1990

Book Review. Judicial Rhetoric and Administrative Law

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In 1976 Professor G. Edward White published *The American Judicial Tradition: Profiles of Leading American Judges*. In it he sought to define and trace a coherent, roughly consistent philosophy of judging held by American state and federal appellate judges:

The title [of the book] is intended to suggest a generalized argument that there has been and is a tradition of American appellate judging; that it contains, at a minimum, certain identifiable elements; and that it has persisted, in a complex and variegated fashion, through time (p. 1).¹

The essence of the tradition, he argued, is a tension between the enormous power possessed by the largely unelected American judiciary and the procedural or institutional constraints that the judges have developed to maintain their legitimacy in a democratic society. American judges exercise their independence, but they couch their decisions in rhetoric (for example, reasoning from accepted authorities like the Constitution, statutes, or judicial precedent) that is intended to demonstrate the constraints on that independence. The need to demonstrate adherence to these constraints is a limitation on the institutional competence of courts to decide certain kinds of questions. *The American Judicial Tradition* developed this theory through biographical es-

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1Parenthetical citations are to the 1988 Expanded Edition. This passage appears on page 1 of both the 1976 and 1988 editions.

White has recently published an expanded edition of The American Judicial Tradition, which is the subject of this essay. Expanded, that is, but not significantly revised—White has added chapters on Justice William O. Douglas and on the Burger Court, but the original chapters are essentially unchanged. In the preface to the expanded edition, White also recasts the book's purpose as meeting "a need to make celebrated American judges more accessible" (p. xii). This is a modest goal by comparison with the "generalized argument" quoted above, and by this standard White's book succeeds admirably. It is a stimulating and highly readable discussion of many of this country's most important judges and their opinions in celebrated cases. It places them in a coherent context of historical events and ideas, and it does so in a book of manageable length and complexity. Part I of this essay discusses the biographical aspects of The American Judicial Tradition, concentrating on the two new chapters.

Its announced goal notwithstanding, White's book is more than a dictionary of cultural literacy for lawyers. It is not merely a descriptive account of people and ideas. White espouses a particular theory of American appellate judging (the tradition sketched above) and its relation to the institutions of government. For the expanded edition, White revises that theory somewhat: the institutional constraints on judges are not inevitable in the judicial role per se, as the original edition suggested, but rather are part of "an established jurisprudential orthodoxy," an ideology within which the judges operated (pp. ix–x). Nevertheless, the book's overall focus on institutional issues is unchanged. While White's book hardly mentions the area, the nature and extent of institutional constraints are central issues in administrative law. Part II of this essay discusses the relevance of White's judicial tradition to the rhetoric and ideology of administrative law.

I

A

As biography, The American Judicial Tradition consists of a series of essays, each focusing on one or more appellate judges. The essays are

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9There is no appreciable difference between the two editions in the introductory and concluding chapters, in which White most directly states his basic theory.
arranged chronologically, and they are closely interrelated by common themes and by comparisons with judges studied in previous chapters. The main theme, of course, is the tradition itself. Derivative concerns are judicial rhetoric, the relation of judges’ ideas to contemporary jurisprudential theories, judges and politics, judicial activism, the nature of judicial institutions, and appellate judges’ professional audiences and their expectations. This is a tall order, and White is remarkably good at returning to these themes throughout the book without making each chapter read like a shopping list of required topics.

White’s narrative opens with Chief Justice Marshall, whom he characterizes as the “primary creator of this unique institutional role” for the courts, i.e., of the American judicial tradition (p. 9). He charts Marshall’s transformation of the judicial office through an analysis of Marshall’s most celebrated cases. In each case, White examines the rhetorical technique (which was reasoning from first principles) that Marshall used to justify expansive federal judicial power while maintaining the appearance of a limited (or constrained) judicial role (pp. 22–33). For example, Marshall derived a constitutional prohibition on state licensing of ferries in state waters from the apparently uncontroversial premise that the enumerated powers of Congress are to be read liberally (pp. 31–33). The Marshall chapter sets the stage for the rest of the book. According to White, Marshall’s rhetoric is virtually the sole source of the legitimacy of his consolidation of power in the federal judiciary: once Marshall could convince people with his words that he was constrained in his power, he could by his actions extend his power enormously (pp. 33–34).

