full evidentiary hearing and a final decision from the Secretary of Labor (in this case, Brock). The way the law was written, during the initial investigation the Labor Secretary did not have to tell the employer why the company was being investigated or even allow for employer participation in the investigation. Only after the initial investigation was completed could the employer ask for a post-investigation hearing and decision. In this case, Hufstetler claimed that his discharge qualified under Section 405 and was reinstated to his job. Although Roadway was given opportunity to present reasons why Hufstetler was terminated, the firm was not given all of the evidence collected during the investigation. Roadway sought an injunction in district court to thwart Hufstetler's reinstatement, and it challenged the constitutionality of Section 405 on the grounds that the law violated the due process clause of the Fifth Amendment as Roadway was not given the opportunity to respond to charges before Hufstetler was reinstated. The district court agreed with Roadway.

The Supreme Court took the case to answer the question of whether the failure of Section 405 to provide for an evidentiary hearing prior to reinstatement of an employee deprived the employer of due process under the Fifth Amendment. Justice Marshall wrote for the majority, and he begins his opinion with lyrics taken from the Justice White songbook, that the Court's duty here is to balance competing interests, including the following:

- The government's interest in promoting highway and workplace safety;

- The company's property interest in discharging employees for cause;
- The employee's property interest in not being discharged in retaliation; and
- The Court's interest in determining the value of increased procedural safeguards compared to the cost to agencies being required to give due process.

According to Marshall, the relevant Court precedent is *Loudermill*, which stated that the due process clause means the government must give a person with a property interest an opportunity to an initial check on mistaken administrative decisions, but not a full evidentiary hearing. In this case, Roadway should have been given copies of the employee's allegation, evidence collected by the Labor Department's investigator, and an opportunity to present its reason for employee dismissal. Roadway was not given copies of the allegation or the evidence gathered; as such, Roadway's due process rights were violated. Marshall did conclude that there is no need to provide a full evidentiary hearing prior to the employee reinstatement (per *Loudermill*), as Section 405 does provide a full evidentiary hearing post-reinstatement.

Two Justices, Brennan and White, offered concurrences and dissents in this case. Brennan, employing his standard rhetoric in these administrative due process cases, contends that due process mandates a full evidentiary hearing prior to reinstatement, particularly since the post-reinstatement hearing/determination might not be prompt and Roadway's property interest might be damaged until the dispute is resolved.

White concurs with Marshall's majority opinion, save one important aspect of the pre-reinstatement hearing. Looking to the purpose of Section 405 of the Surface Transportation Act, White argues that the majority is wrong to require the Labor Department afford the names and witness statements to Roadway prior to employee

reinstatement. Furnishing this information to the trucking company could thwart one of the purposes of the law – curbing company retaliation against whistleblowers of safety violations. For White, Roadway’s property interest, much like *Loudermill’s* in his case against the Cleveland School Board, is sufficiently protected by a pre-reinstatement hearing that acts as an initial check on administrative mistakes. To furnish the names of witnesses and their statements would allow companies to retaliate against those who assist the employee who made the charges of unsafe driving conditions in the first place.

The main thrust of the Court’s opinion in this case – that the due process clause mandates a hearing before one’s property is taken – continues the jurisprudential tack first offered by White in his dissenting opinion in *Arnett*. No matter the context, it is now settled law that due process in the administrative context requires the rights holder be given an opportunity to respond prior to the right being abridged by the government, so as to check mistaken administrative decisions. For many scholars (Warren, 1996; Hutchinson, 1998), the Court has adopted a very practical and common-sense based approach of trying to afford a degree of due process protection, while providing administrators the flexibility to administer benefits programs, personnel systems, and the like. While some Court members, like Brennan on one extreme and Rehnquist on the other, would prefer the Court to issue more bright-line rules, the *Loudermill* approach authored by White represents the current Court case law on the issue.

#### Administrative Discretion

In the previous section, I examined Supreme Court cases that addressed what process is due when administrators abridge a person’s liberty or property. In this section, I look at two Court cases that deal with administrators exercising discretion in the

performance of their duties. I briefly touched upon this subject in Chapter III when discussing a series of cases regarding official immunity. Occasionally, public officials are sued for violating a person's civil rights while exercising discretion in their official duties. Here, I will look more concretely at the issue of administrative discretion, an issue that a number of scholars, including Rohr (1998), have identified as one of the most ethically problematic facing the country's modern administrative regime.<sup>6</sup>

In *Delaware v. Prouse* (440 U.S. 648, 1979), a police officer stopped Prouse to check his driver's license and car registration, based upon a *feeling* that Prouse might be a criminal. Upon checking the documents, the police officer spotted marijuana in plain view within Prouse's automobile, and subsequently arrested him on drug possession charges. The trial court granted Prouse's motion to suppress any evidence as a result of the plain view search on the grounds that the officer had no probable cause to stop Prouse in the first place. The Delaware Supreme Court affirmed the trial court's decision on the motion to suppress, with the state appealing to the United States Supreme Court.

The Court took the case to answer the question of whether a vehicle stop and subsequent search by the police, without probable cause that any wrongdoing was committed, was a violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. The Court, in an 8-1 vote, held that the vehicle stop did violate the Fourth Amendment. Justice White wrote the opinion for the Court. He begins his opinion by stating that unless an officer can point to some cause, e.g. traffic violation or reasonable suspicion that a driver was wanted for breaking the law, to stop a vehicle for

---

<sup>6</sup> Rohr and others have identified administrative discretion as the most vexing ethical problem associated with the modern administrative era, because, as Rohr states (*Ethics for Bureaucrats: An Essay on Law and Values*, 2<sup>nd</sup> edition revised and expanded; Marcel Dekker; 1989), "Through administrative discretion, bureaucrats participate in the governing process of our society; but to govern in a democratic society without being responsible to the electorate raises a serious ethical question for bureaucrats."

no cause, ask for the driver's license and registration, and then perform a search of the vehicle is a blatant violation of the search and seizure clause of the Fourth Amendment.

Addressing each aspect of the stop and search in this case, White clarifies that stopping a vehicle and detaining its occupants qualifies as seizure per the Fourth Amendment (Delaware had claimed otherwise). White continues by declaring that the test for a reviewing court is to decide whether police action and interests in a particular case outweigh the rights of individuals to be free of unreasonable searches and seizures. Here, White finds that the police wanting to ensure highway safety via discretionary and intuition-based spot checks does not come close to being greater than an individual's Fourth Amendment rights. White is also dismissive of Delaware's claim that because it licenses drivers and regulates the use of automobiles, drivers give up the right to be free of unreasonable searches and seizures. White says that automobile drivers do not give up their constitutional rights merely because they are given the privilege of driving an automobile in a given state. Yet, White also makes clear that other state efforts to achieve highway safety, especially those that use less discretion, do comply with the Fourth Amendment.

Justice Blackmun, joined by Justice Powell, emphasizes that the Court is explicitly approving state action that is not random to achieve highway safety (including road stops of all vehicles). Justice Rehnquist disagrees with the majority that the state does not have an interest in stopping vehicles to determine if one is properly licensed and if the vehicle is registered. According to Rehnquist, if a state is tasked with regulating traffic on the roadways within its borders, then automobile stops like the one in this case further a legitimate state interest and with minimal infringement of a person's Fourth

Amendment rights. Furthermore, Rehnquist expresses a large dose of skepticism at how the majority finds roadblock stops of all vehicles constitutional but not the intuition-based stop used by the Delaware officer; are not both intrusive and based on something other than probable cause?

This case typically is labeled a criminal law case, as it addresses behavior of a Delaware policeman who arrested Prouse for violating a criminal statute. Yet, because both the majority and the dissent focus in part upon the discretion utilized by street-level police officers, this case also touches upon a core issue of the modern administrative state – administrative discretion. As Rosenbloom, Carroll, and Carroll (2000; p. 93) suggest, it appears that the second criticism Rehnquist offers in the dissent – that the discretion exercised by a street-level bureaucrat is more of a concern than the intrusiveness of the search and seizure of evidence – gets at the heart of the majority’s issue in this case. No matter the merits of the arguments offered by White and Rehnquist (and there is much internal rigor to Rehnquist’s criticism of the majority), I was struck by how much instruction White offers the street-level bureaucrat in his majority opinion. Making clear that a police officer acting on a “feeling” does not comport with the Fourth Amendment, White takes pains to show what is or is not permissible in the context of stopping vehicles. Such instruction is often unheard of coming from the Supreme Court.<sup>7</sup>

---

<sup>7</sup> Other notable Supreme Court cases with similar “instruction” opinions include Justice Jackson’s in *Wong Yang Sung v. McGrath* (339 U.S. 33, 1950) and Justice Stewart’s in *New York Times v. U.S.* (403 U.S. 670, 1971). In the former, a case where the INS claimed that deportation hearings did not have to comply with the Administrative Procedures Act, Justice Jackson gives a homily of sorts when he writes...

“But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such a hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress’ power to legislate and, where applicable, permeates every valid enactment of that body. It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally...”

Four years after the *Prouse* decision, the Court had an opportunity to rule on agency discretion, specifically an agency changing rules it had created, in the case of *Motor Vehicle Manufacturers Association v. State Farm Mutual* (463 U.S. 29, 1983; herein referred to as *Motor Vehicle*). In 1982 the National Highway Traffic Safety Administration (NHTSA) rescinded its modified standard 208, which would require automobiles to have automatic seat belts or air bags after 1983. The NHTSA claimed that it could no longer show that standard 208 would have the desired safety effects. State Farm challenged on the grounds that the NHTSA's decision was arbitrary and capricious, thus violating the Administrative Procedures Act (APA) and relevant auto safety legislation. The court of appeals agreed with State Farm, and the Motor Vehicle Association appealed to the Supreme Court.

The Supreme Court took the *Motor Vehicle* case to answer the questions of whether the NHTSA's rescission of standard 208 was arbitrary and capricious, and thus, in violation of the APA. Citing *SEC v. Chenery Corporation* (332 U.S. 196, 1947), White begins the opinion by stating that if an agency changes course by rescinding its own rule(s) it is required by the APA to supply a "reasoned analysis" for the change. This does not mean that a reviewing court should take a "hard look"<sup>8</sup> or substitute its

---

In *New York Times* (otherwise known as *The Pentagon Papers* case), Justice Stewart, joined by Justice White, argues that...

"In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry – in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people."

<sup>8</sup> Federal courts in the late 1960s and early 1970s used the "hard look" doctrine when reviewing numerous agency actions. The doctrine is generally considered to have been created by the D.C. Circuit Court of Appeals during this time, as it admonished the federal courts to make sure that government decision makers take a "hard look" at the facts before reaching a decision. It was seen by some jurists, like Justice Douglas,

judgment for that of an agency's, but it should consider if an agency considered all relevant factors before it changes course. If an agency has not considered all relevant factors, then a reviewing court should find the agency's actions to be arbitrary and capricious and in violation of the APA.

White then offers two reasons why the NHTSA's decision in this case was arbitrary and capricious. First, the NHTSA did not consider, as many stakeholder had requested, replacing the automatic seat belt requirement with mandatory air bags. For White, the agency had to offer more than the regulated automobile industry claiming air bags would not work as a justification for rescinding standard 208. Second, NHTSA offered little analysis that seat belts would not work. In particular, White takes issue with what appeared to be the real reason why the NHTSA rescinded standard 208 – the Reagan administration did not like standard 208 and wanted it changed.

White concludes his opinion by demonstrating how the *Vermont Yankee* (435 U.S. 519, 1978) ruling was not applicable in the *Motor Vehicle* case. *Vermont Yankee* prohibited reviewing courts from forcing agencies to utilize more extensive rulemaking procedures than what was required by the APA or relevant authorizing legislation. In *Motor Vehicle*, the Court is not requiring the NHTSA to follow any specific procedures or enforce automobile safety technology not already considered by the agency. Rather, the Court is simply requiring the NHTSA to offer a rational justification for its decision to rescind standard 208.

Justice Rehnquist, joined by Chief Justice Burger and Justices Powell and O'Connor, agrees with the majority that the NHTSA's rescission of standard 208 needed

---

as a response to a concern that many federal courts had that government officials were becoming overly influenced by those agencies were to regulate, and often at the expense of individual rights.

explanation, but he contends that the agency had explained why the seat belt requirement would not work as intended (tests indicated that the public would deactivate the automatic seat belts). Moreover, Rehnquist believes that a change in presidential administrations from President Carter to President Reagan, with different priorities and policy stances, is an adequate basis for an agency to modify or change one of its rules – as long as the rule modification is within the parameters established by Congress. In *Motor Vehicle*, Rehnquist finds the rescission of standard 208 to be well within the parameters Congress created in both the APA and the relevant authorizing legislation.

Some commentators criticized the Court's holding in *Motor Vehicle* for confusing what seemed to be settled case law with the *Vermont Yankee* decision. Most of these commentators were not persuaded by White's claim that there was an important difference between *Vermont Yankee* and *Motor Vehicle* (Warren, 1996; p. 386). I would contend, however, that though both cases address the broad issue of agency discretion, the distinction White suggests is more apparent if one notes that in *Vermont Yankee* the Court was reviewing a lower court's treatment of what was patently discretionary agency behavior (as afforded by Congress), whereas in *Motor Vehicle*, congressional intent was much clearer regarding how NHTSA was to improve automobile safety, and thus, required more reasoned analysis by the NHTSA if the agency wanted to rescind one of its own regulations.

Additionally, the contrast between Justices White and Rehnquist is once again obvious. Rehnquist is quite comfortable deferring to agency decisions, even if these decisions are based on the policy preferences of a new administration. White would hardly consider that justification appropriate; instead, he pulls out an old administrative

law chestnut – *Chenery*'s reasoned analysis approach – and asks that agencies' modifying their own rules give some sort of rational basis to justify their actions.

In short, White's approach to administrative discretion is very similar to what is seen in his rulings in other areas of administrative law. White is willing to administrative determinations, but only if such decisions follow established processes (found in APA) or can be justified by reasoned analysis. While others on the Court would be less (Rehnquist) or more (Douglas) stringent in what agencies must do in employing discretion, White assumes a middle approach very characteristic of his jurisprudence in other administrative law subjects

#### Administrative Searches: Flexible Standard of Reasonableness

The first of four cases I will examine regarding the topic of administrative searches is *Camara v. Municipal Court* (387 U.S. 523, 1967). Of concern in administrative search cases is the question of whether the Fourth Amendment's privacy protections extend to the administrative context. It is well established Supreme Court case law what the Fourth Amendment means to the application of criminal statutes, but what of the application of regulatory schemes associated with the modern administrative state?

