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DEDICATION OF PORTRAIT

EDWARD DOUGLASS WHITE: FRAME FOR A PORTRAIT*

Oration at the unveiling of the Rosenthal portrait of E. D. White, before the Louisiana Supreme Court, October 29, 1982.

Paul R. Baier**

I

Royal Street fluttered with flags, we are told, when they unveiled the statue of Edward Douglass White, in the heart of old New Orleans, in 1926. Confederate Veterans, still wearing the gray of '61, stood about the scaffolding. Above them rose Mr. Baker's great bronze statue of E. D. White, heroic in size, draped in the national flag. Somewhere in the crowd a band played old Southern airs, soft and sweet in the April sunshine. It was an impressive occasion, reported The Times-Picayune,1 notable because so many venerable men and women had gathered to pay tribute to a man whose career brings honor to Louisiana and to the nation.

Fifty years separate us from that occasion, sixty from White's death. Louisiana's Great Chief Justice is only an ember on the hearth. We meet anew to rekindle the flame.2

II

Edward Douglass White was always proud of his birthright. He had an abiding affection for the plantation home of his birth, bordering on Bayou Lafourche, near Thibodaux, the land of sugar cane, cypress, and Spanish moss. "There was," he said, "a certain hesitancy

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[Ed. Note: Professor Baier's speech is reproduced here as it was delivered. The speech was annotated by Professor Baier for publication in the Review.]

* By statute, Act 87 of 1980, the Louisiana Legislature authorized the Clerk of the Supreme Court of Louisiana to perpetuate the memory of Chief Justice White through any appropriate means. The author wishes to acknowledge the able services of Mr. Frans J. Labranche, Jr., Clerk of the Supreme Court of Louisiana, in coordinating the proceedings at the unveiling of White's portrait.

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1. Speakers Laud Character of Justice White as Statue in His Memory is Unveiled, The Times-Picayune (New Orleans), Apr. 9, 1926, § 1, at 3, col. 1.
2. "I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget." O.W. Holmes, Jr., The Unveiling of Memorial Tablets at Ipswich, (1902) in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 136 (M. Howe ed. 1962).
in signing the final word to put the plantation out of my life. I was born there, my father and grandfather lived there, and almost everything that is dear to me in memory was associated with it."

The little town of Thibodaux is a very Catholic one. White was baptized in St. Joseph's Church in 1845, the year of his birth. Two years later his father was dead, and his lot fell to the care of a loving mother. Ned White took his early schooling with the Fathers of the Society of Jesus, first at Mount St. Mary's in Maryland, ten miles from Gettysburg, and later at Georgetown College, entering in 1857, when White was twelve years old. The College Ledger for 1860 shows the boy spent 25 cents for skate straps and 43 cents for fishing tackle during the year.

Then The Great War called Ned White home to Port Hudson, just as it called Wendell Holmes to Antietam. "[T]he C.J. & I had been enemies," Holmes could later quip when he and White served together on the Supreme Court of the United States. There is something romantic, to my way of seeing things, in the mutual service of these two soldier boys on the nation's highest tribunal. There was genuine affection between them. They shared the common bond of near death fighting for a cause each believed just.

III

White's long walk home from Port Hudson, following his imprisonment and parole, is part of Louisiana's folklore. His admission to the

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3. White's words were quoted by Henry Plauché Dart, in his memorial address on behalf of the Louisiana Bar Association, delivered at the opening of the October 1921 Term of the Louisiana Supreme Court. 149 La. vii, x (1921), reprinted in Dart, Edward Douglass White, 3 Loy. L.J. 1, 8 (1921).


5. M. KLINKHAMER supra note 4, at 13 n.55.

6. Holmes's biographer, Mark DeWolf Howe, tells the story of Holmes getting shot in the back of the neck at the Battle of Antietam. On the day after the battle, Holmes, then 20 years of age, wrote to his parents: "Usual luck—ball entered at the rear passing straight through the central seam of coat & waistcoat collar coming out toward the front on the left hand side—yet it didn't seem to have smashed my spine or I suppose I should be dead or paralyzed or something," 1 M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1842-1870, at 126 (1957).

7. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (June 1, 1917), in 1 HOLMES-POLLOCK LETTERS 245 (M. Howe ed. 1941).

8. In White's own words:
Like everyone else in my environment, as a little boy I went into the army on the side that didn't win. I know I did myself more harm than I did harm to anybody else. I was taken prisoner, and carried to the town where I lived, and my mother
bar of Louisiana followed in 1868, the year of the fourteenth amendment's ratification. White's legal mentor, Edward Bermudez, was a great Civilian. He was like a father to White, and he tutored him in the early Spanish and French law and in the history of Louisiana's legal system. Bermudez's office, in the Vieux Carre, was a great law school in its day. It was said that the light never went out there until put out by the rising sun. As it usually happens, White's first case was hopeless, yet "You may win your spurs with it," Bermudez told him. After many night watches, the young lawyer became the master of his cause, just as he was to master others throughout his career. We lawyers know that the first victory in what is called a great case is always the sweetest. White's triumph on the levee question involved in his earliest appearance at the bar of this court was no exception; his success sparked a measure of self-confidence and industry that assured him high ranking as a lawyer. In due course, White earned himself a place on this court, by appointment of his political mentor, Governor Nicholls, in 1878, when White was thirty-three.

IV

Thereafter, White's career is a quintessential example of the importance of contingency and the logic of events in life. It was natural

went to the officer in charge of the prison and asked permission to come to see me. . . .

On the next morning, I had a prison number, and my number was called out, and I was marched by the corporal of the guard along the dead line, where if a man tries to cross, he is shot. I was taken out into the guardroom, and there stood a gentleman. He asked my name, and he said, "Come along with me," . . . . [W]hen we got out into the street—it was a cold February day—there stood a hansom. There was an orderly holding the horse, and the gentleman said, "My boy,"—and he looked at me—he said, "You have no coat on." I had nothing on but a thin flannel shirt. I said, "Yes, that is so." But he said, "Go back and get your coat." I said, "I cannot go back and get what I have not got." "Oh," he said, and putting his hand up to the long heavy blue braided coat which kept the cold from his vitals, he unbuttoned it, button by button, took it off his own shoulders and said, "My boy, I am more warmly clad than you are. Put on my coat."

Address of Chief Justice White, 12 PRINCETON ALUMNI WEEKLY 525-26 (1912), quoted in Fegan, Edward Douglass White, Jurist and Statesman, 14 GEO. L.J. 1, 4-5 (1925).


11. I owe the reference to the importance of contingency and the logic of events to my learned friend and mentor Colonel Frederick Bernays Wiener, who heard it in his day from his teacher and lifelong friend Felix Frankfurter: "Justice Frankfurter's life, like that of so many, many others, was a curious amalgam of the importance of contingency and the logic of events. He stressed the first in his autobiography; he
that White, having vanquished the dreaded Louisiana Lottery, should be called to the Louisiana Senate, and thence to the Upper House of the United States Congress. "[T]he Chief has Irish blood," Holmes said of White, "he is naturally a politician and a speaker."12

After three years in the United States Senate, a bolt of contingency struck in 1894. The story of Senator Hill's double rejection of President Cleveland's two New York nominees to the Supreme Court is well known.13 To show Hill a thing or two, Cleveland surprised everybody by nominating White, a deep Southerner, to the Court.14 Naturally the Senate, including poor Hill, unanimously confirmed one of its own in less than fifteen minutes.15 It is perhaps fitting that the portrait we unveil today hung for years in the New York City Clubhouse of the National Democratic Club, as a sort of mocking reminder of the twist of fate that put a Louisianian in what was supposed to be New York's seat on the Supreme Court.16 White served

invoked the other whenever younger men turned to him in moments of discouragement." Wiener, Felix Frankfurter (1882-1965), 1965 Y.B. AM. PHIL. SOCY 146, 152.