One must be struck by White’s extraordinary claim that the entire American judicial tradition sprang fully grown from Marshall’s brain, like Athena from Zeus’s head. White summarily dismisses colonial and late eighteenth-century state and federal courts as intellectually too wedded to “mechanical” or “oracular” jurisprudence, and institutionally too accountable to other branches of government, to have any relevance to the post-Marshall American judicial tradition (pp. 7–8). This total discontinuity of intellectual tradition is improbable for a number of reasons. As a lawyer, Marshall himself was undoubtedly the product of a judicial tradition as much as the creator of one. Oracular jurisprudence did not die with Marshall’s predecessors; rather, White himself dates the death to the New Deal (pp. 195–97). Finally, many state judges were and are elected and so are accountable directly to the electorate. While White’s decision to date the American judicial tradition from Marshall may be a useful simplifying strategy, the uniqueness of the tradition is unproven. This is significant because, as we shall see, White sees his tradition as the product of American ju-

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4See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).
5I.e., the idea that judges do not make but rather “discover” law (p. 8).
judicial institutions. If the tradition existed before the institutions did, then one must conclude either that the tradition is based on institutional arrangements that encompass but are not limited to familiar American ones, or that the tradition is not founded on institutions but on an ideology of judging.

Equally unlikely is White's explanation for Marshall's astonishing success in transforming the American judicial role: rhetoric. Some of Marshall's readers may have been drawn by his elegant reasoning to conclusions with which they otherwise would have disagreed. However, others—White gives the example of Thomas Jefferson (pp. 125–126)—undoubtedly saw right through Marshall's ability to use syllogistic gymnastics to support any conclusion from virtually any premise. Unless Jefferson was unique in this insight, one must assume that Marshall's success was not due solely to his rhetoric. Later judges—the "Four Horsemen" who sought to invalidate the New Deal come to mind—were certainly unable to prevail on the basis of appropriate legal rhetoric in well-crafted opinions. The ideological acceptability of the role Marshall asserted for the courts is a more plausible explanation.

The tradition in the remainder of the nineteenth century is treated in five chapters. Marshall's activist, centralizing jurisprudence is the point of reference for consideration of each judge. The judicial power created by Marshall was deployed by New York Chancellor Kent and Justice Story in defense of vested property rights, which became increasingly unsuited to an industrializing nation (pp. 47–55, 62–63). Chief Justice Shaw of Massachusetts, by contrast, supported broad legislative police powers to promote an active economy, and consequently espoused a passive judicial role (pp. 55–61). Chief Justice Taney accepted Marshall's activist stance, but also wanted to restore the sovereignty to the states that Marshall had limited in *McCulloch v. Maryland*6 (pp. 68, 72–74).

The Civil War and the subsequent passage of the Reconstruction Amendments might have required a full reassessment of Taney's view of state sovereignty in matters of individual civil liberties. Instead, the Fourteenth Amendment was developed by Justices Miller, Bradley, and Field into a strong substantive limitation on state economic regulation, a "radical augmentation of judicial power" (pp. 100–08). The state courts, represented by Justice Cooley of Michigan and Chief Justice Doe of New Hampshire, followed a similar pattern of limiting state interference with property rights (pp. 118–19, 125). For White, as for others, the first Justice Harlan resists categorization. Like his immediate predecessors, he was suspicious of state economic regulation, but like Marshall he believed in a strong federal government. Harlan's fame, however, rests on his passionate defense—usually in dissent—

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617 U.S. 159, 4 Wheat. 316 (1819).
of civil rights and liberties, a concern that did not become central to the Supreme Court for several more decades. White brings his survey of the nineteenth century to a close with a helpful chapter summarizing the American judicial tradition as it stood at the end of the century.

A chapter on Holmes and Brandeis opens the twentieth century. They are also the first representatives of what White calls modern liberalism, characterized by recognition of the heterogeneity of the American polity and the concomitant loss of universally accepted, consensual values. These values were replaced for Holmes and Brandeis by an active technocratic state whose power was controlled only by procedural limitations (pp. 151-53). Holmes was more resigned than Brandeis to the hegemony of the majoritarian legislature (pp. 164-65), but both accepted and encouraged the development of the modern regulatory state. In contrast, the “Four Horsemen” who led the attack on the New Deal—Justices Van Devanter, Butler, McReynolds, and Sutherland—rigidly adhered to a nineteenth-century vision of limited government and the sacredness of property. Their notoriety resulted from the aggressiveness with which they sought to impose this vision on a post-Depression America. The rigidity and atavism of their views destroyed the “mythic character of their jurisprudence” and finally buried the oracular theory of judging, to be replaced eventually by Realism (pp. 195-97).