In *Camara*, the petitioner owned a building in San Francisco, and he leased the ground floor for residential purposes. Camara was charged with violating the San Francisco housing code for refusing to allow a warrantless inspection of his ground floor quarters. Camara's residential lease violated the residence's building permit, and he had rejected the warrantless inspection three times before he was charged with the housing code violation. Camara challenged the warrantless inspection on the grounds that it

violated the Fourth Amendment's requirement of a search warrant being based upon probable cause. The federal district court denied Camara's challenge, based on the Supreme Court's holding in *Frank v. Maryland* (359 U.S. 360, 1959).

The Supreme Court sided with Camara (in a 6-3 vote),<sup>9</sup> holding the San Francisco housing code that called for warrantless searches violated his Fourth and Fourteenth Amendment rights. Justice White begins his majority opinion by stating how the Court took the case to provide some clarity as to the meaning and application of the Fourth Amendment. Acknowledging that the Court had been closely divided in a number of Fourth Amendment cases, White claims that the Court needs to offer clear guidance to police officers, civil servants, and the public as to when the state could search one's property, with or without a warrant.

For White, the basic purpose of the Fourth Amendment, which is enforceable upon the states via the Fourteenth Amendment, is to safeguard individuals against arbitrary invasions by government. This is accomplished through the Amendment's requirement of a warrant-based search. Save some carefully defined exceptions (e.g. searches incidental to arrests), warrantless searches of private property are unreasonable and in violation of the Fourth Amendment.

If White's intent was not clear at that point in his opinion, the next section of his reasoning cleared up any doubts. White says the Court's ruling in *Frank* (a case about a homeowner who refused to allow a health inspector to enter his home without a warrant) was plainly wrong. As *Camara* demonstrates, although San Francisco had legitimate interests in enforcing building and fire codes, violations of the code are enforceable

---

<sup>9</sup> Justice Clark, joined by Justices Harlan and Stewart, dissented in this case, but issued a dissenting opinion for both *Camara* and *See v. City of Seattle* in the *See* case.

through the criminal law process, thus bringing to bear the requirements of the Fourth Amendment to bear.

San Francisco's main argument was that warrantless administrative searches make minimal demands on individuals and that inspection programs could not work without warrantless searches. White's response is that the standards for determining probable cause to get a warrant for an administrative search should vary, depending upon the inspector's reasonable appraisal of conditions and the municipal program being enforced. As White elaborates, what is probable cause sufficient for a judge to grant a warrant for an administrative search should be flexible, allowing for the variance that characterizes various regulatory schemes commonplace in the country. In other words, the probable cause standard to get an administrative search warrant is not necessarily onerous; rather, it should be flexible and designed to provide a check on government action that is clearly in violation of the Fourth Amendment.

Clearing up the case law confusion regarding the differences in Court holdings between administrative and criminal searches, *Camara* overturned *Frank* and makes clear that the Fourth Amendment is applicable to administrative searches of residential dwellings. More importantly, White once again tries to walk that fine line of balancing the needs of society (as expressed in government searches pursuant to enforcing housing codes) and the basic individual rights found in the Fourth Amendment. The Justice acknowledges the government imperatives related to code inspections and even establishes an easy-to-satisfy probable cause standard, but he ultimately insists that individual rights deserve some constitutional protection from warrantless administrative searches.

The same year that the Court decided *Camara*, it also heard another administrative search case -- *See v. City of Seattle* (387 U.S. 541, 1967). In this case, See was convicted of refusing to permit a Seattle fire department official entrance and inspection of his locked commercial warehouse. As the fire department official did not have a warrant and could not persuade See that there was probable cause that he had committed a city code violation, See refused the official entrance to his warehouse. See challenged the conviction and resulting fine on the grounds that fire code inspection violated his Fourth and Fourteenth Amendment rights.

The Supreme Court took the case to answer the question of whether its ruling in *Camara* was applicable to inspections of commercial structures that are not used as private residences. The Court, in an opinion written by Justice White, held in the affirmative. White commences his discussion by noting that the Court has held that criminal law searches of businesses deserved the same constitutional protection as did similar searches of residences. White believes the same principle should hold true with administrative searches, whether the search is of a business or a private home.

As government regulation of business has increased, the Court has seen numerous challenges to the meaning of the Fourth Amendment. White acknowledges that various and sundry government policies require public sector officials to enter businesses to implement regulations. However, government inspections of businesses are no more or less intrusive than similar inspections of private residences. Business owners, like homeowners, have an expectation that they are secure in their possessions, and accordingly, the Fourth and Fourteenth Amendments are applicable in both contexts.

Then, White asks, “What kind of probable cause is necessary for a warrant to be granted for an administrative search of business property?” As with *Camara*, White repeats that magistrates should employ a “flexible standard of reasonableness” to determine if a warrant should be granted. This flexible standard requires that magistrates take into account the regulatory scheme and whether the government official has reasonable cause to inspect a business (per the aforementioned regulatory scheme). And as White stresses, the Court is not holding regulatory inspections called for in business licensing programs unconstitutional in this case. Instead, the Court is asking that judges require administrators to at least provide some cause that suggests a warrant to search a business and seize evidence is reasonable within the applicable regulatory scheme.

Justice Clark writing in dissent states that the *Frank* ruling should be affirmed in both *Camara* and *See*, as the government interest in maintaining the health and safety of a community is being unnecessarily harmed by requiring officials to get warrants before a building, whether a home or a business, is searched. As Clark suggests, the majority seems to be forgetting that the Fourth Amendment prohibits only “unreasonable” searches; reasonable searches are constitutional. Clark closes with a reminder to the majority that throughout the country’s history, municipalities have been given authority to conduct inspections for the general welfare of their citizens, and he sees no reason why the Court should interfere with this practice.

White’s opinions in *Camara* and *See* did much to clarify the Court’s case law regarding the process government officials must follow to conduct constitutionally acceptable administrative searches. In doing so, White stakes a claim to being the Court’s leader on the subject of administrative searches, as we also will see in *Biswell*

(1972) and *Barlow's, Inc.* (1978). In particular, White's advocacy of the flexible standard of reasonableness and his emphasis on the context in which the search or inspection occurs will drive the Court's jurisprudence for years to come.

White's leading role in shaping the Court's administrative searches case law can be best seen in *United States v. Biswell* (406 U.S. 311, 1972). In 1968, Congress passed the Gun Control Act, which authorized federal officials to enter facilities of arms dealers during business hours to inspect records and arms storage. Biswell, a pawnshop owner and licensed arms dealer, allowed a city police officer and a Treasury agent to inspect his records and storage area. The officials found two sawed-off guns, which Biswell was not licensed to sell. Biswell challenged the warrantless searches on the grounds that they violated his Fourth Amendment rights, and the court of appeals agreed with Biswell.

The Supreme Court, in an 8-1 vote, overruled the court of appeals and held the warrantless searches met constitutional requirements. Writing for the majority, Justice White distinguishes this case from *Colonade* (1970), in which the congressional regulation of the liquor industry in that case was found constitutionally invalid because Congress failed to give specific guidelines for officials to follow when deciding to engage in a warrantless search. In *Biswell*, White finds that Congress provided ample guidance to federal officials in the Gun Control Act.

White also distinguishes this case from *See* (1967), since for the regulation of the firearms industry to be effective, random and warrantless searches are needed. In *See*, Court found that the purpose of searching businesses for housing and fire code violations did not demand such flexibility in the search process. Additionally, White claims that when a person enters an industry that is as heavily regulated as the firearms industry, he

or she should expect business property, records, and inventory will be subject to inspections to ensure a dealer is complying with the law; thus, a firearms dealer has no expectation of full Fourth Amendment protection.

White's opinion in *Biswell* is a good example of what Hutchinson (1998, p. 451) claims is the Justice's usual manner of deciding cases – employing a case-by-case approach and eschewing broad theories that could control an area of the law. White's majority opinions in *See* and *Camara* would suggest that he would rule against any warrantless administrative searches. Yet, in *Biswell*, he examines the particulars of the regulatory scheme, the guiding legislation, and the nature of the regulated industry and comes to a different conclusion.

Scholars, though, have criticized the Court's decision in this case for suggesting that certain businesses require prior or informed consent to administrative searches before a person enters the industry (like firearms). The concern rests with the fear that federal courts will use the logic of informed consent to quickly settle cases without exploring Fourth Amendment challenges to government action.<sup>10</sup>

The last of the four administrative search cases I explore is *Marshall v. Barlow's, Inc.* (436 U.S. 307, 1978). According to a 1970 law, the Occupational Safety and Health Agency (OSHA) could conduct warrantless searches of workplace areas within its jurisdiction. *Barlow's, Inc.* brought suit to obtain injunctive relief against OSHA for conducting a warrantless search of its premises. A district court, based on *Camara* and *See*, held that the Fourth Amendment required OSHA to get a warrant to conduct a search of *Barlow's, Inc.*

---

<sup>10</sup> See Kevin MacKenzie's "Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement." *Cornell Law Review*. 64 (1979): 864 – 871.

The Supreme Court held that the 1970 law allowing OSHA to conduct warrantless searches violated the Fourth Amendment. The federal government offered two main arguments to justify OSHA being able to employ warrantless searches – because Barlow’s, Inc. engages in interstate commerce, the firm could be closely regulated, and because the firm opens its property to its employees, this means that Barlow’s, Inc. has no expectation of privacy from administrative searches.

Justice White responds that the mere fact a business engages in interstate commerce does not mean it qualifies as a closely regulated business that the government may search without a warrant (*Biswell*, 1972). According to White, businesses within an industry that *historically* have been extensively regulated may be searched without a warrant by government agents. Such firms should expect more government regulation than firms within industry sectors that have not been traditionally subjected to close government scrutiny. Additionally, White lays waste to the government argument that because *Biswell*, Inc. opened its grounds to its employees the firm was implicitly opening its property to warrantless government searches. White states that such logic would suggest that businesses immediately close all non-essential areas to its workers, bringing a certain chill to employer-employee relations across the country.

Even though White gives no quarter to the government’s arguments, he does stress that the standard the government has to meet to achieve an administrative search warrant is a flexible one. White’s opinion advises magistrates that all agencies need to show to obtain a search warrant is that the search meets the regulatory needs, as called for in statute. Moreover, White emphasizes that the mere fact OSHA has to get warrants to conduct administrative searches does not mean that all government agencies have to do

the same. Rather, magistrates and reviewing courts should look at the specific regulatory needs, the nature of the industry being regulated, and the privacy protections available in the authorizing legislation before making any determination as to the necessity of getting a warrant prior to an administrative search.

Justice Stevens offers a rather persuasive dissent in this case. He begins with the claim that the framers were not as concerned with searches, whether reasonable or unreasonable, as they were with general warrants being issued without any evidentiary foundation. For Stevens, if the majority guts the evidentiary foundation from which an administrative search is to be issued (the so-called flexible standard), what is the value of the Fourth Amendment? Moreover, the dissent looks to the general purpose of OSHA existing in the first place – that of stopping workplace accidents that harm employees and decrease the country’s productivity – and states that if reasonable warrantless searches serve that purpose, then the demands of the Fourth Amendment have been met.

Although some commentators (Warren, 1996, p.424) have commended the Court for balancing business privacy interests and administrative regulatory needs in this case, the Court’s ruling still raises the question for me of whether the weakening of the Fourth Amendment’s probable cause standard to get a warrant is worth the balancing act White performs in his majority opinion. Distinguishing the probable cause standard for administrative searches compared to criminal searches may be laudable, but could not the Court adopt Steven’s assertion that an agency search to meet the requirements of a regulatory scheme, as with OSHA in *Biswell*, fulfills the “reasonable search” demands of the Fourth Amendment?

### Chapter Summary

This is the second of two chapters that describes Justice White’s opinions in three types of administrative law cases – administrative due process, administrative discretion, and administrative searches. Table 2 summarizes the dominant themes found in White’s jurisprudence in these cases.

**Table 2: Identifiable Themes in White’s Opinions Discussed in Chapter IV**

<b>Name of Supreme Court Case</b>	<b>Theme or Essence of White’s Jurisprudence</b>	<b>Secondary Themes or Issues in White’s Opinion</b>
<i>Arnett v. Kennedy</i> (1974)	Pre-termination Hearing Is Necessary Per Due Process	Balancing of Competing Interests – State v. Individual
<i>Goss v. Lopez</i> (1975)	Once State Creates Right, Even w/ Public Education, It Cannot Take Away the Right w/out Due Process	Provides Specific Guidance as to What Process State Should Provide to Comply w/ Due Process
<i>Cleveland v. Loudermill</i> (1985)	Pre-termination Hearing Is Required before Government Employment is Terminated	Pre-termination Hearing Does Not Have to be a Full-blown Evidentiary Proceeding
<i>Brock v. Roadway</i> (1987)	Concurs w/ Majority that Due Process Requires Pre-reinstatement Hearing	Due Process Requires Pre-reinstatement Hearing but not Affording Witness Names & Statements
<i>Delaware v. Prouse</i> (1979)	Street-level Intuition Is not Enough to Satisfy the Probable Cause Requirements of the 4 <sup>th</sup> & 14 <sup>th</sup> Amendments	Specific Instruction RE What Behavior Does Pass Constitutional Muster
<i>Motor Vehicle</i> (1983)	Agency Must Supply Reasoned Analysis to Support Changing Its Own Rules	Distinguishes this Case from <i>Vermont Yankee</i>
<i>Camara</i> (1967)	4 <sup>th</sup> Amendment Applicable to Administrative Searches of Homes	Flexible Standard of Probable Cause to Get a Warrant
<i>See</i> (1967)	Administrative Searches of Businesses Require Same Compliance w/ 4 <sup>th</sup> Amendment as do Searches of Homes	Reiterates Flexible Standard of Probable Cause to Get a Warrant for an Administrative Search
<i>Biswell</i> (1972)	When Person Enters Heavily Regulated Industry, He or She Should Not Expect Full 4 <sup>th</sup> Amendment Protection	Case-by-Case Approach – Deviating from <i>See</i> & <i>Camara</i> Opinions
<i>Marshall v. Barlow’s</i> (1978)	Businesses that Engage in Interstate Commerce Are Not Subject to <i>Biswell</i>	Reiterates Flexible Standard of Probable Cause

In the administrative due process cases, the hallmark of White's jurisprudence is his willingness to ensure that due process is afforded to individuals, while at the same time giving some flexibility to the process administrators must provide before terminating benefits or employment. The key element to this process is White's admonition that a pre-termination hearing's purpose is to act as initial check on administrative mistakes. This initial check is to give an individual notice of the reasons for termination (whether benefits or employment) and an opportunity to be heard. In a basic sense, White's jurisprudence here advocates a conception of administrative due process similar to the notice and comment requirements of rulemaking found in the APA, where an agency must provide notice to the public that the agency is proposing a rule and give the public an opportunity for comment. Notice and comment grants the public a check on agency rulemaking; likewise, Justice White's conception of administrative due process affords an individual a check on administrative action. Yet, unlike in criminal law cases, the provision of due process in administrative matters is not designed to achieve justice; as White states, administrative due process is correct administrative error and nothing more.