12. Holmes to Pollock (March 21, 1912), in 1 HOLMES-POLLOCK LETTERS, supra note 7, at 190. Holmes wrote similarly to Harold J. Laski: "[White] is a big fellow, though (strictly between ourselves) I should think built rather for a politician than a judge." Holmes to Laski (Nov. 26, 1920), in 1 HOLMES-LASKI LETTERS 294 (M. Howe ed. 1953).


14. White's deep religious convictions may have had something to do with the nomination. Sometime before the nomination, at a party given by one of White's fellow senators, President Cleveland overheard White ask if there was a Catholic church nearby where he could attend early Mass. "I made up my mind," said Cleveland, "that there was a man who was going to do what he thought was right; and when the vacancy came, I put him on the Supreme Court." B. PERRY, AND GLADLY TEACH 146-47 (1935).

15. Cleveland was put to it, and he did what Presidents have done before and since. He drew on that powerful force, the club feeling of the Senate. And he said, "I'll fix you. I'll name a senator to the Supreme Court." (They never reject Senators for anything, almost.) So he named Senator White of Louisiana, and within fifteen minutes Senator White was confirmed.

F. FRANKFURTER, CHIEF JUSTICES I HAVE KNOWN, in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRA-JUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 483 (P. Kurland ed. 1970). Allan Nevins in his biography of Cleveland quotes the President's comment when word drifted back to the White House from the Senate that the President could not name any man whom the Senate would accept. "Tomorrow I'll name a man whom the Senate will unanimously confirm and for whom that little son of a bitch himself will be compelled to vote." A. NEVINS, GROVER CLEVELAND: A STUDY IN COURAGE 571 (1932).

16. Ex rel. Robert G. Szabo, Esq. Mr. Szabo is largely responsible for the return of White's portrait to Louisiana, since he was the first to suggest to Chief Justice John Dixon that Louisiana might want her Chief back home. The portrait was purchased with funds remaining from the Edward Douglass White Memorial Commission,
for sixteen years as an Associate Justice. Then President Taft moved him over to center chair in 1910, when White was sixty-five. It seemed to Taft the logical thing to do. \(^7\) White remained Chief Justice for eleven years, from 1910 to 1921. His career spans 105 volumes of the United States Reports, \(^8\) spread out over twenty-seven years of total service on a Court he loved dearly.

V

This is not the place to unravel the mysteries of *The Insular Cases*\(^9\) or to rehearse White's contributions to the law of the Commerce Clause.\(^10\) It is enough to say that, like every other judge, White which was created by the Louisiana Legislature in 1960. Just how the Rosenthal portrait of White came to hang on the walls of the New York City Clubhouse of the National Democratic Club is unknown. No record of its purchase can be found, and the details of its New York display are shrouded in mystery.

17. R. Highsaw, *supra* note 4, at 57. Shortly before White's appointment as Chief, Holmes wrote to Pollock: "I know of no first-rate man except White. His writing leaves much to be desired, but his thinking is profound, especially in the legislative direction which we don't recognize as a judicial requirement but which is so, especially in our Court, nevertheless." Holmes to Pollock (Sept. 24, 1910), in 1 Holmes-Pollock Letters, *supra* note 7, at 170. White was the first Associate Justice moved over to the center chair. There was talk at the time of the appointment of Taft setting bad precedent by the nomination: "Old line Republicans argued that never before had an Associate Justice been made Chief Justice and that it was a total disregard of party traditions for a Republican President to award so coveted an honor to a member of the opposition." Chief Justice White Dies at Age of 75, N.Y. Times, May 19, 1921, 51, at 8, col. 3. But, politics aside, most contemporary commentators approved the appointment. See, e.g., A Merit Appointment, 23 Green Bag 102-03 (1911).

18. 152 U.S. through 256 U.S.

19. De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); The Diamond Rings, 183 U.S. 176 (1901); Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Rassmussen v. United States, 197 U.S. 516 (1905). All of these cases involved the question, in the language of the hour, "Whether the Constitution follows the flag." Professor Highsaw very perceptively links White's "Incorporation Doctrine" with the law of Rome:

White met the problem of new American insular possessions by splitting constitutional law into two categories: fundamental law, similar to the *jus gentium*, applying to "incorporated" and "unincorporated" territories alike; and laws peculiar to American jurisprudence, akin to the *jus civile*, which apply only to the states and such territories as have been "incorporated" by Congress. Although not extending the Constitution in its entirety to the peoples acquired by treaty, White did recognize a body of fundamental principles that reached them.