There follows an interesting treatment of the unique role of the Chief Justiceship through portraits of Charles Evans Hughes and Harlan Fiske Stone. In the next three essays—Justice Jackson; Justice Cardozo and Judges Hand and Frank; and Chief Justice Traynor—White concentrates on the differing internalized constraints that each judge developed. Cardozo and Traynor, in particular, struggled with a felt need to innovate but also to remain within the judicial tradition of a limited institution. The views of Hand (pp. 267, 284-85) and Traynor (pp. 294-96, 304-05) on statutory interpretation merit particular attention from lawyers who deal with statutes on a regular basis.

White lavishes great attention on the modern period. The Warren Court, Justice Douglas, and Burger Court chapters are individually the longest in the book; collectively they comprise about one third of it.\(^7\) This is no doubt due in part to the greater availability of information regarding the internal relationships on the Court. White’s greater attention is manifested in detailed discussion of more cases and more detail about the background of each case. The chapter on the Warren Court compares the judicial theories of Justices Frankfurter, Black, Harlan, and Chief Justice Warren. Black (pp. 328-32) and Warren (pp. 341) represented the humanitarian aspect of modern liberalism. Their main concern was to implement basic values and constitutional

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\(^7\)By comparison, the time period covered by these chapters is about one-sixth of the entire period covered by the book.
guarantees. Frankfurter (pp. 322–24) and Harlan (pp. 342–45), on the other hand, were exponents of the strain of modern liberalism that emphasized professional skill, process, and the matching of governmental institutions to the areas of their special competence.

The Douglas chapter is new and contains the most detailed biographical study—it is almost a psychological profile at points—in the book. White’s basic text is Douglas’s two-volume autobiography, which White finds to be a unique source in its “outspoken and ostensibly candid commentary” on other justices, on the inner workings of the Supreme Court, and on the Court’s relationship to political Washington (p. 370). White demonstrates that Douglas created for himself the image of an “indomitable individualist” (p. 370), and then goes to great lengths to refute the factual basis for this image. White points out inaccuracies in a number of anecdotes in the earlier volume of Douglas’s autobiography and the consistent tendency of the inaccuracies to overstate Douglas’s self-image (pp. 376–84). White also reviews in detail Douglas’s apparently contradictory actions on the succession of petitions for stays of execution in the Rosenberg atomic secrets case (pp. 390–403). What emerges is a portrait of Douglas as a highly disagreeable person whose opportunism and self-promotion knew no bounds.

Douglas’s personality resulted, White claims, in a “strikingly idiosyncratic approach... to the role of a Justice” (p. 384). Douglas was entirely uninterested in doctrine and rarely discussed it in any detail. Instead, he saw in cases only ideological results, which he pursued in a purely consequentialist way (pp. 389–90, 414–15). White develops this theme through a study (pp. 403–12) of the reasoning in three important Douglas opinions, *Skinner v. Oklahoma,*9 *Griswold v. Connecticut,*10 and *Harper v. Virginia Board of Elections,*11 which demonstrates Douglas’s interest in “substantive values rather than traditional doctrinal sources as a basis for justifying results in constitutional cases” (p. 412). White, it is plain, strongly disapproves of Justice Douglas, so much so that White in effect excludes Douglas from the American judicial tradition with the epithet “anti-judge,” the title of the Douglas chapter.

The exclusion of Douglas must be regarded as a serious limitation on White’s theory of institutional constraints and the centrality to it of the use of traditional legal authorities. Because Douglas is inescapably part of the American judicial tradition (after all, he served on the Supreme Court for thirty-six years, longer than anyone else), White must either encompass Douglas by expanding the elements of the tradition...

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11381 U.S. 479 (1965) (use of contraceptive devices).
to the point of meaninglessness, or he must write Douglas off. Tactically, White chooses the latter option to preserve the elements of the tradition, but strategically this choice undermines the book’s argument that the American judicial tradition of constraint is institutionally compelled and therefore universal (pp. ix, 4). The exclusion of Douglas emphasizes that the institutional constraints which comprise the book’s “central generalized argument” are ultimately ideological. Therefore, individual judges may accept or reject the constraints, as their judicial philosophies dictate. White concedes this in the new Preface (pp. ix–x, xi–xii) and talks around the problem in concluding the Douglas chapter (pp. 418–20), but he never really explains what it means to be an anti-judge—why, that is, apart from White’s disapproval, Douglas’s rejection of received tradition made him less a judge.12