A second theme found in White's opinions in this Chapter concerns his insistence that administrators exercising discretion base its use upon either probable cause, as in *Delaware v. Prouse*, or reasoned analysis, as in *Motor Vehicle*. In both of these cases, White shows how even though he tends to be a supporter of government officials, he demands that they have some sort of intelligent basis underlying their actions. In *Prouse*, the police officer could not rely upon a *feeling* as the justification for his stopping and searching a vehicle. In *Motor Vehicle*, White instructs federal agencies that they must

use reasoned analysis when they rescind one of their previous standards. In both, White is not asking the impossible of public officials; rather, he is asking that public officials have a rational basis for their actions.

A third theme is that of White contending that administrative searches are bound by the Fourth Amendment. White's work in these cases did much to clarify the Court's confusing Fourth Amendment case law. Yet, there is something more here. White does not believe that the Fourth Amendment should be applied to administrative searches in a literal manner; rather, his approach here is much more nuanced. For instance, White says that though agencies need to have probable cause to get a warrant for an administrative search, the standard to meet the probable cause threshold should be a *flexible* one, where a magistrate is to take into account the needs of the regulatory scheme in question and other factors necessary for a public official to implement public policy. Additionally, as seen in *Biswell*, White even carves out an exception for the administrative search warrant requirement, as his ruling in this case sends notice to individuals in heavily regulated industries that they should expect to lose some of the privacy protection afforded by the Fourth Amendment.

## Chapter V: Analysis

*Red Lion* arises at the crossroads of conflicting interests – the speech rights of broadcasters and those of the dissenting public. To Justice White, it was clear that fateful collisions between these rights could be averted by stationing in the midst of their intersection not a cop, but a traffic control specialist, expertly trained, public-minded, and zealous in the performance of his duties. If in an age of skepticism the entire tone of *Red Lion* resonates with an almost quaint ring, it is the echo of the New Dealer’s faith in government. Kenneth Starr, 1993.

### Introduction

In this chapter, I analyze Justice White’s administrative law opinions (described in Chapters III and IV) via three frameworks. First, I place White’s writings within Rohr’s regime values framework, attempting to demonstrate what lessons public administration may be able to draw from a Justice thoroughly at home in the workings of the modern administrative state.

Next, I apply the notion of constitutional competence to White’s opinions. Here, I draw upon the work of Rosenbloom, et al., who contend the Court in its ruling in *Harlow v. Fitzgerald* (1983) requires administrators to be aware of how the Constitution is applicable to their jobs. If this is so, then what is White’s conception of a constitutionally competent bureaucrat?

The third framework of analysis is one a number of scholars have identified: how the federal courts in the last seventy-plus years have attempted to judicialize the work of administrators. The questions driving this discussion are whether and to what extent White represented the effort to judicialize the administrative process.

Finally, I discuss whether White’s administrative law jurisprudence places him within the legal realism movement that arose during the 20<sup>th</sup> century. I find some evidence to support the claim, but not enough to make his realist tendencies strong enough to influence the primary goals of this study. The overall purpose of this threefold

analysis is to locate White's jurisprudence within the broad field of public administration itself and thereby forge a link between administrative law and administration.

### Regime Values

As discussed earlier (see both Chapters I and II), Rohr posits that if we are concerned that unelected civil servants in the modern administrative state exercise significant discretionary authority, then how does the government ensure that they do so ethically? His answer is by teaching and training public administrators to exercise their given authority within the values of the American constitutional regime.

Rohr claims regime values are based on three considerations (68):

1. Ethical norms should be derived from the relevant values of the regime;
2. Regime values are normative for civil servants, because they take an oath to uphold the Constitution; and
3. Regime values can be discovered in the public law of the regime.

Rohr's preference is to discover regime values through the use of Supreme Court opinions, because these opinions present administrators with competing interpretations of American constitutional values through four interrelated characteristics. They are pertinent, concrete, dialectic, and institutional. For a fuller discussion of these characteristics, see Chapter II.

I offer one last point before applying this framework to White's administrative law jurisprudence; Rohr stresses throughout *Ethics for Bureaucrats* that the use of regime values is not for the purpose of establishing right or wrong behavior in bureaucrats. As he contends in a number of texts, most unmistakably in Chapter Six of *Public Service, Ethics, and Constitutional Practice*, much of the current legal framework of American public service ethics is predicated on prescribing correct behavior (financial disclosure requirements, prohibitions on lobbyists buying administrators meals, "revolving door"

restrictions upon leaving public service, and the like). Often, the result of this structure is to create a checklist of “do’s” and “don’ts” that leave civil servants feeling as though they are second-class citizens. Or, bureaucrats believe that if they can positively check the “do” boxes on ethics forms, then they are magically ethical. Thus, there is a government workforce that is technically in compliance with various ethics laws, but largely angered by the implications of the standards imposed and ignorant of what it may mean to be truly ethical (Rohr, 1998). Rather, the purpose of regime values, which I explore in this work via Justice White, is to instruct civil servants on how they may act ethically while serving multiple masters and performing a multitude of governing functions in the modern administrative state.

That said, the first thing that strikes me is that a number of White’s administrative law opinions mirror the considerations that Rohr suggests are the basis of regime values. This is most evident in *CSC v. Letter Carriers* (1973). Recall that in this case the constitutionality of the Hatch Act was questioned, as it limited the political speech opportunities of federal civil servants while also limiting the practice of political masters using their bureaucratic subordinates for election work while on the job. The Court held that the law was constitutional. Most noteworthy, however, was White’s majority opinion in this case.

The Court was faced with the delicate task of reconciling two competing imperatives: how does the government protect the First Amendment rights of its employees while also attempting to convey to the public that the large government workforce created since the New Deal was neutrally implementing the laws passed by the public’s elected representatives? Should the Court issue a bright-line rule favoring one side over the

other? If so, what is the cost to the political speech of millions of government workers? On the other hand, what if unelected civil servants use their positions and discretionary authority for their own aggrandizement or that of a favored political party? Would not there be a cost in that instance, measured in the loss of public trust in these civil servants?

White's discussion of the four exemplary purposes of the Hatch Act is instructional for bureaucrats, especially for those with human resource management functions. As mentioned in Chapter III, these exemplary purposes are:

1. A great end of government, the impartial execution of laws, is guaranteed by limiting some, but not all, political speech of government employees;
2. It is essential that government workers appear to be avoiding the partisan implementation of law if confidence in the United States system of governance is to be maintained;
3. The initial impetus of the Hatch Act, that the growing federal bureaucracy not become a political machine for the executive branch, is still relevant today; and
4. The Hatch Act also provides protection to government employees, who could be pressured to perform partisan activities to retain their jobs.

Those purposes speak pointedly to the difficulties modern governance creates, but White seems to be advocating a middle ground, calling upon a reconciliation of a number of values that may be in conflict. The first purpose speaks of the impartial execution of laws, which is characteristic of the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. The second and third purposes remind us of the admonitions of the Progressives at the turn of the 20<sup>th</sup> century, exhorting the country to rid itself of the evils associated with political party machines. But how is this accomplished without affecting the rights of public employees, or for that matter, without harming the responsiveness many elected officials demand of the bureaucracy?

The fourth purpose calls us to remember that employees need to be protected from being pressured to do campaign work for their elected superiors, that their constitutional rights of free speech, or at least some semblance of them, should be protected. In short, the protections and responsibilities addressed by this case are compelling, and call to mind Woodrow Wilson's claim that it is often far easier to write a constitution than it is to run one.

Beyond White's *Letter Carriers* opinion representing the three considerations of regime values that Rohr posits, a number of his other opinions speak specifically to the interrelated characteristics Rohr identifies as being instructional for administrators. For instance, White's dissent in *INS v. Chadha* exhibits the institutional nature of the Supreme Court's rulings concerning the concept of separation of powers. As discussed previously (see Chapter III), the Court held in *Chadha* that the legislative veto was unconstitutional, because it violated the bicameralism and presentment clauses. White, writing in dissent, engaged the majority in a spirited discussion of how the veto, while not specifically mentioned in the Constitution, deserved protection because it allowed Congress to hold the executive branch accountable in its use of delegated authority. Thus, for White, the inter-branch accountability found throughout Articles I – III of the Constitution was maintained in theory and practice with the legislative veto.

The core difference between Chief Justice Burger, writing for the majority, and White rests with their interpretations of what separation of powers truly means for governance. Burger claims that some government functions are purely legislative, while others are either exclusively executive or adjudicative. Thus, separation of powers means for Burger that government powers are separated so as to make sure that no one branch of

government has too much authority over the others. White's conception of separation of powers is fundamentally different; to wit, for him it means separate but shared powers. Much like Publius' claim in *Federalist 51*, where the structure of the proposed federal government was defended on the grounds that the ambitions of those holding government offices would be pitted against the ambitions of officials in other government offices, for Justice White the legislative veto maintains this separation and sharing of power. Congress was not looking to add to its power – the power belonged to Congress in the first place before it delegated the authority to the executive branch. But, as the Constitution consistently mandates, power is not the domain of any one branch. The president, for example, does not have absolute personnel authority, as any number of persons he nominates to fill various positions (like federal judges or cabinet secretaries) has to be approved by the Senate. The courts do not have absolute judicial independence, as the Congress may create additional courts as it wishes and can limit the appellate jurisdiction of all federal courts.

As Rohr suggests in arguing for the use of regime values, this case, and in particular White's dissenting opinion juxtaposed with Burger's majority opinion, is institutional in that it brings to administrators' attention how a core concept of the Constitution – separation of powers – is still at the heart of important governing debates in the United States.<sup>11</sup> While the opinions of Burger and White also speak to the dialectical nature of the Court's case law (more later on that characteristic), of importance to the bureaucrat is that one of the most basic of governing concepts to the U.S. regime –

---

<sup>1</sup> This was in evidence throughout the 1980s, as seen in *Northern Pipeline*, *Bowsher v. Synar*, *Morrison v. Olson*, and *Mistretta* cases, and into the 1990s with the Court holding the line item to be unconstitutional in *Clinton v. City of New York*, 118 S.Ct. 2091.

separation of powers – is at the heart of what it means to govern in modern society. As Rohr indicates in discussing the institutional character of Court decisions, “the Court is a contemporary institution in a dialogue with its past” (1989; 78). The Court was, in the 1980s, continuing a dialogue begun by the framers regarding the best manner in which to hold federal government officials accountable for their actions. Specifically in the *Chadha* case, questions were asked as to whether we create governing processes to comply with Burger’s view that separation of powers is designed to limit the power of any one branch of government, or do we agree with White’s claim that the concept means separate but shared powers? As public administration is increasingly adopting new governing arrangements – contracting out, privatization, etc., what conception of separation of powers will guide our efforts? And what are the implications for governing?<sup>12</sup>

Another characteristic of Rohr’s regime values is that of Supreme Court case law being dialectical in nature, how in many cases there are a number of opinions reflecting the differing points of view among Court members. These differing views should give the interested administrator an opportunity to formulate policies in an area of law (following the lead of the Court majority) while taking into account the views of others (whether concurring or dissenting opinions). This dialectic can be seen above with the back and forth between Burger and White regarding the legislative veto and separation of powers, and very vividly with the series of cases concerning administrative due process.

---

<sup>2</sup> See Rohr’s discussion of the current practical import of this separation of powers debate regarding the passage and implementation of the Government Performance Results Act (GPRA) of 1993 (Rohr; 2002; pp. 84-6). GPRA requires federal agencies to create strategic plans and performance targets, with congressional appropriations tied to agency success in meeting performance targets. GPRA requires a level of interaction between the legislative and executive branches that would hardly comply with the strict separation as suggested by Chief Justice Burger’s majority opinion in *Chadha*.

Chapter 4 noted that White's opinions regarding administrative due process eventually came to dominate the Court's jurisprudence in this area of law. Administrative due process raises the question of whether a government job (or benefit) is one's property, and if so, what procedures, if any, are required by the Constitution's Fifth and Fourteenth Amendments. Eventually, the *Loudermill* Court held that before the government takes away one's property (a government job), the government must afford an individual notice of the causes for termination and an opportunity for the person being terminated to respond in an attempt to make sure administrative error has not been committed. These requirements of notice and hearing are the bare bones of due process of law.

While the case law is settled on what constitutes minimal administrative due process, the debate among the Court members is very instructive for the interested administrator. On one end of the continuum, then Justice Rehnquist contended the due process requirements of the Constitution were satisfied by the government affording individuals post-termination hearings (see his plurality opinion in *Arnett v. Kennedy*). I labeled this the "bitter with the sweet" approach, as government employees were to take the bitter (limited, post-termination due process) if they were to receive the sweet (a government job). For Rehnquist, government employees were thoroughly aware of the termination processes when they took their jobs, and therefore due process was satisfied with a post-termination hearing.

On the other end of the spectrum was Justice Marshall's approach, seen in his dissent in *Arnett* and his concurrence in *Loudermill*. For Marshall, due process as developed by the Court's precedents, notably in *Roth* and *Sindermann*, mandated that not

only was a pre-termination hearing required, but it had to be a full-evidentiary hearing with the employee having the right to be represented by counsel, the opportunity to cross-examine adverse witnesses, and to provide evidence. Marshall's perspective was that a government job became one's property once it was offered by the government and accepted by the individual, and as such, the Constitution undoubtedly requires due process of law. Just what process is due is another question, as we have just seen how Marshall and Rehnquist disagree on the timing of the hearing.

In between Rehnquist and Marshall was White's version of administrative due process. For White, unlike Rehnquist and Marshall, the purpose of administrative due process was to guard against administrator errors. Whereas Rehnquist assumed such errors would/could be corrected with a post-termination hearing and Marshall assumed that the process should attempt to make whole a person's property right, White had a more nuanced purpose in mind – how to maintain administrative human resource imperatives while making sure some version of due process attached.