R. Highsaw, *supra* note 4, at 170-71.

20. Of White's contributions to the law of the Commerce Clause, particularly Congress's power to regulate the railroads, Chief Justice Taft said:

The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White in construing the measure and its great amendments has had more to do with placing this vital part of our prac-
has had his ups and downs. Only the other day his opinion in the Geer case—you may remember it dealt with shooting woodcocks in Connecticut—was expressly overruled. White's great civilian learning, quite evident in Geer, was tossed aside lightly—too lightly I fear—by the current Court. On the other hand, my colleagues in antitrust tell me that White's Rule of Reason remains the controlling construction of the Sherman Act. If a cynic were to ask me "Why waste time on a dead man?" I would point his nose to the advance

tical government on a useful basis than any other judge.

Proceeding on the Death of Chief Justice White, 257 U.S. v. xxv (1921). While White was still very much alive, Holmes wrote to Harold Laski, saying of White: "His faults are obvious, but he has insights. I think, e.g., the credit is wholly his of making the relations between the Interstate Commerce Commission and our court clear and putting the whole important business on a sound and workable footing." Holmes to Laski (Nov. 28, 1920), in 1 HOLMES-LASKI LETTERS, supra note 12, at 294.


23. White not only mastered the civil law, but it was common for him to address a jury first in French, then in Spanish, then in English. White also spoke Italian and read German. Joyce, Edward Douglass White: The Louisiana Years, Early Life and on the Bench, 41 TUL. L. REV. 751, 754 (1967). White was also quite familiar with English and American constitutional history; and, generally speaking, his opinions reflect great interest in historical materials of all kinds in aid of judgment. According to one study of the uses of history in Supreme Court opinions:

In the court under White, the Chief Justice himself was by far the leading historian on the bench. His well-rounded knowledge not only of the history of the origin and development of the American Constitution but also of English constitutional history—as well as a firm grasp of general history—was displayed in many of the opinions he wrote.


24. A rule of construction of the Sherman Act first espoused by White in dissent in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343 (1897), and later adopted by the Court, with Chief Justice White writing for the majority, in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Under the Rule of Reason, not all restraints of trade are illegal per se, only those that unduly restrain trade. Said White:

Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

221 U.S. at 60. Justice Harlan dissented in a stinging, sarcastic opinion. He particularly resented what he called the rhetorical legerdemain by which Chief Justice White attempted to deny any inconsistency between the Rule of Reason and the earlier cases; for Harlan, such verbal subterfuge "surprises me quite as much as would a statement that black was white or white was black." United States v. American Tobacco Co., 221 U.S. 106, 191 (1911) (Harlan, J., dissenting).
sheets and ask him to compare White's dissent in the *Weems* case\(^\text{25}\) — Holmes joined it — with the Supreme Court's recent reversal of a lower court for usurping legislative powers in the criminal sentencing area.\(^\text{26}\) To the discerning eye, White is quite alive, as judges live, in the *United States Reports*. It has been said with some truth that White's opinions tend toward the obscure.\(^\text{27}\) His fondness for logical analysis and the very breadth of his reasoning powers sometimes carried him quite out of range of ordinary comprehension.\(^\text{28}\) Indeed, it was said of White that he could spin out an argument so fine that not even a spider could get through it.\(^\text{29}\) Poor eyesight and a pair of cataracts, which caused White to dictate his opinions, doubtless contributed to the observed tendency.\(^\text{30}\) But on the pre-eminent questions of war and taxes,\(^\text{31}\) White's opinions are models of forceful English