The discussion of the Burger Court focuses on three series of cases regarding, respectively, gender discrimination, defamation, and substantive due process. The opinions are skillfully used to support White’s characterization of the Burger Court as “transitional” between the Warren Court and the Rehnquist Court. This is a highly plausible thesis on the basis of personnel alone, but White also shows that the jurisprudence that emerged from the Burger Court reflected a pragmatic, narrow, ad hoc compromise between competing values.13 The Court protected its legitimacy by avoiding strong statement and by retreating from some of the Warren Court’s more expansive rulings, but it did not retreat from the activist institutional position taken by the Warren Court. The Burger Court debated the strength of various rights, but not whether it was appropriate for the courts to vindicate them (pp. 455–58).

Like the Douglas chapter, the Burger Court chapter seems less well integrated into the judicial tradition originally posited by White. The Burger Court’s efforts to ensure legitimacy are not procedural constraints but substantive compromises, not asserted lack of competence in particular areas but lack of consensus on results. The Burger Court essay concludes somewhat discordantly (for a book whose argument is a continuing, identifiable tradition) that the American judicial tradition “has important elements of continuity, but its predominant fea-

12 On the other hand, Douglas’s idiosyncrasy may be a missed opportunity to demonstrate White’s thesis that a judge’s rhetoric underlies his or her legitimacy as a decisionmaker. There is little reason to believe that the person on the street (or in Congress, for that matter) is seriously concerned with more than the result of particular cases. However, Justice Douglas was the subject of various impeachment efforts. White does not mention the impeachment attempts, but perhaps the arguments of the would-be impeachers could provide some evidence that Douglas’s “idiosyncratic” judicial reasoning had in fact robbed him of his legitimacy as a judge.

13 One has the sense from White’s description that in considering the Burger Court he is mourning the passing of a golden age. He notes the “more modest composition” of the Burger Court by comparison to the giants of the Warren Court (p. 424), and he speaks of the “great cases of Warren’s tenure” but the “major Burger Court cases” (p. 455).
ture is that of a reflection of cultural change” (p. 459). Thus, the new chapters leave the “central generalized argument” of The American Judicial Tradition in some doubt, especially because they are followed by an entirely unreconstructed concluding chapter.

B

White’s biographical narrative has two great strengths. First, as narrative it is well stocked with revealing personal anecdotes and illuminating discussion of principal cases. For example, the story of Justice Field being assaulted on a train by a losing litigant (and former colleague) not only makes good reading but proves an apt illustration of Field’s personality (pp. 93-95). White’s discussions of cases, and especially tying together a series of cases, are easy to follow and give an excellent sense of the several ways that cases can have significance. The analysis of Trop v. Dulles, Poe v. Ullman, and Baker v. Carr in the Warren Court chapter beautifully elucidates the doctrinal underpinnings of the complex alliances and antagonisms among those Justices (pp. 346-59). Even though the amount of biographical detail varies substantially from judge to judge, and the material and some of the interpretations are not original with White, the book provides a stimulating narrative of persons and ideas.

Second, as a historian of ideas, White has a knack for describing ideas clearly and revealing their relationships to each other. In the twentieth-century chapters, he develops and returns frequently to the jurisprudential progression from the nineteenth-century oracular theory, to Sociological Jurisprudence, to Legal Realism, and finally to Process Jurisprudence (a.k.a. Reasoned Elaboration or the Rule of Law). By placing judges within or outside of broader legal trends, White illuminates much about their thinking and about the relationship of jurisprudential theory to judicial action. The regular recapitulations are of enormous help to the reader not previously familiar with these concepts (e.g., pp. 252, 292-94). White also is at pains to

14This statement contrasts sharply with the following passage from the Introduction: “But in examining appellate judging in America one cannot ignore its distinctive institutional characteristics, which have remained relatively constant over the years and which have affected judicial behavior” (p. 4). Similarly, the assertion that Marshall was “the primary creator of this unique institutional role” (p. 9) announces that continuity and not change is the book’s central theme. Cf. Schauer, supra note 2, at 443 (praising original edition’s unusual approach of emphasizing similarities rather than differences among judges).