For the public human resource professional, especially one tasked with administering discipline and termination processes, this series of administrative due process cases – from *Arnett* to *Goss v. Lopez* to *Loudermill* to *Brock* – should provide ample instructional grist for the mill. For example, many agency line managers struggle with the problems associated with trying to discipline and/or terminate a non-performing employee, and because managers are hesitant to enter into that troubled process, they avoid it and leave non-performers in place (Klingner and Nalbandian; 2003; pp. 324-5). While not ameliorating the condition, White's opinions in these cases help explain why the process is so time-consuming and burdensome, while emphasizing the purposes

thereof. More importantly, I contend, is that the dialogue between White and his brethren help put government employment into a broader context that may be largely ignored within many government agencies – that a government job is viewed by the courts as one’s property, and as such, cannot be removed without due process. This context may also help explain to many in government why the contracting out movement, particularly the outsourcing of government jobs to the private sector, has gained some traction in the past two decades – if the job/function is provided by a private sector vendor, then onerous civil service rules that protect the due process rights of employees may no longer be in play.<sup>13</sup>

Another characteristic of regime values is that court opinions are concrete, meaning they must provide an answer to a specific question posed to a court. For instance, previously I discussed how the issue of administrative discretion has bedeviled American public administration for years, especially since the creation of the modern administrative state. In a number of cases, the Supreme Court was tasked with deciding upon what criteria administrators and agencies must base their delegated decision-making authority. In this project, I looked at the cases of *Delaware v. Prouse* and *Motor Vehicle*. In the following discussion, I apply the characteristic of concreteness to *Motor Vehicle* and *INS v. Chadha* (which also delved into the issue of how Congress could hold accountable agencies exercising discretion) to illustrate how White provided definitive answers to specific administrative questions.

---

<sup>3</sup> Yet, one should also note how the federal courts have begun to develop a body of case law to deal with the problems associated with contracting, privatization, etc. In particular, the courts have struggled to make current the state action doctrine to cover these new governing arrangements. For a good summary treatment of this phenomenon, see Jensen and Kennedy’s chapter, “Ethics, Accountability, and The New Governance” in *Ethics in Public Management*. M.E. Sharpe: Armonk, NY. 2005.

In *Motor Vehicle*, the Court was asked to review whether the National Highway Traffic Safety Administration (NHTSA) violated the Administrative Procedures Act (APA) when it rescinded the modified standard 208, which would have required automobiles to have automatic seat belts or air bags after 1983. Finding that the NHTSA did act arbitrarily and capriciously, White, writing for the majority, reminded agencies that even when they rescind their own rules (which modified standard 208 did) reasoned analysis has to be employed.

So, regarding this particular case question, the Court clearly outlined for agencies what they would have to do to comply with the APA. The broader context of this case can be seen as involving the discretion of agencies to make and rescind rules regulating highway safety. However, the Court was sending a direct warning that politics had to be balanced against APA requirements, regardless of what the Reagan administration would have preferred. When discussing the *Motor Vehicle* case earlier in this project, I shared with the reader how the Court's ruling in *Motor Vehicle* was criticized for confusing the Court's previous ruling in *Vermont Yankee*. Yet, with *Vermont Yankee*, agency discretion was clearly permitted by Congress, whereas in *Motor Vehicle*, agency discretion was bounded by instructions given by Congress, with the reasoned analysis to be employed by the agency.

Agency discretion was also the central point of *Chadha*, as the legislative veto was employed to hold agencies accountable for their use of delegated authority. As I have mentioned at length regarding the dialogue between Chief Justice Burger's majority opinion and White's dissent, here I will direct our attention to the concrete governing dilemma at issue. Specifically, White noted that if the legislative veto was

unconstitutional, Congress had either to pass very specific legislation limiting the discretion of agencies or enact very broad legislation with little hope of holding agencies accountable for how they exercised the authority. As a number of scholars have reported (Rohr, 2002; Fisher, 1995), the demise of the veto did not significantly alter the working relationship between executive branch agencies and Congress, especially congressional committees and subcommittees. A number of agencies have worked out informal arrangements with congressional committees that had the effect of the legislative veto.

Aside from the concrete questions being answered by the Court in *Delaware v. Prouse* and *Motor Vehicle*, there are a number of broader lessons that rank and file bureaucratic policy makers might glean from White's opinions in these cases. For instance, look at the explicit guidance White is offering to administrators in the *Motor Vehicle* case. While acknowledging that circumstances change, and so may agency rules in a particular substantive area, White emphasizes that there is value to rules remaining consistent over time, unless a "reasoned analysis" (emphasis added) indicates the contrary. So, the question remains: can agencies adapt existing rules to accommodate changes – whether mandated by the legislature, encouraged by the executive, or influenced by those regulated? Yes, they can make such changes, but White's caution is that such changes have to be the fruit of a thoughtful analysis in which an agency can support the change.

The last characteristic Rohr points to regarding the use of court case law for exposing regime values is that court decisions are pertinent – meaning that most political issues of the day find their way to judicial bodies. Because the Supreme Court often offers multiple opinions in an area of law over time, these opinions may then provide the

interested bureaucrat a body of literature that highlights the potential consequences of change across interested and affected actors.

For instance, regarding the hot-button topic of new governing arrangements that are part and parcel of the New Public Management, a central issue is the state action doctrine. The state action doctrine is founded on the idea that while the state (government) must respect individual rights found in the Constitution, there is no constitutional obligation for private citizens to do the same (Lieberman, 1999; Schwarzschild, 1989). Arising from the Fourteenth Amendment, the doctrine places an affirmative obligation on the state not to impair the rights given individuals in the Constitution. What has become at issue in the past two decades is whether this affirmative obligation is passed from the state to private contractors when the government hires private citizens and vendors to do the work of the government. In a series of cases in the period of the 1970s to the present, the Supreme Court has attempted to provide answers to this pertinent question: to what extent and under what circumstances does the state action doctrine apply to these new governing arrangements?<sup>14</sup>

Likewise, in reading White's administrative law opinions, there is an apparent desire by the Justice to provide the kind of relevant constitutional advice that administrators could use to do their jobs. Within the context of the modern administrative state, where new governing arrangements occurred with some regularity, and frequently without much congressional statutory guidance,<sup>15</sup> White appeared to be very interested in guiding the bureaucracy to fulfill its myriad obligations within the

---

4 Ibid.

5 See Lowi's description of the "evolution" of administrative discretion in *The End of Liberalism*. Norton; NY, NY. 1969.

boundaries of the Constitution. The clearest example of this comes in the area of administrative searches.

Recall, the core constitutional question is how do we apply the Constitution's Fourth Amendment language to government searches in the administrative arena? Most scholars find the Fourth Amendment's meaning regarding searches pursuant to criminal codes to be clear and relatively uncontroversial. However, the creation of the modern regulatory state, with searches related to any number of policy schemes, raised concerns about whether agencies should have to comply with the same search warrant requirements required of police departments. In a series of cases in the late 1960s through the late 1970s, the Supreme Court, led by Justice White, began to clarify what is expected of agencies conducting searches pursuant to a regulatory scheme.

First, in *Camara* (1967) White says that the Fourth Amendment, as applied to the states and localities via the Fourteenth Amendment, requires that regulatory searches should comply with what the Justice describes is a flexible standard of probable cause – i.e. that judges should take into account the nature of the regulatory scheme being implemented, the purposes of the search, etc. So, while San Francisco's warrantless housing code search violated of the Fourth and Fourteenth Amendments, White left open the door that other kinds of administrative searches may not necessarily be based on a search warrant procured from a neutral magistrate.

This flexible standard was on display in the *See* case, a decision handed down by the Court on the same day as the *Camara* ruling. In *See*, the issue was whether a fire code inspection of a commercial property (*Camara* concerned a residential property) required a search warrant. In answering in the affirmative, White stressed that as the

Court has held criminal searches of commercial properties required a search warrant (just like that of residential properties), the same standard should hold for administrative searches of commercial properties. In short, if the Court was requiring administrative searches of residential properties be founded upon a warrant, then so should administrative searches of commercial properties.

In the next decade, the Court, as seen in White-authored opinions, clarified the flexible standard stated in the *Camara* ruling. First, in *Biswell* (1972), the Court held that those in historically heavily regulated industries, such as the firearms industry, should expect to have warrantless searches conducted of their papers, property, etc. Moreover, the goals of the regulatory scheme created by Congress could be achieved only if federal officers had the opportunity to engage in random, warrantless searches. Six years later in *Barlow's*, the Court held the Occupational Safety and Health Agency could not perform warrantless searches, as the effectiveness of the regulatory scheme authorized in code was not predicated upon random, warrantless searches.

As mentioned above (Chapter IV)), some of White's colleagues criticized his flexible standard of probable cause necessary for administrative searches. For instance, Justice Stevens in *Barlow's* wondered if the Court was doing significant harm to the Fourth Amendment by claiming that probable cause should be flexible depending upon the nature of the regulatory scheme and other variables. I sympathized with Stevens' position there, and here wonder what kind of guidance the Court and White were offering to administrators who are tasked with crafting an administrative search program to achieve the policy goals demanded by legislators.

However, such criticisms may be offset by the pertinence of the legal issue. For example, consider the concerns raised in the current war on terrorism. In this war, one issue amongst many is how the federal government is conducting reviews of various records and databases that log the activities of American citizens (via national security letters). On the one hand, civil libertarians have been critical of the executive branch requesting telecommunications records of citizens, claiming that such requests for and subsequent reviews of this information constitute an invasion of privacy, especially since these records are being submitted by private companies without the government providing a subpoena or warrant. On the other hand, some, like executive branch officials (see John Yoo) and federal judges (see Richard Posner),<sup>16</sup> claim that the government should be able to conduct “administrative” searches (not for criminal law purposes) of this information in an attempt to provide a national defense to those who would want to commit terrorist activities on American soil. If the Supreme Court is willing to let historically well-regulated commercial activities be searched without warrants, then why not let the federal government conduct similarly warrantless searches for the important purpose of national security intelligence gathering?

Generally, White’s contributions to the Court’s administrative search jurisprudence track closely his contributions in other areas of administrative law. White is willing to:

- Defer to the political branches to craft solutions to solve problems associated with modern governance (see *Chadha* and *Bowsher v. Synar*);

---

<sup>6</sup> See Yoo’s *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (University of Chicago Press; Chicago, IL), 2005, and Posner’s (more penetrating) *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press; NY, NY), 2006. For a counter perspective, see Heymann’s *Terrorism, Freedom, and Security* (MIT Press; Cambridge, MA), 2003.

- Fashion the First Amendment toward a normative standard of public interest, in contrast to a more individually based right (see *Red Lion*, *Letter Carriers*, and *Connick v. Meyers*, 1985<sup>17</sup>);
- Expect civil servants to reasonably know which sections of the Constitution are applicable to their government positions (see *Wood* and *Butz* concerning government official immunity);
- Require government agencies to provide a pre-termination hearing (not as extensive as in a criminal trial) to satisfy the Constitution's due process clause (see *Arnett*, *Goss*, *Loudermill*, and *Brock v. Roadway*);
- Demand that government officials use reasoned analysis in exercising their discretion (see *Motor Vehicle* and *Delaware v. Prouse*).

### Constitutional Competence

The above summary of White's contributions to administrative law connects directly to the second lens in which I view White's administrative law jurisprudence. As more thoroughly discussed in Chapter I, the notion of constitutional competence is taken from the Court's ruling in *Harlow v. Fitzgerald* (1983), wherein the Court stated public administrators must be constitutionally competent in their positions. Therefore, ignorance of how laws and the Constitution shape and affect their jobs is not a defense for violations of civil rights and other forms of tort liability.

Rosenbloom, et al., developed this notion in *Constitutional Competence for Public Managers*. Specifically, the authors claim there are two reasons why civil servants need to be competent in the Constitution. First, per the Court's ruling in *Harlow*, civil servants may not receive immunity from tort liability if they knowingly (or, should have known) violate individual rights. Second, if civil servants want the support

---

<sup>7</sup> This case concerned the issue of whether the First Amendment prohibited a district attorney (Connick) from terminating a subordinate (Meyers) for, in part, distributing a survey of employees in the office calling into question the district attorney's management of the office. White, writing for the majority, held that there was little public interest to be gained from this survey, and as such, if Connick felt that the survey undermined his office authority, it was within his purview to terminate Meyers without violating the First Amendment's free speech clause.

of the public, then they must internalize the values and rights afforded the public in the Constitution.

In reviewing White's administrative law opinions, what is his conception of a constitutionally competent public manager? In this section, I will draw upon his opinions concerning official immunity (*Wood* and *Butz*) and those regarding administrative due process to present defining characteristics of White's constitutionally competent public manager.

Concerning official immunity, bear in mind that the key issue in these types of cases is the extent to which government officials may claim that they are immune from tort liability for their actions in performing their jobs. In the modern administrative state, bureaucrats and agencies are often tasked with performing discretionary legislative, executive, and judicial functions (and frequently, all at the same time). The task, then, for reviewing courts is to determine what kind of immunity protects bureaucrats from frivolous lawsuits while also making sure that citizens have an opportunity to challenge government actions that infringe upon constitutional rights. White helped develop "the reasonably should have known" standard to help the courts and administrators understand that government officials have an affirmative responsibility to know how the current case law, statutes, and constitutional provisions affect their duties.

In *Wood v. Strickland* (1975), the Court held that in the context of disciplining high school students, school principals, like other government officials, could be sued for ignoring the due process clauses of the Fifth and Fourteenth Amendments, if the school principal *knew or reasonably should have known that their actions violated constitutional rights*. White's opinion provides the interested civil servant, much like his opinion in

*Letter Carriers*, a thorough discussion of the difficulties associated with governing in modern times. It acknowledges the problems that arise when legislative bodies delegate authority to bureaucrats; a high school principal is expected to create (legislative) and implement (executive) policies of various kinds, all the while meting out (judicial) punishment for students who violate certain policies. Despite serving these often thankless and conflicting functions, White makes clear that the difficulties do not abrogate a bureaucrat's responsibility to protect, and in some cases, promote the rights of the citizenry.

In *Butz*, decided in 1978, the Court held that federal government officials do not have unqualified immunity for discretionary acts performed as part of their jobs. At issue in this case was whether the same rule applies to federal officials when they violate their statutory authority as it does for exercising discretionary authority (discretion clearly given to officials by law). In his majority opinion, White stated that because the Court refused to give civil servants unqualified immunity when officials violate their statutory authority, it would be inconsistent to grant unqualified immunity to officials when carrying out discretionary authority.

For White, a constitutionally competent administrator should not be afraid of making mistakes. Government officials are human, and, with the amount of discretionary authority given them in the modern administrative state, mistakes will be made. However, those actions that violate the rights possessed by the public are not mere mistakes that deserve the protective blanket of immunity; rather, those mistakes may be legally punishable if the official knew or should have known he was violating someone's rights.