27. In one of his letters to Sir Frederick Pollock, Holmes said of White's writing that, "His mode of exposition rarely strikes me as felicitous or as at all doing justice to his great ability." Holmes to Pollock (July 15, 1906), in 1 *HOLMES-POLLOCK LETTERS*, supra note 7, at 130. And in another of these letters, Holmes spoke of "the wish of the C.J. for superfluous longwindedness—the abiding desire of many in these parts." Holmes to Polloke (March 12, 1911), id. at 178. In all fairness to White, however, it should be pointed out that Holmes's opinions were often none too clear to the practicing bar. As recorded by Chief Justice Hughes, who had earlier served as an Associate Justice under Chief Justice White:

As [Holmes] wrote his opinions in his own hand, they were usually short. At the time to which I am now referring [1910], Justice Holmes was not as popular with the bar as he became later. Lawyers complained that he did not adequately set forth the case and that his language was frequently obscure. This I learned from Chief Justice White who received letters which occasionally he would show me, and I was somewhat amused that the Chief Justice, who was none too clear in his own style, should refer to Holmes's "obscurities."

28. It should be remembered, however, that to White's orderly mind "a just distinction, however refined, was as plain as the noon-day sun." Garwood, *Chief Justice Edward Douglass White*, 24 Rep. La. B. Ass'n 151, 156 (1923).
30. For 27 years White wrote decisions in all of his hundreds of cases usually dictating to a stenographer and later correcting the typescript. He became an indefatigable worker, to the extent that by the time he had completed working over a decision and dictating it, his amazingly retentive memory allowed him to repeat it verbatim without consulting his notes. In the years to come, White would on occasion become so involved while delivering an oral opinion that he would neglect his notes and recite his usually involuted and obscure reasoning from memory.

31. On questions involving racial discrimination, White's opinions are quite cloudy,
that march the reader to his conclusions. Little wonder the statue of E. D. White that guards this very courthouse is inscribed with a passage from White's brooding dissent in the Pollock case, a dissent perhaps necessarily so in light of the peculiar delicacy of such questions during White's time. See, e.g., the Grandfather Clause Cases, Guinn v. United States, 238 U.S. 347 (1915) and Myers v. Anderson, 238 U.S. 368 (1915), in which the Supreme Court for the first time applied the fifteenth amendment and what was left of the federal civil rights statutes to strike down state laws designed to deny blacks the right to vote. Recent historical scholarship suggests the White Court was far more progressive in protecting the civil rights of blacks than most people know:

But if the White Court did not turn back the tide of racism inundating America in the Progressive era, neither did it put its power and prestige behind the flood, as had the Waite and Fuller Courts that preceded it, and, at critical points, it resisted. The White Court's judicial countercurrents were more symbols of hope than effective bulwarks against the racial injustice that permeated American law. But the decisions taken together mark the first time in American history that the Supreme Court opened itself in more than a passing way to the promises of the Civil War amendments, a development that is usually passed over by students of constitutional law and by historians of the Progressive era.


32. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), holding unconstitutional as a direct tax void for want of apportionment so much of the Income Tax Act of August 15, 1894 as levied a tax upon rents or income from real property; the Court was equally divided upon the validity of a tax on income from personal property. Justice White's dissent was not only his first dissenting opinion, but also his first important opinion upon any grave constitutional question. Those charged with remembering White by his written words selected the following connected passages from his first Pollock dissent to affix to his statue:

Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result. . . . The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that . . . this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will . . . be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.

157 U.S. at 650-51, 652. In Pollock, a rehearing was granted upon the points as to which the Court was in equipoise, and the Court on May 20, 1895, by a vote of five to four, held a tax upon the income from personality to be a direct tax also, and void as such for want of apportionment. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895) (on rehearing). Justice White, joined by Justices Harlan, Brown, and Jackson, again dissented in what is doubtless one of White's finest judicial opinions. The depth of his conviction appears in the 16th numbered paragraph of White's 21-point dissent:

The injustice of the conclusion points to the error of adopting it. It takes invested wealth and reads it into the Constitution as a favored and protected class of property, which cannot be taxed without apportionment, whilst it leaves the occupation of the minister, the doctor, the professor, the lawyer, the inventor, the author, the merchant, the mechanic, and all other forms of industry upon which the prosperity of a people must depend, subject to taxation without that condition. A rule which works out this result, which, it seems to me, stultifies
later ratified by the People in the sixteenth amendment. And what patriotism White poured into his opinion for the Court in the Selective Draft Law Cases, written for a nation at war. "As the mind cannot conceive an army without the men to compose it," said the Chief Justice in the style of the schoolman, "on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice." This was written at a time when it was difficult for White to do any work at all. "I have constantly ringing in my ears the noise of the awful conflict along the Belgian and French border," White wrote in a letter, "and the appalling thought of the splendid men who are giving up their lives haunts me day and night." In December 1917, one month before the Selective Draft Law Cases were handed down, White wrote to a friend: "I do not like to talk about the war situation. I hate to be pessimistic, I dare not be hopeful, and I am afraid I am not good enough to pray. I am too old to fight. I am in a bad fix, ain't I?"

That gentle lawyer and scholar Henry Plauché Dart ventured to predict in 1921 that posterity would link together the names of Marshall and White, the teacher and the disciple. Those who would doubt this comparision would do well to reread Chief Justice Marshall's Marbury opinion and to compare it to the style and statesmanship of Chief Justice White's opinion in Virginia v. West Virginia, wherein

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the Constitution by making it an instrument of the most grievous wrong, should not be adopted, especially when, in order to do so, the decisions of this court, the opinions of the law writers and publicists, tradition, practice, and the settled policy of the government must be overturned.

158 U.S. at 712. This dissent is the last reported opinion in 158 U.S.; White literally had the last word on the income tax. What's more, in 1913 White's views became the law of the land by operation of the sixteenth amendment.

33. 245 U.S. 366 (1918).

34. It is sometimes said, perjoratively, that White's style is that of the scholastic; "schoolman" comes closer to the mark. For a perceptive study of White's style in relation to substance, see Sister Marie Carolyn's The Legal Philosophy of Edward Douglass White, 35 U. DET. L.J. 174 (1957).

35. 245 U.S. at 377.


37. Id. at 28.

38. H. Dart, supra note 9, at 22, in 5 MEMORIALS 350.


40. 246 U.S. 565 (1918). Charles Evans Hughes, writing in the period between his service as an Associate Justice and later as Chief Justice of the United States, said of White's opinion in Virginia v. West Virginia: "This,—from the lips of one who in his youth had fought to maintain the Confederacy but as Chief Justice exemplified the loftiest statesmanship and patriotic devotion to a united country." C.E. HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 128 (1928).
the Court finally managed to close the book on a long drawn out fight between two sister states, one of which sought to disregard without judicial sanction its obligation to the United States Constitution. Wearing the mantle of Marshall, Chief Justice White would have none of it. Still, he withheld mandamus for the moment, so as to allow the offending state to save face.41

VI

On questions involving the judiciary, Chief Justice White took special interest. Perhaps his thoughts turned homeward to the Cabildo,42 where he once sat as a member of this court,43 when later as Chief Justice he spoke of the essential partnership of state and federal courts under our Constitution: "[T]his theory and practice is but an expression of the principles underlying the Constitution," said White, "which cause the governments and courts of both the Nation and the several States not to be strange or foreign to each other in the broad sense of that word, but to be all courts of a common country . . . ."44 Marshall himself could not have been more eloquent. Coming from Louisiana's Chief, and uttered in the company of this audience, surely these words have extra poignancy. As Chief Justice of the United States, White regarded his office "as a sacred trust, as a Holy Grail,"45 according to his successor as Chief, William Howard

41. As White put it in his opinion for the Court: we are fain to believe that, if we refrain now from passing upon the questions stated, we may be spared in the future the necessity of exerting compulsory power against one of the States of the Union to compel it to discharge a plain duty resting upon it under the Constitution.

246 U.S. at 604. Professor Thomas Reed Powell, of the Harvard Law School, who was not given to quick praise, wound up his critique of Chief Justice White's handling of Virginia v. West Virginia by paying tribute "to the statesmanship that accords to the defendant the respect which refuses to believe that this inaction will continue, now that the question of duty is authoritatively and finally determined." Powell, Coercing a State to Pay a Judgment: Virginia v. West Virginia, 17 Mich. L. Rev. 1, 32 (1918). A year after White's opinion was announced, his temperate view prevailed: an acknowledgment of the satisfaction of the Court's decree was presented and filed by counsel for the contending States. C.E. Hughes, supra note 40, at 129.