18Krattenmaker, supra note 2, at 751. White’s notes and bibliography provide ready access to his source materials.
show how judges' ideas compare with each other, both within the chapters that deal with more than one judge (e.g., pp. 325-45 (Frankfurter, Black, Warren, and Harlan II)), and among chapters (e.g., pp. 130 (Harlan I and predecessors), 239 (Jackson and Marshall), 271-72 (Frank's commentary on Cardozo)).

Before leaving the biographical aspect of The American Judicial Tradition, a few words should be said about White's "all-star" or "Hall of Fame" approach to judicial history. The criteria used to select judges are admittedly somewhat arbitrary (pp. 2-4), and the result is a fairly conventional selection of all-stars. Obviously, one would not look to the greatest players to learn how the game was actually played, though this limitation may be overstated since the great players tend to be emulated by others. Of more significance is that White's all-star approach selects the work of judges who are all male, all white, mostly Protestant (with important exceptions), and all highly successful within the legal elite. True, the pool of appellate judges from which White must draw is not abundant (to say the least) in minority groups and women. However, having chosen to approach intellectual history through biography, it seems incumbent upon the author to account for these basic attributes of the individuals chosen.

If White had decided simply to trace historically the American judicial tradition as a developing set of ideas, there might be some justification for ignoring the characteristics of the persons who held those ideas. By emphasizing biography and personality, however, the judges' sex, ethnicity, and elitism become unavoidable issues. If one looks beyond White's tradition characterized by adherence to constraint and rhetorical style, it is plain that the American judicial tradition produced many decisions that were substantively unjust. The position of

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20These terms were applied by Schauer, supra note 2, at 440, and Krattenmaker, supra note 2, at 750, 754-55. White also adopts an all-star approach to case selection. The reader is likely to find that he or she is familiar with, or at least was supposed to have read in law school, almost all of the cases discussed at length in The American Judicial Tradition.

21The exceptions mentioned by White are Justices Brandeis, Cardozo, and Frankfurter, who were Jews. White also notes in passing that Justice Butler was Catholic (p. 185). Otherwise, the judges' religious preferences are not reported. Cf. H. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court 61-65 (2d ed. 1985) (analyzing the background characteristics of Supreme Court justices through Justice O'Connor).

22Obviously, many would disagree that race, sex, religion, and ancestry could appropriately be ignored even in "pure" intellectual history.

23Dred Scott is perhaps the most notorious instance. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). For further discussion of White's approach to the case, see infra text accompanying note 26. Similarly, a nineteenth-century judge like Field, who was willing to expand judicial competence in favor of economic interests (pp. 106-08), did not accord the same consideration to women or to blacks. This choice can hardly be explained as an institutional limitation—if anything, restraint would have suggested that the Fourteenth Amendment be applied to human and not economic rights. It is not enough, in other words, to characterize a judicial tradition by adherence to a process or rhetorical style.
White's judges in the social and professional hierarchy must have contributed to those results. White's reluctance to address these issues deprives the reader of his analysis of the often subtle relationship between personal characteristics (other than biographical incident) and jurisprudential views. It also leaves unanswered the broader question of the role of the judicial tradition in American society. Legitimacy established by reasoning and rhetoric is inevitably legitimacy within the legal elite which reads and understands the judges' opinions. For the rest of society, especially politically weak groups, was the judiciary simply an extension of the politically powerful elite? Was its legitimacy in this sense merely recognition of the judiciary's power, and judicial rhetoric a mere facade?

In addition, the failure to account for the personal similarities of the subjects of the book weakens White's thesis on its own terms. The most powerful case for an American judicial tradition based on the unique nature of American judicial institutions would be that, despite vast differences among individuals, American judges shared common institutional views. This is the point that White wants to make by emphasizing the widely differing judicial theories of his subjects (p. 466). But the coherence he finds may not be institutionally compelled (as opposed to ideologically) if the individuals are not so fundamentally different after all. It is hardly news-worthy to find that members of the same sex, race, religion, and legal elite share a fundamental ideology.

Despite this omission, the all-star approach to judges—and, for that matter, cases—serves White's purpose "to make celebrated American judges more accessible" (p. xii) exceptionally well. I will readily admit to having been educated by the book, and certainly to having my memory refreshed and clarified. White gives life to the judges and context to the cases around which most of our legal educations turned. White's style is direct and free-flowing, if occasionally at the cost of vague generalities. As an effort to provide historical and intellectual perspective on the legal profession, The American Judicial Tradition must be accounted a great success.