Likewise, when one looks at White's administrative due process opinions, one is struck by the Justice's conception of how a constitutionally competent civil servant should act concerning what process is due to those who encounter the government machinery. For instance, in *Loudermill* (1985), White clearly opines that in the administrative context, unlike that in criminal law, the purpose of due process is not the finding of truth. The purpose is to correct administrative error. However, this is not to minimize the constitutional responsibility of the bureaucrat. As a government job is interpreted to be a person's property, the government cannot treat this employment as if it is a privilege upon which the government can place any or all kinds of conditions or from which the government may strip any or all constitutional rights. And, as a number of academics and human resource professionals will attest (Klingner and Nalbandian; 2003), administrative due process can become onerous in the realm of disciplining and terminating government employees. Again, for White, the task is to balance competing imperatives – an efficient and effective government workforce versus the constitutionally protected rights that citizen-bureaucrats maintain, no matter the administrative context.

As Rosenbloom, et al., emphasize throughout *Constitutional Competence for Public Managers*, no matter the extent to which bureaucrats are trained to stress managerial values – like the 3 E's of efficiency, effectiveness, and economy – such values cannot replace constitutional requirements. The difficulty of balancing these competing imperatives is at the heart of White's administrative law jurisprudence. As I have previously discussed, in a number of cases White speaks directly to the difficulties associated with this balancing, and a number of his rulings attempt to create equilibrium. Moreover, in the era of New Public Management, I suggest that White's opinions can

offer some sage advice to an administrator asked to construct new governing arrangements that comply with the core values found in the Constitution while also achieving the political and managerial goals of doing more with less resources.

### Judicialization of the Administrative Process

The last lens through which I analyze White's administrative law jurisprudence focuses on whether his opinions are characteristic of the effort made by the federal courts to judicialize the administrative process since the rise of the modern bureaucratic state. Specifically, scholars have suggested that the federal courts have had periods since the New Deal wherein they have attempted to have government agencies act more like courts of law – decisions made on the record, elaborate hearings, multitude avenues of appeals for citizens and interest groups challenging agency actions, and the like (Warren, 1996; Bertelli and Lynn, 2006; and Cooper, 2000).

Some scholars, like Ely (1980) and Bork (1990), were quite skeptical of the federal courts trying to have agencies act like judicial bodies. Horowitz (1977), in particular, was critical of this effort by the federal courts, arguing that administrative agencies were becoming “second class courts,” making it very difficult for agencies to act on the discretion given in law, as the courts, led by lawyers with little technical and managerial expertise, were burdening agencies with extensive, time-consuming processes that only made it harder for civil servants to do their jobs.

Warren (1996) concisely summarizes the roots of the judicialization movement, especially the one that occurred in the late 1960s throughout the 1970s. Federal courts understood that Congress was in the habit of delegating significant authority to executive branch agencies, but Congress did not routinely hold agencies accountable for the

exercise of that discretion. The D.C. Court of Appeals, situated geographically in the home of many federal agency headquarters, led the way during this period in attempting to impose greater judicial procedures upon agencies, indicating a desire to make sure that congressional intent did not get lost in the halls of the federal bureaucracy (paraphrasing Judge Skelly Wright in *Calvert Cliffs v. AEC*, 1972). Even certain members of the Supreme Court, like Justices Douglas and Marshall, expressed concern that federal agencies had grown too close to those who were to be regulated (Douglas, in *Sierra Club v. Morton*, 1972) or were largely unconcerned with citizen rights (Marshall in *Arnett*, 1974). As a result, there was a contingent on the Court that approved of what the D.C. Court of Appeals was doing – requiring agencies to use more court-like processes, or in some cases, employing a “hard look” at both the process and substance of what an agency did.

This hard look (see Morris, 2001, pp. 298-9) was very problematic for many scholars, as it is one thing to require that *processes* become more judicial, but a number of federal courts, particularly the D.C. Court of Appeals, began to replace the *substance* of agency decision making with its own, particularly in areas where Congress provided little, if any, direction to agencies in the exercise of their discretion. It appeared that the Supreme Court, in its holdings both in *Vermont Yankee* (1978; discussed earlier in this chapter) and *Chevron* (1984; discussed earlier in Chapter I), sent clear signals to the lower courts that when Congress gives discretion in law to agencies (as was the case in *Vermont Yankee*, as long as the agency followed the Administrative Procedures Act) or congressional intent is unclear (as was the situation in *Chevron*), then the federal courts should defer to reasonable agency interpretation.

In raising the topic of judicialization, I wondered at the onset of this project if White's administrative law jurisprudence complied with the basic characteristics of this movement. In reviewing an extensive sample of his work, I have come to the conclusion that White was not a proponent of the judicialization of the bureaucratic state.

Evidence for my claim may be seen in White's dissent in the *Lopez-Mendoza* case (1984), wherein the Court was asked if the exclusionary rule was applicable in an administrative deportation hearing. While the Court majority held that the exclusionary rule (see Chapter III for an explanation of this rule) was not applicable to a civil deportation order, White claimed that it should. However, White's claim was *not* based on a desire to have immigration officials act more like federal judges; rather, his claim was based on what he contended was the purpose of the exclusionary rule – whether in the criminal justice or administrative realms. That is, the exclusionary rule was to prevent the use of illegally procured evidence to deter government officials from knowingly violating the rights of American citizens. Whereas the other three Justices in dissent (Brennan, Marshall, and Stevens) emphasized the Fourth Amendment roots of the exclusionary rule, White stressed the rather practical concern of making sure that reasonably competent administrators not knowingly violate relevant law or sections of the Constitution. In short, if the exclusionary rule is good enough to deter unlawful official behavior in the criminal justice context, then why is it not good enough for the administrative context?

Or, let us revisit those cases concerning due process to be provided by administrative agencies. In these cases, White adopted a middle ground approach, rejecting Rehnquist's bitter with the sweet approach and Marshall's full evidentiary

hearing standard. In rejecting both, White shows his true colors; to wit, he recognizes the extent to which the modern administrative state affects the lives of many American citizens, and in the process, may violate their constitutional rights. Accordingly, public agencies must offer some sort of due process when individuals' property rights are at the mercy of the administrative state (rejecting Rehnquist's approach). On the other hand, White understands the managerial and political imperatives bearing upon the administrative state, and as such, he argues (see *Loudermill*) that the purpose of administrative due process is to act as a check on administrative error (rejecting Marshall's standard). While such a middle approach, or balancing of imperatives, can lead to charges that White is offering agencies (and courts) little clear guidance (see Powell's criticism of White's due process views in *Goss v. Lopez*, 1975), White is nevertheless trying find a way for the modern administrative state to exist within the values and principles stated in the Constitution.

Finally, I turn to White's views concerning the basis upon which agencies and bureaucrats exercise discretion. In the *Prouse* case for instance, White's majority opinion plainly states that a police officer cannot base an automobile search merely on a *feeling* that wrongdoing had been committed. As Rosenbloom, et al. (2000), suggest, with extensive discretionary authority given to street-level bureaucrats in the modern administrative state, it would very easy for the federal courts either to require decisions be based on an extensive evidentiary record or to throw their hands up and let decisions be based on things like intuition and feelings. Yet, White suggests otherwise in *Prouse*. He rejects decision making based upon intuition, but he also recognizes that other

government actions in policing the roadways may pass constitutional requirements if they are less discretionary in nature.

Moreover, as discussed earlier in this chapter, White tells the NHTSA in *Motor Vehicle* that if it wants to rescind modified standard 208 it had to follow the APA and make its decision based on reasoned analysis. White easily could have adopted the hard look doctrine of the D.C. Court Appeals and even the judicialization viewpoint of Marshall, but he chose something less burdensome. Or, he could have adopted Rehnquist's view, expressed in *Motor Vehicle*, that a change in presidential administrations was reason enough for the NHTSA to rescind standard 208. Yet, White said that Congress made clear to the agency that no decision to change one of its rules could be arbitrary and capricious.

This study has offered other examples of White eschewing judicialization (*Letter Carriers* is another prime example), but I think the point is apparent – White's administrative law jurisprudence was often an explicit attempt to show how modern governance could comply with constitutional values/principles while also achieving various other political and managerial purposes. It, at times, required greater adherence to the Constitution on the part of civil servants (see *Goss v. Lopez*). At other times, it offered less constitutional protection than desired by individuals (see *Letter Carriers*). Overall, it was an effort to come to grips with how we could have modern governance be in congruence with the Constitution, without requiring the extensive judicial processes favored by many.

A Final Note...on Legal Realism

One last substantive point to offer in this chapter concerns the possible foundation of White's jurisprudence. In Chapter II, I discussed how a number of commentators (Ides, 1993; Stith, 1993; and Nelson, 1994) have posited the notion that White's legal philosophy was rooted in the legal realism tradition that arose at the turn of the 20<sup>th</sup> century. Here, I will briefly explore this claim, and ultimately, conclude, as do a number of other scholars, like Starr (1993) and Hutchinson (1998), that it is very difficult, if not impossible, to center White's jurisprudence within legal realism. Moreover, it may be less important to know the roots of White's jurisprudence than to fully comprehend what public administration can learn from his writing in this area of law.

Legal realism arose as a counter to legal formalism's claim that judges do not make law. Formalists stated the job of the jurist was merely to interpret the words written by elected officials in statute or the framers in the Constitution. Realists maintained otherwise, that to discover the meaning of law or the Constitution, one must surely apply his/her biases, experiences, and desires to a given case or legal text. As Cooper states (2000; p. 59), some of the basic assumptions of realists included the following:

- Legal decisions are not rational;
- Judges have preferences and values that affect their decisions;
- Judges' decisions, especially on multi-member appellate courts, are affected by small group dynamics found in most collegial bodies; and
- Strict legal principles should be eschewed in legal decision making; rather, the judge is tasked with understanding the particular facts of a case and arriving at a decision that addresses those specific facts.

A number of scholars have suggested that legal realism was a much needed wake-up call for the legal profession, as it demonstrated how laws are often contradictory, vaguely written, and without clear guidance to government officials and jurists. As such, judges have extensive discretion to read as much or as little into law as they wish – which directly conflicts with the claims of legal formalists (Hasnas, 1995; pp. 46-7).

Others, like Nonet and Selznick (1978), contend that judges, like other government officials, should aggressively use the law to become responsive to the needs of society. As the modern administrative state is marked by blurred lines of authority, ever changing and complex spans of control, and various forms of accountability, the law also must change. Constitutional principles, like separation of powers and federalism, become irrelevant in today's legal environment, with the citizenry turning to the courts to help correct many of the problems that have arisen with the rise of the bureaucratic state (pp. 103 – 07). As such, judges, like members of Congress or officials in the executive branch, should seek to be active policymakers in the pursuit of making the law responsive to the needs of society.

In some ways, White's administrative law jurisprudence seemingly would be consistent with some of the legal realism agenda. For instance, White drew my attention, at least initially, because he took the Court majority to task in *Chadha* for ignoring how the legislative veto was a modern invention of the political branches, necessary to provide some accountability for the exercise of discretion given to unelected bureaucrats. In this case, White was seemingly contending the Court should be responsive to a changing society that drove the creation and continued development of the administrative state.

However, to make the claim that White was a legal realist ignores the substantial evidence that the Justice hardly ever was interested in expanding the role of the judiciary into the administrative process. He took conscious steps to avoid having bureaucratic processes become judicialized (see above discussion), which one could claim would be characteristic of a judge looking to take an active role in the administrative process. While White was willing to give bureaucrats room to do their jobs, it usually was within the parameters established by the elected branches (see *Letter Carriers* and *Motor Vehicle*).

Additionally, his words are suggestive of one representing the Progressive's good government movement or the desire of many of the latter New Deal era justices to defer to the wisdom of the political branches. With the former, as I discussed in Chapter III, White was a constitutional schoolmaster writing about the grand purposes of the First Amendment serving the public interest (see *Red Lion*) or the value of having a neutrally competent public workforce (*Letter Carriers*). With the latter, deference to elected officials, White's willingness to give constitutional approval to the legislative veto in *Chadha* could have had as much to do with a willingness to let the political branches solve intractable policy problems as it did with some (realist) desire to make the law responsive to the needs of society.

For the purposes of this project, I have been less concerned with the roots of White's administrative law jurisprudence than I have been at determining the lessons, if any, public administrators may ascertain from reading his opinions. I argued in this chapter that in reading these opinions interested bureaucrats can learn much about how the Constitution influences his/her work – what regime values are applicable and in what

context(s); how a public manager can be constitutionally competent, and how White was rarely interested, if at all, in the bureaucracy becoming judicialized. The kind of balanced, middle-of-the-road approach White favored may or may not be characteristic of legal realism. This approach may be difficult to put into practice, as a number of White's brethren commented in various cases. Yet, for the civil servant tasked with serving various masters in a complex governing environment, White's administrative law jurisprudence may be the nuanced, sophisticated guidance that is required.

## Chapter VI: Conclusion

...and another thing – if the Court is demanding a certain degree of “Constitutional Competence” from public officials, it had damn well better clearly define exactly what is expected. Otherwise, judicial rulings are no better than vague pieces of legislation, the meaning of which is up for grabs to whoever makes the best argument. Kevin Long, in private correspondence (11 March 2004) regarding what he considered cautious Supreme Court rulings in the early 2000s concerning the implementation of various public programs.

### Introduction

I choose to frame the concluding chapter of this book with a quote from a good friend’s private e-mail that he sent a few years back. My friend, Kevin Long, has had a sustained interest in how the federal courts have shaped the work of public institutions and administrators.<sup>18</sup> In our discussions and collaborations, we have spoken at length about the role the federal courts should have in a constitutional republic in shaping the work of public institutions and those who toil in them. While we have had our disagreements on the general topic, where we have agreed consistently is in thinking that the federal courts have a modest but very important role in providing guidance to public administration as to how it may serve constitutional values while also meeting other felt needs.

Long’s remarks serve to encapsulate what this dissertation set out to explore -- what public administration could learn from a Supreme Court Justice who struck me as a

---

<sup>1</sup> See conference papers:

- Aughenbaugh, John M. and Kevin Long. “Prophets without a Paradigm: The Federal Judiciary and Institutional Reform Litigation.” at Courts and Social Change Panel of Southern Political Science Association Annual Meeting, Savannah, GA: November 8, 2002.
- Aughenbaugh, John M. and Kevin Long. "Does Outcome Follow Notion?: Role of Organizational Theory in Court Directed Reform of Prisons." at Staffing and Decision Making in the Lower Federal Courts Panel of Southern Political Science Annual Meeting, Atlanta, GA; October 29, 1998; and
- Aughenbaugh, John M. and Kevin Long. "The Ignorance of Conventional Wisdom: Federal Court-Directed Institutional Reform as a Management Process." at Administration and Reform of Judicial System Panel of Southern Political Science Association Annual Meeting, Norfolk, VA; November 8, 1997.

jurist with something new and distinctive to offer the interested bureaucrat. In the following pages, I will offer a summary of the preceding chapters, touching upon the purpose and expectations of the study, themes found in White's opinions, limitations of the project, and some thoughts regarding future research.