42. "[W]here the Supreme Court of Louisiana held its sessions in the Salle Capitulaire, the Audience Chamber of the Governors of Spanish Louisiana." H. Dart, supra note 9, at 16, in 5 Memorials 344.

43. White's appointment as an Associate Justice of the Louisiana Supreme Court was dated January 10, 1878, when White was just entering his thirty-third year. He served a brief term of only fifteen months, until the Constitutional Convention of 1879 forced him out of office by its creation of a new court. White's opinions while on the Louisiana Supreme Court are contained in volumes 31 and 32 of Louisiana Annual Reports (1879-1880).


Taft. That is as it should be, lest we lose
the power for good of that ideal and undying personality, the
Supreme Court of the United States . . . . So noble in conception
and yet so simple in execution; so ordinary in its incidents and
yet so majestic as the servant of the whole people; so weak and
yet so strong, because founded upon the affection of all the peo-
ple and depending for its existence upon their continued support.46

These are moving words, spoken by White as he bid farewell to his
fallen colleague Harlan, that "lion-hearted fellow,"47 according to
Holmes, the last of the tobacco-spitting justices.48

There is talk these days, if the newspapers are to be believed,
of petty squabbling and hard feelings among the Brethren.49 These
reports, I think, would hurt White deeply.50 True, there was plenty
of heat between Harlan and White; they split hard on the Standard
Oil and American Tobacco cases.51 But White was not a man to hold

46. Response of E.D. White, Proceedings on the Death of Mr. Justice Harlan, 222
U.S. xxv-xxvi (1912), 2 MEMORIALS 375, 376.
47. "When in conference Justice Harlan would express himself rather sharply in
answer to what Justice Holmes would say, the latter, always urbane, would refer to
Justice Harlan as 'my lion-hearted friend.'" C.E. HUGHES, supra note 27, at 168.
48. "Unlike Harlan, [White] was a nibbler rather than a chewer of tobacco, and
while in Court he used to break five-cent cigars into little pieces, put one piece in
his mouth and stuff the rest into his pockets." W. SHIRAS, JUSTICE GEORGE SHIRAS
JR. OF PITTSBURGH 130 (1953). Francis Biddle, who clerked for Holmes, avouches that
when White was made Chief Justice, "he gave up the habit as a little undignified
for the Chief." F. BIDDLE, MR. JUSTICE HOLMES 107 (1942).
49. Contra Powell (Justice Lewis F. Powell, Jr., Supreme Court of the United
50. To be sure, White had his personal scraps with one or two of the colleagues,
but his goal was always to get along. According to Charles Evans Hughes:
he was most considerate and gracious in his dealings with every member of the
Court, plainly anxious to create an atmosphere of friendliness and to promote
agreement in the disposition of cases. . . . Keenly sensitive, and solicitous for
the reputation of the Court, he bore his heavy burden with a troubled spirit but
with unvarying steadfastness and courage. . . . In his last years, he suffered from
serious physical disability but was determined not to yield his place, and with
rare heroism kept at his task until the end.
C.E. HUGHES, supra note 27, at 169.
51. Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American
Tobacco Co., 221 U.S. 106 (1911). In his autobiography Charles Evans Hughes relates
just how hard the split was:
With a passionate outburst seldom if ever equaled in the annals of the Court,
he [Harlan] brought his service to a dramatic conclusion. This was his oral dis-
sent in the Standard Oil case. He went far beyond his written opinion, launching
out into a bitter invective, which I thought most unseemly. It was not a swan
song but the roar of an angry lion.
C.E. HUGHES, supra note 27, at 170.
a grudge. His heart was too big. Equally important, Chief Justice White well understood

how completely the discharge of judicial duty in a court of last resort necessitates an effort by all to efface every merely incidental mental and moral tendency to difference of opinion in order that by the perfect equipoise of mind with mind and the union of heart with heart, a composite, wise, and just judgment may result.  