White occasionally recognizes the membership of his group in a legal and social elite. In debunking Douglas's self-created image as a man of humble origins and an outsider, White points out that the autobiography virtually ignores Douglas's "extraordinary professional success" at elite institutions like the Columbia and Yale law schools and the Cravath firm (p. 376). Similarly, White notes that Frankfurter's social egalitarianism was tempered by his extreme intellectual elitism (p. 326). More frequently, however, White emphasizes the supposed lack of elitism in people like Warren and Black (p. 325). This may be fair relative to Harlan and Frankfurter (id.), but it hardly seems accurate in absolute terms so to characterize two persons whose immediate previous occupations were, respectively, Governor of California and United States Senator from Alabama.
As an argument for the existence of a continuous judicial tradition, White's book is worthwhile in a different way. White substantively describes the tradition this way:

The tradition Marshall passed on at his retirement contained three identifiable elements: ... a tension between independence and accountability, a delicate and unique relation to politics, and a recurrent trade-off between acknowledged powers and freedoms in the individual judge, and acknowledged constraints on the institution of the judiciary (pp. 1-2).

Judges use their opinions to create and maintain the appearance that they are not independent, unconstrained lawmakers (pp. 462-63). Consequently, judicial rhetoric is exceptionally important in White's judicial tradition. The reasoning in judges' opinions not only verifies conformity with the tradition; the rhetoric is the tradition. Cardozo, for example, was a highly innovative judge in reaching results and changing doctrine, but his dazzling use of traditional reasoning (i.e., the appearance of constraint) preserved the legitimacy of his actions (pp. 256, 260, 283). The process of reasoning from generally accepted authority is the essence of judicial legitimacy (e.g., pp. 33-34 (Marshall)).

One sees in White's statement of the American judicial tradition the strong influence of the Process Jurisprudence view that judges and cases can be evaluated according to neutral, professional principles. The tradition in this sense is both positive and normative. The appearance of the elements of the tradition in the jurisprudence of the judges studied is the evidence for a coherent judicial tradition. It is also the standard for evaluating their performance. The use of the tradition as a standard leads to some harsh judgments. In contrast to Cardozo, the first Harlan's "currently high stature may be more transitory than it now appears" because he lacked a coherent theory of judging (pp. 145; his jurisprudence was "result-orientation"). Douglas, who showed "radical indifference to the approved sources of judicial constraint" (p. 390), was the "anti-judge." The tradition-standard also produces questionable judgments: "It was not the Taney Court's failure [in Dred Scott] to solve the problem of slavery that disgraced it, but the manner in which its attempt was made" (p. 81). White echoes Process Jurisprudence in explaining:

The judiciary in America has not proved to be suited to the resolution of controversies in such instances. The legitimacy of judicial decisions rests on the public's willingness to accept the expertise and authority of the

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25 In this respect, the tradition sometimes seems hollow: Cardozo's rhetorical techniques "mask" his freedom (p. 256); they are "judicial subterfuge" (p. 260).

26 See Tushnet, supra note 2, at 178-79; Krattenmaker, supra note 2, at 755-56; see also Whitfield, supra note 2, at 302-03.

judicial office, which is itself based on the ability of judges to persuade by a process of reasoning in their opinions (p. 82).

One is left to wonder how the result in *Dred Scott* could ever have been made palatable to the anti-slavery North.

In the Preface to the expanded edition, White candidly recognizes the Process Jurisprudence influence on the original edition and distances himself somewhat from it (p. viii). One might, therefore, with White's tacit concurrence pass by the book's emphasis on institutional competence and process—except that the rhetoric of competence and process is still very much with us.28 It is the rhetoric of administrative law.

Administrative law embodies a number of aspects of White's judicial tradition. First, administrative law is concerned primarily with institutions and process; it is a set of essentially procedural rules tailored to the nature and functions of administrative agencies.29 Second, like the judicial tradition, administrative law consists of a group of constraints on institutions that might otherwise be capable of exercising arbitrary power. Administrative agencies are not mentioned in the Constitution and often combine governmental powers in extra-constitutional ways. Accordingly, the legitimacy of the exercise of administrative power is a matter of recurrent attention in administrative law, much as White argues that the exercise of judicial power over political issues is problematic for the judiciary's legitimacy.