### A Revisiting: Purpose of Study and Research Expectations

The overarching task I set for this project was to determine if the work of public administration could be enriched by taking a closer look at Justice White's administrative law opinions. In part, this work follows in the tradition of understanding how the Supreme Court has affected modern governance in the United States. From the excellent administrative law texts produced by Philip Cooper (2000) and Kenneth Warren (1997) to the more expository and thematic efforts crafted by Rosenbloom, et al. (2000) and Lee (2005), there has been a strong effort in the past two decades to examine how the Court has influenced the work done by civil servants. My dissertation is rooted in that work, but narrower in focus – how a single Justice could influence the work of bureaucrats.

From that purpose, I proposed a number of research expectations that I wanted to explore:

- There is an identifiable White administrative law jurisprudence;
- Within this jurisprudence is a body of thought that recognizes and is sensitive to the distinctive nature of modern governance; and
- White's administrative law jurisprudence can be translated and used by public administrators to guide and inform their work.

To the expectation that there is an identifiable White administrative law jurisprudence, I contend that there is ample support for that claim. Specifically, White's opinions in a number of areas became controlling precedent on the Court. For instance,

regarding the application and meaning of due process in the administrative context, White created a version of due process that remains the standard to date, and one that is sensitive to the needs of many administrators. As stated in my discussion of *Loudermill*, White claims the purpose of administrative due process is not to find truth (as is pursued in criminal due process); rather, it is to correct administrative error. The process is not as burdensome as that found in criminal law, but administrative due process does guarantee that the individual is told why his/her job (or government benefit) is being abridged and is given an opportunity to respond, both of which must occur before the office (or benefit) is officially taken away.

Likewise, regarding official immunity, White spoke with clarity in establishing the “reasonably should have known” standard to guide federal court review of claims made by public officials that they should be immune from lawsuits contending violation of civil rights. White’s work in official immunity cases is characteristic of the balancing he emphasized in a number of administrative law areas – what is being expected of administrators in their jobs (by the political branches and the public), what is expected of government officials by the Constitution, and how we might bridge the gaps that exist. With official immunity, White’s “reasonably should have known” standard acknowledges the broad discretionary authority delegated to unelected administrators in the past seventy years. However, that delegated authority is not a blank check that may be used by administrators to violate any or all constitutional rights maintained by individuals. Instead, White attempts to create a framework in which administrators may receive qualified immunity if their actions comply with the provisions of the Constitution.

While other themes exist in White's jurisprudence, like his willingness to defer to the political branches in creating new tools in the modern administrative state to ensure the accountability enshrined in the Constitution's separation of powers doctrine (see his dissents in *Chadha*, *Bowsher v. Synar*, and *Northern Pipeline*), most of these themes exhibit a keenness to understand the needs of modern governance and how the federal courts should evaluate them per constitutional dictates. As I argue in Chapter V, White's effort to make sure the work of today's administrator complies with the Constitution is much different from the efforts of the federal courts to judicialize the modern administrative state. For instance, the "hard look" doctrine of the late 1960s and early 1970s was founded upon a marked skepticism that anyone in or any branch of government was holding bureaucrats accountable for their exercise of discretion, AND a clear willingness to replace substantive administrative decisions with those of federal judges. White was hardly interested in going as far as the hard look doctrine suggested. For him, the task was to give guidance, to ensure that constitutional values and principles were maintained while giving civil administrators the authority and flexibility to do the work expected of them.

The clearest representation of the difference between White and those who favored judicialization may be seen, again, with White's administrative due process opinions. Whereas Justice Marshall called for an extensive, trial-type version of due process, White adopted a middle ground approach that, in effect, provided the individual notice and comment (much like informal rule-making in the APA). As White explained at some length, within the administrative context, there is an imperative for administrators to employ the most efficient and effective means in implementing

government programs, but that imperative has to conform to the individual rights listed in the Constitution. Moreover, White's approach was a direct repudiation of Justice Rehnquist's approach that suggested administrative due process could be whatever the legislature determined in its authorizing legislation. Some criticize White for being unwilling to offer a bright line rule to govern most administrative due process situations (as both Marshall and Rehnquist desired in contrast), but I subscribe to the notion that White, unlike his brethren, recognized that bright line rules often were inappropriate for the changing dynamics found in modern governance.

Throughout White's administrative opinions, one finds a Justice often dedicated to delve into the intricacies of governing, and how those mechanics could be supported by the Constitution. Whereas much of the common wisdom surrounding White's overall jurisprudence suggests that he was not interested in deciding cases beyond their specific facts, I found with some regularity a Justice who was adept at elucidating how specific cases fit within larger legal and governing contexts. For instance, regarding the Court's separation of powers cases throughout the 1980s, White, more so than his brethren, was interested in exploring the context in which modern governance operates – the political pressures, managerial imperatives, extensive discretionary authority, and the competing demands placed upon unelected administrators. Other Justices, like Chief Justice Burger, argued that the Constitution was not designed to address many of the political innovations created per the administrative state, and as such, those innovations were unconstitutional. While both views help contribute to the ongoing debate associated with running the U.S. Constitution, I found much support for the expectation that White was sensitive to the distinctive pressures placed upon today's civil servants.

Additionally, I found considerable evidence that White's administrative law jurisprudence could be used rewardingly by today's civil servant. A good example of this is in the area of administrative discretion. In the *Motor Vehicle* case, White cautioned agencies that in making changes to existing regulations they must base such adjustments on a reasoned analysis and not just on the policy desires of a new presidential administration. White's guidance in this instance does not make work easier for the agency; however, it does remind agencies that no matter the incentives to go along with a new administration they must still follow applicable law (here, the APA). White also offers guidance in this regard to the individual civil servant. In *Prouse*, White's majority opinion emphasizes that a decision to stop and search an automobile has to be founded upon more than mere intuition. White does not offer a magical elixir for the often frustrated bureaucrat; instead, he offers a foundation upon which he/she may base his/her thinking and decision making.

In summary, White suggests practical guidance for civil servants throughout his administrative law opinions. As White reminded his brethren in the separation of powers cases, they were attempting to reconcile modern governance with constitutional dictates. White took that charge seriously, as seen in his efforts to balance First Amendment concerns in *Red Lion* and *Letter Carriers* versus various government and political imperatives. His efforts at practical advice were also seen with his opinions in administrative due process (especially of value for the public human resource professional), administrative searches (of benefit to those tasked with implementing various regulatory schemes), and official immunity (administrators cannot use ignorance of the law as a justification for violating constitutional rights). Indeed, an interested

administrator need not look very hard or far to find guidance in White’s administrative law opinions.

Themes in White’s Administrative Law Jurisprudence

In Chapter I, I suggested that a second purpose of this study was to explore the dominant themes that existed in White’s administrative law jurisprudence. In part, this exploration was a challenge to what I had initially perceived in reading a handful of White’s administrative law opinions,<sup>19</sup> that he was a Justice who seemed to be crafting a vision for the modern administrative state that balanced competing imperatives. Additionally, searching for themes in White’s administrative law jurisprudence was a test of the general impression of White within the literature that indicated he was incapable of offering any discernible legal doctrine or philosophy. The following table highlights the themes I found in White’s administrative law opinions.

**Table 3: Identifiable Themes in Justice White’s Administrative Law Opinions**

Theme	Supreme Court Cases
Balancing of Competing Interests – Normative Strain in First Amendment Cases	<i>Red Lion &amp; Letter Carriers</i>
Separation of Powers Means Separate but Shared Powers – Meeting the Demands of Modern Governance	<i>Northern Pipeline, Chadha, &amp; Bowsher v. Synar</i>
Reasonably Should Have Known Standard	<i>Wood v. Strickland &amp; Butz v. Economou</i>
Administrative Due Process Requires Pre-termination Hearing	<i>Arnett v. Kennedy, Goss v. Lopez, &amp; Loudermill</i>
Reasoned Analysis – Intuition Not Enough to Satisfy Probable Cause	<i>Motor Vehicle &amp; Prouse</i>
Flexible Standard of Probable Cause to Obtain Warrant for an Administrative Search	<i>Camara &amp; See</i>

<sup>2</sup> The initial cases were *INS v. Chadha* (1983), *Bowsher v. Synar* (1986), *Cleveland Board of Education v. Loudermill* (1985), *CSC v. Letter Carriers* (1973), and *Butz v. Economou* (1978).

First, White, more so than any other Justice with whom he served on the Supreme Court, was interested in seeing how the modern administrative state could fit within constitutional principles and values. Thus, one sees with some regularity White attempting to balance competing interests. For example, how do we balance First Amendment rights versus various regulatory and managerial imperatives? How do we balance administrative discretion while holding bureaucrats accountable for the exercise of delegated authority?

Second, while understanding of the difficulties inherent in administrative work today, White did not give civil servants free rein to trample on the Constitution. Whether cases addressed termination of government employment or official immunity, White made clear to civil servants that they had an affirmative responsibility to know how the Constitution affected their jobs. Once again, White offered to the Court (and to the interested bureaucrat) a framework to judge governing in the modern administrative state. What is being asked of the administrator or agency? What are the applicable law and/or section of the Constitution? How do we bridge the gap that exists so the needs of both are satisfied?

Third, the identified themes may be translated and used by rank and file civil servants. White's opinions are laden with discussions of exemplary purposes (*Letter Carriers*), processes (*Chadha*, *Loudermill*, and *Motor Vehicle*), regulatory schemes (*Camara*, *See*, and *Biswell*), and political pressures (*Bowsher*, *Butz*, and *Motor Vehicle*). In reading the cases and identifying the various themes, what often came to mind was how White attempted to address what was demanded of administrators in modern governance and how administrators could do their work today within constitutional

constraints. As I discussed at a number of points in Chapter V (see, especially, the section on Constitutional Competence), White offered clear notions of what administrators had to do to be in compliance with the law, but this was not a Justice sitting in the marble palace of the Court unaware of what was being asked in the bowels of today's administrative state. While others on the Court were suggesting complete deference to the government (Rehnquist) or judicialization of administrative processes (Marshall), White struggled to find a way to place administrators within the Constitution without severely handicapping their efforts. Even when one could quibble with White's thoughts (see his weakening of probable cause in the administrative search cases), it was largely due to his effort to make constitutional sense of government today.

#### Limitations of Study

This dissertation is both descriptive and normative. It is descriptive in that a significant portion of the work was devoted to analyses of Supreme Court cases in which Justice White contributed opinions. The purpose of this description was to detail White's views on various administrative law areas and to identify any themes that arose in his opinions. By analyzing selected cases, I attempted to explain more fully how the Supreme Court and Justice White were addressing core issues associated with modern governance.

One of the chief advantages in employing a descriptive research design is that it allows the researcher to explore previously uncharted territory. That was definitely the case with this work, as most commentators claim that White lacked a clear vision or doctrine in any substantive area of law. Moreover, I employed a number of analytical frames that typically have been used to study what courts, and not a single justice, have to

offer public administration. Whether it is Rohr's regime values, Rosenbloom's advocacy of constitutional competence, or the judicial branch's various judicialization movements, these frames have tended to focus on the larger collective rather than a single member of the federal courts. As such, a descriptive design allowed me a format to test their suitability indirectly for exploring the research expectations I had for this study.

However, there are a number of disadvantages to using a descriptive design. Most prominently, one cannot establish causality with a descriptive research model. While a number of scholars have suggested that White's exposure to legal realism while at Yale law school contributed significantly to his jurisprudence, as I noted in Chapter V, such causal claims are not easily determined with the type of research I conducted in this work.<sup>20</sup> As such, one looking to explore such root causes for White being sensitive to the needs of modern governance would have to utilize other research designs and data sources.

While descriptive, this study also is normative; specifically, what can and should public administration learn from reading White's administrative law opinions? As I noted approvingly in Chapter V when providing a brief review of Rohr's regime values framework, the normative purpose of this study was not one of providing a list of do's and don'ts for civil servants based on White's opinions. Instead, the expectation I had was that White could offer the interested bureaucrat a discussion of what it means to apply regime values in their daily efforts. That is, within the rubric of constitutional

---

<sup>3</sup> Moreover, one could argue, as do I, that for the purposes of this study, it was largely irrelevant as to what experience(s) led White to become interested in modern governance and its connection to the Constitution. Rather, it was more important for this study that evidence was found to either support or challenge the research expectations I had when beginning this study.

competence, what does White suggest administrators and agencies should do to ensure compliance with the Constitution while also meeting other demands placed upon them.

Within the themes I identified in White's opinions, there are various behavioral norms to which civil servants could aspire (see, for instance, the provision of administrative due process). However, as Rohr (1988), Frederickson (2005), Rosenbloom (2000), and Gawthrop (1998) have noted, historically American public administration has tended to seek concrete managerial solutions ("this is how we achieve efficiency in offering this program") instead of normative guidance to direct bureaucratic behavior ("in providing this service, we must be cognizant of the process rights that..."). For those who fall in the former camp, this study will provide little nourishment to satisfy their appetite for how we should govern in modern times. On the other hand, if one acknowledges the important role the federal courts have played and continue to play in shaping governance in the United States, then this study may offer a method with which administrators can enrich the work they do on a daily basis.

### Future Research

In projecting to the future, there are several avenues down which I may want to travel. First, I may want to expand my review of White's administrative law opinions. This dissertation specifically described and explored twenty of the Justice's administrative law opinions in an attempt to keep the study to a manageable size. However, initially I had thirty-five administrative law cases, some of lesser import than included here, in which Justice White offered opinions. Perhaps a study of those additional opinions will yield more information about how public administration could utilize Justice White's jurisprudence to assist in the work of modern governance.

Another research avenue is comparing White to other Supreme Court Justices who have shared White's interest in administrative law. For instance, two current Justices come to mind – Justices Stephen Breyer and Antonin Scalia. Breyer had written extensively on regulatory matters before being nominated to the Supreme Court, and has been willing to engage Justice Scalia on administrative law matters since both have been on the federal bench.<sup>21</sup> Justice Scalia had an extensive background in administrative law before arriving at the Court, and he, too, has written at length and with considerable sophistication on administrative law matters, both on the bench and in the academy.<sup>22</sup> It may be illuminating to track the evolution of the Court's administrative law thinking by comparing White to two of his successors on the bench who apparently are interested in administrative law matters.