Third, institutional competence is a matter of tangible concern in allocating power between courts and agencies. In one sense, institutional competence refers to the question of who has been given the power to perform certain governmental tasks. Take for example setting appropriate levels of air pollutants. A glance at the Clean Air Act makes it perfectly clear that Congress has allocated to an agency, the Environmental Protection Agency, the power to set such levels in the first instance. Thus the reviewing court may be dissatisfied with EPA's reasoning or evidence, but it may not "substitute its judgment" for the agency's.30 Judicial intrusion into the agency's standard setting is carefully constrained by the Administrative Procedure Act's limited

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29 Interestingly, Professor Stewart uses the term "reasoned elaboration" to describe the model of administrative decisionmaking promoted by the procedural requirements that courts have imposed on the Environmental Protection Agency. Stewart, The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act, 62 IOWA L. REV. 713, 731 (1977).

scope of judicial review, which reflects the primacy of the agency decision. The judges in *The American Judicial Tradition* grapple with virtually identical issues in their relationship with Congress and state legislatures.

The second sense of institutional competence refers to the relative abilities of governmental bodies to make good decisions regarding certain kinds of questions. Even if courts have concurrent power with agencies to control air pollution (through nuisance actions), they approach the problem with drastically different institutional equipment. Many factors suggest greater administrative competence: agencies can adopt procedures that acquire a wide variety of information from a wide variety of sources; they have a staff capable of analyzing complex and specialized factual information on its own; they can consider issues from the broadest possible perspective instead of through a few discrete cases; they can consider and choose from a large number of possible responses; and they have resources that more nearly approximate what is needed to accomplish all of this. Courts concerned about institutional competence regularly leave the field to agency action.

A prominent characteristic of Process Jurisprudence was its attempt "to match governmental institutions to the areas they were best prepared to supervise and the problems they were most suited to resolve" (p. 322). It is not an accident that Justice Frankfurter was not only the Warren Court's leading exponent of Process Jurisprudence (pp. 323-24), but also a major force in the development of modern administrative law. The perceived limitations on the institutional competence of courts have a direct bearing on the scope and nature of judicial review of agency action. *Overton Park*, the customarily cited statement of minimal judicial review, emphasizes deference to agencies on substantive issues. But on procedural requirements the courts have been willing to scrutinize closely agency actions because courts are uniquely expert

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34On the other hand, some courts have attempted to overcome institutional limitations by, for example, hiring their own technical experts to assist in evaluating the evidence. See *Reserve Mining Co. v. Environmental Protection Agency*, 514 F.2d 492, 513 (8th Cir. 1975) (en banc) (pollution claims under the Federal Water Pollution Control Act and nuisance law).

in such matters and procedure is an "area of traditional judicial preem-

inence." 34

Administrative lawyers, therefore, should recognize in White's dis-

cussion of institutional competence many of the concerns in their field.

This consideration underlies the differing positions taken by Judges

Wright, Leventhal, and Bazelon on the nature of judicial review in

_Ethyl Corp. v. Environmental Protection Agency_. 35 Industry had sought

review of EPA's regulations phasing out lead in gasoline. Wright and

Leventhal undertook to immerse themselves in the agency record to

understand the complex health and technology issues facing the agency,

so that they could make an informed judgment concerning the ration-

ality of the agency's action. 36 Bazelon argued that because judges could

never obtain a meaningful degree of understanding of technical issues,

the courts should strictly enforce agency procedures to channel dis-

cretion appropriately. 37 Thus judges' perceptions of their own com-

petence determine the nature and extent of judicial intrusion into

agency action.

White recognizes in the expanded edition that judges' perceptions

of the limits of their institutional competence derive ultimately from

an ideology of the proper distribution of power in American govern-

ment and not necessarily from structural limitations on judicial insti-

tutions (p. ix). This recognition should also serve warning that the

current ideology of the administrative state is not inevitable. The un-
derlying allocation of power between the federal courts and Congress

was in no small part Marshall's creation in _Marbury v. Madison_; 38 it

could have been (and apparently had been, pp. 7–9) otherwise. Cor-

respondingly, courts have at times taken upon themselves tasks, like

ratemaking, which we might now think quintessentially administrative

(pp. 125–26).

The range of possible judicial roles can be illustrated by the _Chevron_


34 Natural Resources Defense Council, Inc. v. Securities & Exchange Comm'n, 606

F.2d 1031, 1048 (D.C. Cir. 1979); see also Natural Resources Defense Council, Inc. v.

Environmental Protection Agency, 683 F.2d 752, 760 (3d Cir. 1982).

Even the substantive determination of arbitrariness has been cast as the quasi-pro-

cedural question whether the agency has considered all of the appropriate statutory

factors and only those factors. The court, under this formulation, merely ensures fair

consideration of appropriate factors and not the rationality of the agency's conclusions

with respect to them. _See_ Citizens to Preserve Overton Park, 401 U.S. at 416; Motor


35 541 F.2d 1 (D.C. Cir. 1976) (en banc), _cert. denied_, 426 U.S. 941 (1976). _See also_

Friends of the Earth v. U.S. Atomic Energy Comm'n, 485 F.2d 1031 (D.C. Cir. 1973);


36 541 F.2d at 35–36 (per Wright, C.J.), 68–69 (Leventhal, J., concurring).

37 541 F.2d at 66–67 (Bazelon, J., concurring). The courts' ability to be inventive in
developing such procedures was sharply limited in _Vermont Yankee Nuclear Power

38 5 U.S. (1 Cranch) 137 (1803).
It is unclear on its face whether the term “stationary source” in the non-attainment provisions of the Clean Air Act must mean a single smokestack or may mean a single plant that contains several sources of emissions. Both the courts and EPA have claims to interpret the statute. The courts, of course, have the ultimate authority to declare the meaning of the law that governs agencies. On the other hand, EPA can claim expertise in the particular application of the law. For Learned Hand, congressional ambiguity would have been an invitation to the courts to discover a meaning most in keeping with the statute’s purposes as interpreted by the court (pp. 267, 284–85). In contrast, *Chevron* upheld the agency interpretation of the Clean Air Act, not because its interpretation was “right” but because it was “reasonable.” Echoing the two aspects of institutional competence identified above, the Court concluded that “those with great expertise and charged with responsibility for administering the provision would be in a better position” to decide the question.

*Chevron* may well represent the current “jurisprudential orthodoxy,” that is, the ideology within which judicial process and rhetoric operate. The Supreme Court has shown no inclination to reconsider *Chevron’s* deferential approach to agency interpretation of statutes, and the Court recently has turned aside challenges to governmental structures that would have called into question the constitutional legitimacy of the administrative state. That leaves administrative agencies firmly entrenched, but it does not resolve the problems of the accountability of independent agencies, the relationship of specialized agencies to political goals, and the extent to which agencies’ potential for the arbitrary exercise of enormous power is internally and externally constrained. In deferring to the agency interpretation of a statute on the ground of its assigned powers and expertise, the Court inevitably limited to some degree the accountability of the agency to Congress and the electorate, expanded the extent of political direction of agency decisions, and reduced the ability of the courts to restrain certain agency actions. I do not argue that *Chevron* itself was wrongly decided or that its general rule of deference is mistaken—only that

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40 See Clean Air Act § 172(b) (6); 42 U.S.C. § 7502(b) (6).
41 *Chevron*, 467 U.S. at 865. The Court admonished NRDC that “policy arguments are more properly addressed to legislators or administrators, not to judges.” *Id.* at 864 (footnote omitted). The Court went on:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal preferences. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices. . . . *Id.* at 865. This reasoning closely resembles White’s judicial tradition. Cf. p. xi.

the case’s allocation of power has fundamental implications for the structure of government.

The issues raised by *Chevron* read like the headings of an administrative law casebook. They are also the elements of White’s judicial tradition. The great value of White’s jurisprudential work lies both in its discussion (mainly in the original edition) of the many approaches to the allocation of power in American government within an ideology of judicial constraint, and also in the intimation in the expanded edition that this ideology is not an institutional postulate and so is subject to re-examination. *Chevron* cannot be understood simply as a vindication of competence concerns. As an ideology of government, *Chevron* can be taken to reflect acquiescence in an activist administrative state, loosely overseen by a relatively passive judiciary.

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*The American Judicial Tradition* is a rich source of information and ideas. If the historical information is mostly not new, it is usefully collected and well presented; if the ideas are unduly “imprisoned by the structures of Process Jurisprudence” (p. viii), they provide a cohesiveness to the book and a hypothesis which engages the reader. Even more impressively, White’s ideas may be profitably examined outside the book’s immediate context. Administrative law, White’s book reminds us, is shaped by the fundamental concerns of American jurisprudential thought. In sum, *The American Judicial Tradition* is worthwhile not only because, as history, it provides an excellent introduction to some of the most influential American judges and cases, but also because as theory it, like all good books, provokes as many questions as it resolves.

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49These problems would be considered in connection with, respectively, the non-delegation doctrine, separation of powers, and judicial review, with considerable overlap between areas.