In the same vein, I could develop a comparative study to include Justice Robert Jackson, who sat on the Supreme Court from 1941 – 1954. As Susan Buck discusses in her unpublished doctoral dissertation on Jackson,<sup>23</sup> this Justice could be viewed as the ideal medium through which to observe the evolution of American administrative law, particularly at the inception of the modern administrative state. Thus, a future study could compare and contrast Justices Jackson, White, Scalia, and/or Breyer. The value of such an effort would rest upon its coverage of the span of the modern administrative state, with a mere period in the late 1950s not represented by these jurists. Such a project

---

4 See *Regulations and Its Reform*. Cambridge, MA: Harvard University Press. 1982; and “Vermont Yankee and the Courts’ Rule in the Nuclear Energy Controversy.” 91 *Harvard Law Review*. 1833. (1978).

5 See “Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court.” 1979 *Supreme Court Review*. 345 (1979); and “Judicial Deference to Administrative Interpretations of Law.” *Duke Law Journal* (June, 1989): 511-521. Scalia was also chairman of the American Bar Association’s section on administrative law from 1981 – 1982.

6 Buck Cox. 1983. *Justice Robert Jackson and the Evolution of Administrative Law*.

could explore how the Court, as represented by these Justices, affected the administrative state in a number areas of law and case holdings.

Last, if not a comparative study, then I may apply the same analytical frames to Scalia and Breyer, emphasizing, as did this study, what public administration could learn from Justices who share White's interest in administrative law matters. As I alluded to in various sections of this project, governance today remains extremely complex, what with New Public Management, new governing arrangements, and the like. While only having a cursory knowledge of Scalia and Breyer's administrative law jurisprudence, what I have encountered in their writings hint at many of the concerns White demonstrated. Specifically, how do we incorporate modern governance into existing legal and constitutional norms?

## CASES CITED

(in chronological order)

*Spalding v. Vilas*, 161 U.S. 483 (1896)  
*Humphrey's Executor v. United States*, 295 U.S. 602 (1935)  
*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)  
*United Public Workers v. Mitchell*, 330 U.S. 75 (1947)  
*United States v. California*, 332 U.S. 19 (1947)  
*SEC v. Chenery Corporation*, 332 U.S. 196 (1947)  
*Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)  
*Youngstown Sheet and Tube Company v. Sawyer*, 343 U.S. 579 (1952)  
*Brown v. Board of Education*, 347 U.S. 483 (1954)  
*Wiener v. U.S.*, 357 U.S. 349 (1958)  
*Frank v. Maryland*, 359 U.S. 360 (1959)  
*Barr v. Mateo*, 360 U.S. 564 (1959)  
*Mapp v. Ohio*, 367 U.S. 643 (1961)  
*Miranda v. Arizona*, 384 U.S. 436 (1966)  
*Camara v. Municipal Court*, 387 U.S. 523 (1967)  
*See v. Seattle*, 387 U.S. 541 (1967)  
*Tinker v. Des Moines School District*, 393 U.S. 507 (1969)  
*Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969)  
*Goldberg v. Kelly*, 397 U.S. 254 (1970)  
*Calvert Cliffs v. AEC*, 449 F.2d 1109 (D.C. Cir., 1971)  
*Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)  
*New York Times v. U.S.*, 403 U.S. 670 (1971)  
*Sierra Club v. Morton*, 405 U.S. 727 (1972)  
*United States v. Biswell*, 406 U.S. 311 (1972)  
*Board of Regents v. Roth*, 408 U.S. 564 (1972)  
*Perry v. Sinderman*, 408 U.S. 593 (1972)  
*Branzburg v. Hayes*, 408 U.S. 665 (1972)  
*Roe v. Wade*, 410 U.S. 113 (1973)  
*United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973)  
*Arnett v. Kennedy*, 416 U.S. 134 (1974)  
*Goss v. Lopez*, 419 U.S. 565 (1975)  
*Wood v. Strickland*, 420 U.S. 308 (1975)  
*Matthews v. Eldridge*, 424 U.S. 319 (1976)  
*U.S. v. Janis*, 428 U.S. 433 (1976)  
*Butz v. Economou*, 434 U.S. 994 (1977)  
*Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978)  
*Monell v. New York Department of Social Services*, 436 U.S. 658 (1978)  
*Marshall v. Barlow's*, 436 U.S. 307 (1978)  
*Zurcher v. The Stanford Daily*, 436 U.S. 547 (1978)  
*Delaware v. Prouse*, 440 U.S. 648 (1979)

*Herbert v. Lando*, 441 U.S. 153 (1979)  
*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)  
*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)  
*Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)  
*INS v. Chadha*, 462 U.S. 919 (1983)  
*Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 29 (1983)  
*Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)  
*INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)  
*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)  
*Bowers v. Hardwick*, 478 U.S. 186 (1986)  
*Bowsher v. Synar*, 478 U.S. 714 (1986)  
*Brock v. Roadway Express, Inc.*, 107 S.Ct. 1740 (1987)  
*Morrison v. Olson*, 108 S.Ct. 2597 (1988)  
*Canton v. Harris*, 489 U.S. 378 (1989)  
*Mistretta v. United States*, 109 S.Ct. 647 (1989)  
*Clinton v. City of New York*, 118 S.Ct. 2091 (1998)  
*U.S. v. Mead*, 533 U.S. 1 (2001)

## WORKS REFERENCED

- Abraham, Henry J. *The Judicial Process*. 6<sup>th</sup>. (New York, NY: Oxford University Press). 1993.
- *Justices, Presidents, and Senators*. Revised. (Lanham, MD: Rowman and Littlefield). 1999.
- American Bar Association. "Justice Byron R. White: Leading from the Center." *ABA Journal* (special issue). 24: June 15, 1986.
- Andersen, Kurt. "An Epic Court Decision." *Time*. 4 July 1983. Vol. 122. Pp. 12-3.
- Armstrong, Michael J. "A Barometer of Freedom of the Press: The Opinions of Mr. Justice White." *Pepperdine Law Review*. 8 (1980):157.
- Atkinson, David N. *Leaving the Bench: Supreme Court Justices at the End*. (Lawrence, KS: University of Kansas Press). 1999.
- Barksdale, Rhesa H. "A Tribute to Justice Byron R. White." *Harvard Law Review*. 107 (1993): 3.
- Bazelon, David. "The Impact of the Courts on Public Administration." *Indiana Law Journal*. 52 (1): 101 – 110.
- Beckett, Julia, and Heidi O. Koenig. *Public Administration and Law*. (Armonk, NY: M.E. Sharpe). 2005.
- Bell, Bernard W. "Book Review: Byron R. White, Kennedy Justice." *Stanford Law Review*. 51 (1999): 1373.
- Bickel, Alexander M. *Politics and the Warren Court*. (New York, NY: Harper & Row). 1965.
- Biskupic, Joan. *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice*. (New York, NY: Harper Collins). 2005.
- Blasi, Vincent. ed. *The Burger Court: The Counter-Revolution That Wasn't*. (New Haven, CT: Yale University Press). 1983.
- Bonfield, Arthur, and Michael Asimow. *State and Federal Administrative Law*. (St. Paul, MN: West Publishing). 1989.
- Bork, Robert H. *The Tempting of America: The Political Seduction of the Law*. (New York, NY: Free Press). 1990.

- Boyle, James. "Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance." *Cornell Law Review*. 78 (1993): 371.
- Brennan, William J. "Some Thoughts on the Supreme Court's Workload." Delivered at the Third Circuit Judicial Conference on September 9, 1982. In *Judicial Politics: Readings from Judicature*. Elliot E. Slotnick ed. (Chicago, IL: American Judicature Society).
- Breyer, Stephen A. "Vermont Yankee and the Courts' Rule in the Nuclear Energy Controversy." 91 *Harvard Law Review*. 1833. (1978).
- *Regulation and Its Reform*. (Cambridge, MA: Harvard University Press). 1982
- Buck Cox, Susan. *Justice Robert Jackson and the Evolution of Administrative Law*. Unpublished Dissertation. 1983.
- Campbell, Geoffrey A. "States, Cities Size Up Mixed Bag of Rulings as a Fledgling Supreme Court Finds Its Way." *The Bond Buyer*. 2 July 1992. Volume 300. Number 28935. Pp. 1-2.
- "Clinton Gets First Chance to Influence Court as White Resigns." *The Bond Buyer*. 22 March 1993. Volume 303. Number 29114. P. 4.
- Carrington, Paul D. "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court." *Alabama Law Review*. 50 (1999): 397.
- Clayton, Cornell W., and Howard Gillman. ed. *Supreme Court Decision-Making: New Institutional Approaches*. (Chicago, IL: University of Chicago Press). 1999.
- Collins, Richard B. "Tribute: Western Justice." *Yale Law Journal*. 112 (2003): 975.
- Cooper, Phillip J. *Battles on the Bench: Conflict Inside the Supreme Court*. (Lawrence, KS: University of Kansas Press). 1995.
- *Public Law and Public Administration*. 3<sup>rd</sup> ed. (Itasca, IL: F.E. Peacock Publishers). 2000.
- *Cases on Public Law and Public Administration*. (Belmont, CA: Wadsworth/Thomson). 2005.
- Coughlin, John J. "Common Sense in Formation for the Common Good - Justice White's Dissents in the Parochial School Cases: Patron of Lost Causes or Precursor of Good News." *St. John's Law Review*. 66 (1992): 261.
- Cover, Robert. "Your Law-Baseball Quiz." *New York Times*. 5 April 1979.

- Coyle, Marcia. "Kodak Moments (Almost) with Justice White." *The National Law Journal*. April 22, 2002.
- Craig, Barbara Hinckson. *Chadha: The Story of an Epic Constitutional Struggle*. (Berkeley, CA: University of California Press). 1988.
- Crawford Greenburg, Jan. *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. (New York, NY: The Penguin Press). 2007.
- Cray, Ed. *Chief Justice: A Biography of Earl Warren*. (New York, NY: Simon & Schuster). 1997.
- Cushman, Clare. ed. *The Supreme Court Justices: Illustrated Biographies, 1789 – 1995*. 2<sup>nd</sup> ed. (Washington, DC: Congressional Quarterly Press). 1995.
- D'Amato, Anthony. "The Limits of Legal Realism." *Yale Law Journal*. 87 (1978): 468.
- Davis, Kenneth Culp. *Administrative Law and Government*. (St. Paul, MN: West Publishing). 1975.
- Davis, Michael J. "In Memoriam: Remembering Justice Byron R. White." *Kansas Law Review*. 50 (2002): 1085.
- Davis, Sue. *Justice Rehnquist and the Constitution*. (Princeton, NJ: Princeton University Press). 1989.
- "Power on the Court: Chief Justice Rehnquist's Opinion Assignments." In *Judicial Politics: Readings from Judicature*. Elliot E. Slotnick ed. (Chicago, IL: American Judicature Society). 1992.
- Dolan, Julie, and David H. Rosenbloom, eds. *Representative Bureaucracy: Classic Readings and Continuing Controversies*. (Armonk, NY: M.E. Sharpe). 2002.
- Ebel, David M. "Byron R. White: A Justice Shaped by the West." *University of Colorado Law Review*. 71 (2000): 1421.
- Edley, Christopher F., Jr. *Administrative Law: Rethinking Judicial Control of Bureaucracy*. (New Haven, CN; Yale University Press). 1990.
- Epstein, Lee, and Joseph Kobylka. *Supreme Court and Legal Change: Abortion and the Death Penalty*. (Chapel Hill, NC: University of North Carolina Press). 1992.
- Epstein, Lee, and Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker. *The Supreme Court Compendium: Data, Decisions, and Developments*. (Washington, D.C.: Congressional Quarterly Press). 1994.

- Epstein, Lee, and Jack Knight. *The Choices Justices Make*. (Washington, D.C.: Congressional Quarterly Press). 1998.
- Feeley, Malcolm M., and Edward L. Rubin. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. (New York, NY: Cambridge University Press). 2000.
- Fisher, Louis. "Judicial Misjudgments about the Lawmaking Process: The Legislative Veto Case." *Public Administration Review*. 45 (1985): 705.
- Frederick, David C. "Justice White and the Virtues of Modesty." *Stanford Law Review*. 55 (2002): 21.
- Frederickson, H. George, and Ghere, Richard K. eds. *Ethics in Public Management*. (Armonk, NY: M.E. Sharpe). 2006.
- Gavin, Tom. Opinion-Editorial. *Denver Post*. 18 May 1988.
- Goldman, Jerry. "Portrait and Overview of Byron R. White." *The Oyez Project*. (Chicago, IL: Northwestern University). 1996.
- Glendon, Mary Ann. "Partial Justice: Jurisprudence on the Supreme Court." *Commentary*. 1994.
- Goldberg, John C. P. "Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence." *University of Colorado Law Review*. 74 (1993): 1471.
- Greenhouse, Linda. "Impolitic: The Separation of Justice and State." *New York Times*. 1 July 2001.
- *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*. (New York, NY: Times Books). 2005.
- Griswold, Erwin N. "Reflections on Justice White." *University of Colorado Law Review*. 58 (1987) 339.
- Hall, Kermit L., ed. *The Oxford Guide to United States Supreme Court Decisions*. (New York, NY: Oxford University Press). 1999.
- *The Oxford Companion to the Supreme Court of the United States*. 2<sup>nd</sup> ed. (New York, NY: Oxford University Press). 2005.
- Hasnas, John. "Back to the Future: From Critical Legal Studies forward to Legal

- Realism, or How not to Miss the Point of the Indeterminacy Argument.” *Duke Law Journal*. 45 (1995): 84.
- Hellman, Arthur D. “The Shrunken Docket of the Rehnquist Court.” *Supreme Court Review*. Harvard Law School. 1996:403-438.
- Herz, Michael. “Deference Running Riot.” *Administrative Law Journal*. 6 (1992): 187.
- “Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny.” *University of Colorado Law Review*. 74 (1993): 1329.
- “Justice Byron White and the Argument that the Greater Includes the Lesser.” *Brigham Young University Law Review*. 1994: 227.
- Heymann, Philip. *Terrorism, Freedom, and Security* (Cambridge, MA: MIT Press). 2003.
- Horowitz, Donald L. “The Courts as Guardians of the Public Interest.” *Public Administration Review*. 37 (1977): 150.
- Hutchinson, Dennis J. “Byron R. White.” *The Supreme Court Justices: Illustrated Biographies, 1789-1995*. Claire Cushman ed. (Washington, DC: Congressional Quarterly). 1995.
- Hutchinson, Dennis J. *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White*. (New York, NY: The Free Press). 1998.
- “Judge White and the Exercise of Judicial Power: Two Cheers for Judicial Restraint.” *Colorado Law Review*. 74 (1993): 1409.
- Hutton, Mary Christine. “The Unique Perspective of Justice White: Separation of Powers, Standing, and Section 1983 Cases.” *Administrative Law Review*. 40(1988): 377.
- Ides, Allan. “The Jurisprudence of Justice Byron White.” *Yale Law Journal*. 103(1993): 419.
- “Realism, Rationality, and Justice Byron White: Three Easy Cases.” *Brigham Young University Law Review*. 1994: 283.
- Irish, Leon E. “Byron White: A Singular Life.” *Catholic University Law Review*. 52 (2003): 883.
- Jeffries, John C. *Justice Lewis F. Powell, Jr.: A Biography*. (New York, NY: Scribner). 1994.
- Jost, Kenneth. “The White Legacy: The Courtship of Byron White.” *American Bar*

- Association Journal*. 79 (1993): 62.
- Kagan, Robert A., Martin Krygier, and Kenneth Winston. *Legality and Community: On the Intellectual Legacy of Philip Selznick*. (New York, NY: Rowman & Littlefield). 2002.
- Kahn, Ronald. *The Supreme Court and Constitutional Theory: 1953-93*. (Lawrence, KS: University of Kansas Press). 1994.
- Kamen, Al. "Supreme Court Scenarios." *Washington Post*. 30 July 1993. A27.
- Kao, Christopher. "Book Review: The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto." *Harvard Journal on Legislation*. 34 (1997): 301.
- Katzenbach, Nicholas deB. "Tribute to Justice Byron R. White." *Stanford Law Review*. 55 (2002): 13.
- Kmiec, Douglas W. "Symposium on the Life and Work of Justice Byron R. White: Introduction." *Catholic University Law Review*. 52 (2003): 877.
- Kmiec, Keenan D. "The Origin and Current Meanings of 'Judicial Activism'". *California Law Review*. 2004: 1441.
- Kindred, Kay. "Civil Rights and Higher Education." in *A Year in the Life of the Supreme Court*. Rodney A. Smolla, ed. (Durham, NC: Duke University Press). 1995.
- Klain, Ronald. "Farewell, Camelot: Puzzling Conservatives, Too." *National Law Journal*. April 22, 2002.
- Lazarus, Edward. *Closed Chambers: The First Eyewitness Account of the Epic Struggles inside the Supreme Court*. (New York, NY: Times Books). 1998.
- Lee, Rex E., and Richard G. Wilkins. "On Greatness and Constitutional Vision: Justice Byron R. White." *Brigham Young University Law Review*. 1994: 291.
- Lewin, Nathan. "White's Flight: The Burger Court's Right-Hand Man: Justice Byron R. White." *The New Republic*. 27 August 1984.
- Liebman, Lance. "Justice White and Affirmative Action." *University of Colorado Law Review*. 58 (1987): 471.
- Lieberman, Jethro K. *A Practical Guide to the Constitution: How the Supreme Court Has Ruled on Issues from Abortion to Zoning*. (Berkeley, CA: University of California Press). 1999.

- Lipsky, Michael. *Street-Level Bureaucracy*. (New York, NY: Russell Sage Foundation). 1980.
- Lowi, Theodore. *The End of Liberalism*. (New York, NY: Norton). 1969.
- MacKenzie, Kevin. ““Administrative Searches and the Fourth Amendment: An Alternative to the Warrant Requirement.” *Cornell Law Review*, 64 (1979): 864.
- Maltese, John Anthony. *The Selling of Supreme Court Nominees*. (Baltimore, MD: Johns Hopkins University Press). 1995.
- Maltz, Earl M. *The Chief Justiceship of Warren Burger, 1969 – 1986*. (Columbia, SC: University of South Carolina Press). 2000.
- Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. *Crafting Law on the Supreme Court: The Collegial Game*. (New York, NY: Cambridge University Press). 2000.
- Malysiak, James T. “Justice White On Antitrust: Protecting Freedom to Compete.” *University of Colorado Law Review*. 59 (1987): 497.
- Mauro, Tony. “White’s Quiet Trek toward a Record.” *Legal Times*. 9 (1987): 11.
- “Byron White: A Force before Joining the Court.” *Legal Times*. April 22, 2002.
- “IOLTA Fight Hits High Court.” *American Lawyer Media*. December 12, 2002.
- McCloskey, Robert G. *The American Supreme Court*. Revised by Sanford Levinson. (Chicago, IL: University of Chicago Press). 1994.
- Merrill, Thomas W. “Judicial Deference to Executive Precedent.” *Yale Law Journal*. 101 (1992): 970.
- Meyer, David D. “Justice White and the Right of Privacy: A Model of Realism and Restraint.” *Catholic University Law Review*. 52 (2003): 915.
- Miller, Christopher S. “The End Justifies the Means: Affirmative Action, Standards of Review, and Justice White.” *University of Miami Law Review*. 46 (1992): 1305.
- National Law Journal*. “White: A Justice of Studied Unpredictability.” 2 (1980): 24.
- Nelson, William E. “Deference and the Limits to Deference in the Constitutional Jurisprudence of Justice Byron R. White.” *University of Colorado Law Review*. 58 (1987): 347.
- “Byron Raymond White.” in *The Supreme Court Justices: A Biographical*

- Dictionary*. Melvin I. Urofsky, ed. (New York, NY: Garland Publishing, Inc.). 1994.
- “Justice Byron R. White: A Modern Federalist and A New Deal Liberal” in *Brigham Young University Law Review*, (1994): 313.
- New York Times*. Opinion-Editorial Piece on White’s Retirement. March 20, 1993.
- O’Brien, David M., ed. *Judges on Judging: Views from the Bench*. (Chatham, NJ: Chatham House Publishers). 1997.
- *Storm Center: The Supreme Court in American Politics*. 5<sup>th</sup> ed. (New York, NY: W.W. Norton & Company). 2000.
- O’Donnell, Pierce. “Common Sense and the Constitution: Justice White and the Egalitarian Ideal.” *University of Colorado Law Review*. 59 (1987): 133.
- Perry, Barbara A. *The Priestly Tribe: The Supreme Court’s Image in the American Mind*. (Westport, CT: Praeger Publishers). 1999.
- , ed. *The Supremes: Essays on the Current Justices of the Supreme Court of the United States*. (New York, NY: Peter Lang Publisher). 1999.
- Perry, H.W., Jr. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. (Cambridge, MA: Harvard University Press). 1991.
- Posner, Richard. *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York, NY: Oxford University Press). 2006.
- Powe, Lucas A., Jr. *The Warren Court and American Politics*. (Cambridge, MA: Harvard University Press). 2000.
- Powell, Lewis F., Jr. et al. “A Tribute to Justice Byron R. White.” *Harvard Law Review*. 107 (1993):1.
- Price, Monroe E. “White: A Justice of Studied Unpredictability.” *National Law Journal*. February 18, 1980.
- Publius. *The Federalist Papers*. Clinton Rossiter, ed. (New York, NY: Mentor Books). 1961.
- Rehnquist, William H. “A Tribute to Justice Byron R. White.” *Yale Law Journal*. 103 (1993): 1.
- Ripley, Randall B., and Grace A. Franklin. *Congress, The Bureaucracy, and Public Policy*. 4<sup>th</sup> ed. (Chicago, IL: Dorsey Press). 1987.

- Rogers, John M. "I Vote this Way Because I'm Wrong:" The Supreme Court Justice as Epimenides." *Kentucky Law Journal*. 79 (1991): 439.
- Rohr, John A. *To Run a Constitution: The Legitimacy of the Administrative State*. (Lawrence, KS: University Press of Kansas). 1986.
- *Ethics for Bureaucrats: An Essay on Law and Values*. 2<sup>nd</sup> ed. (New York, NY: Marcel Dekker). 1989.
- *Founding Republics in France and America: A Study in Constitutional Governance*. (Lawrence, KS: University Press of Kansas). 1995.
- *Public Service, Ethics, and Constitutional Practice*. (Lawrence, KS: University Press of Kansas). 1998.
- Rosen, Jeffrey. "The Next Justice: How Not to Replace Byron White." *New Republic*. April 12, 1993.
- "The Agonizer." *The New Yorker* (November 11, 1996: 82 - 90).
- *The Supreme Court: The Personalities and Rivalries that Defined America*. (New York, NY: Times Books). 2006.
- Rosenbloom, David H., Carroll, James D., and Carroll, Jonathan D. *Constitutional Competence for Public Managers: Cases & Comments*, 2d ed. (Itasca, IL; F.E. Peacock). 2000.
- Rosenbloom, David H., and Rosemary O'Leary. *Public Administration and Law*. 2<sup>nd</sup> ed. (New York, NY: Marcel Dekker). 1997.
- Rosenbloom, David H., and Bernard H. Ross. "Toward a New Jurisprudence of Constitutional Federalism: The Supreme Court in the 1990s and Public Administration." *American Review of Public Administration*. June 1998. Volume 28. Number 2. P. 107.
- Rosenbloom, David H. *Federal Service and the Constitution*. (Ithaca, NY: Cornell University Press).
- *Administrative Law for Public Managers*. (Boulder, CO: Westview Press). 2003.
- Rudstein, David S. "White on White: Anonymous Tips, Reasonable Suspicion, and the Constitution." *Search and Seizure Law Report*. 19 (1992): 25.
- Scalia, Antonin. "Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court."

- 1979 *Supreme Court Review*. 345 (1979).
- “Judicial Deference to Administrative Interpretations of Law.” *Duke Law Journal* (June, 1989): 511-521.
- *A Matter of Interpretation: Federal Courts and the Law*. (Princeton, NJ: Princeton University Press). 1997.
- Scarboro, James E. “Good Judgment as a Manifestation of Character in the Opinion of Justice Byron R. White.” *University of Colorado Law Review*. 71 (2000): 1427.
- Schwartz, Bernard. *Administrative Law: A Casebook*. (Boston, MA: Little, Brown and Company). 1977.
- *The Ascent of Pragmatism: The Burger Court in Action*. (Reading, MA: Addison-Wesley). 1990.
- *A History of the Supreme Court*. (New York, NY: Oxford University Press). 1993.
- “Some Crucial Issues in Administrative Law.” In David Rosenbloom and Richard Schwartz, eds. *Handbook of Regulation and Administrative Law*. (New York, NY: Marcel Dekker). 1994. pp. 207 – 222.
- *Decision: How the Supreme Court Decides Cases*. (New York, NY: Oxford University Press). 1996.
- ed. *The Burger Court: Counter-Revolution or Confirmation?* (New York, NY: Oxford University Press). 1998.
- Shiffman, Stuart H. “A Remarkable Man.” *Judicature*. May-June 1999; Vol. 82, No. 6. pp. 293-4.
- Simon, James F. *The Center Holds: The Power Struggle Inside the Rehnquist Court*. (New York, NY: Simon and Schuster). 1995.
- Silverstein, Mark. *Judicious Choices: The New Politics of Supreme Court Confirmations*. (New York, NY: W.W. Norton & Company). 1994.
- Smolla, Rodney A., ed. *A Year in the Life of the Supreme Court*. (Durham, NC: Duke University Press). 1995.
- Soper, Philip. “Judge White and the Exercise of Power: Why Theories of Law Have Little or Nothing to Do with Judicial Restraint.” *University of Colorado Law Review*. 74 (1993): 1379.

- Starr, Kenneth W. "Byron R. White: The Last New Dealer." *Yale Law Journal*. 103 (1993):37.
- Stith, Kate. "Byron White: The Last of the New Deal Liberals." *Yale Law Journal*. 103 (1993):19.
- "Tribute: Justice White and the Law." *Yale Law Journal*. 112 (2003): 993.
- Sullivan, J. Thomas. "Justice White's Principled Passion for Consistency." *The Journal of Appellate Practice and Process*. 4 (2002): 79.
- Tanielian, Matthew James. "Separation of Powers and the Supreme Court: One Doctrine, Two Visions." *Administrative Law Journal*. 8 (1995): 961.
- Taylor, Stuart Jr. "Justice Byron White: The Consistent Curmudgeon." *15 Legal Times* 1, col. 2. May 17, 1993.
- "Mr. Justice, Restrained: Byron White Not Only Preached Judicial Modesty, He Practiced It." *Legal Times*. April 22, 2002.
- Tobias, Carl. "Justice Byron White and the Importance of Process." *Hastings Constitutional Law Quarterly*. 30 (2003): 297.
- Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. (New York: NY: Doubleday). 2007.
- Tribe, Laurence H. *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History*. (New York, NY: Penguin Books). 1985.
- Tushnet, Mark. *A Court Divided: The Rehnquist Court and the future of Constitutional Law*. (New York: NY: W.W. Norton & Company). 2006.
- Urofsky, Melvin I. ed. *The Supreme Court Justices: A Biographical Dictionary*. (New York, NY: Garland Publishing). 1994.
- Varat, Jonathan D. "Justice White and the Breadth and the Allocation of Federal Authority." *University of Colorado Law Review*. 58 (1987): 497.
- Wall Street Journal*. Opinion-Editorial piece on White's retirement. March 22, 1993.
- Wagner, William J. "Balancing as Art: Justice White and the Separation of Powers." *Catholic University Law Review*. 52 (2003): 957.
- Ward, Artemus, and David L. Weiden. *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. (New York, NY: New York University Press). 2006.

- Ward, Elizabeth. "Nine Who Decide What the Constitution Mean." *Scholastic Update*. September 8, 1996. Volume 119. P. 16.
- Warren, Kenneth F. *Administrative Law in the Political System*. Abridged 3<sup>rd</sup> ed. (Upper Saddle River, NJ: Prentice Hall). 1997.
- White, Byron R. "The Role of Judicial Review." *Horizons* 52 (1970).
- "The Work of the Supreme Court: A Nuts and Bolts Description." 54 *New York State Bar Journal* 346 (1982).
- "Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections." 51 *Antitrust Law Journal* 275 (1982).
- Woodward, Bob, and Scott Armstrong. *The Brethren*. (New York, NY: Simon and Schuster). 1979.
- Yalof, David A. *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees*. (Chicago, IL: University of Chicago Press). 1999.
- Yarbrough, Tinsley E. *The Burger Court: Justices, Rulings, and Legacy*. (Santa Barbara, CA; ABC – CLIO). 2000.
- *The Rehnquist Court and the Constitution*. (New York, NY: Oxford University Press). 2000.
- Yoo, John. *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago, IL: University of Chicago Press), 2005.