Hearing White’s words, let us all rededicate ourselves, in our own endeavors, to live not merely as brethren, but as brothers.

VII

What may be said of White as a man? I make a poor eyewitness,

52. E.D. White, 222 U.S. at xxv, 2 MEMORIALS 375.
53. When he was Chief Justice, White inaugurated a custom of Court that has prevailed ever since, a small amenity calculated to ease the natural tensions of the place and to bring the Court together. As described by one eyewitness:

I cannot refrain from describing a scene, which it was my good fortune to witness. I had been conducted by the clerk of the Court to the robing room just before the convening of the Court, and cautioned not to recognize any one until the Chief Justice had received his colleagues. One by one the Associate Justices entered the room and going to their individual lockers, assumed their gowns. When all were robed and in place, the Chief Justice stepped to the center, and received in the order of seniority his Associates with a cordial handshake and the words: “Good morning, Mr. Justice,” and each would reply “Good morning, Mr. Chief Justice.” Although a daily occurrence, it was not a mechanical routine. The cordiality and sincerity of the greeting, irradiated by the smile and natural grace of the Chief Justice, huge man though he was, imparted a charm and a pleasure to the day’s work that was quite unmistakable. I was told by the clerk that the custom had been introduced by the Chief Justice himself, not as a bit of formalism, but as an amenity calculated to soothe any irritation which might have resulted from differences in the consultation hours.

Remarks of Hampton L. Carson, Memorial Tribute to Edward Douglass White, 44 REP. A.B.A. 28-29 (1921).
54. Other than his profession and his home, two things claimed the attention of White the man:

One was baseball and the other walking. A fair sky and the opportunity to do so always found Justice White in a sunny section of the American League grand stand and “rooting” for the home team. . . .

From the Capitol to the late Justice’s home is a sharp thirty-minute walk, and for years one of the sights of Washington was to see the tall Chief Justice, linked arms with his associates, Justices Lurton and Holmes, swinging along Pennsylvania Avenue earnestly arguing over questions of the day. Sometimes Justice White disagreed with his colleagues, and when he did he would halt in his stride and tightly gripping his less bulky companions make them consent to be “overruled” before he would permit them to continue their walk. He once termed this method “the physical application of the law.”

Chief Justice White Dies at Age of 75, N.Y. Times, May 19, 1921, § 1, at 8, col. 3.
but thanks to Mr. Rosenthal\textsuperscript{55} and his portrait,\textsuperscript{56} we know what White looked like.\textsuperscript{57} As luck would have it, Rosenthal actually painted two portraits of Chief Justice White shortly after his death.\textsuperscript{58} They are identical twins, and one already hangs in the West Conference Room of the Supreme Court of the United States, in the gallery of Chief Justices, in the company of Charles Evans Hughes and William Howard Taft. Only Louisiana's Chief is wearing a white tie, draped languidly about the neck. I like that. It speaks to me of the South and of the sugar planters of Louisiana. I sense from what I have read that White had a sense of humor off the bench. When White welcomed his new colleague John Hessin Clarke to the Court in 1916, White said to him, "It's a great place, Judge, but we live in a cave."\textsuperscript{59} And


\textsuperscript{56} Fifty years ago, when they unveiled Holmes's portrait at Harvard, Learned Hand was the speaker. Judge Hand opened his address with a comment on the value of portraiture: "Carlyle says somewhere that he would give more for a single picture of a man, whatever it was, than for all the books that might be written of him." Hand, \textit{Mr. Justice Holmes}, 43 HARV. L. REV. 857, 857 (1939). The Carlyle quotation appears in his essay on portraiture, \textit{Exhibition of Scottish Portraits}, in 16 \textit{The Works of Thomas Carlyle: Critical and Miscellaneous Essays} 514, 515 (Collier ed. 1897). What Carlyle had to say about the place of portraiture in understanding the man is worth preserving here:

"Often I have found a Portrait superior in real instruction to half a dozen written "Biographies," as Biographies are written;—or rather, let me say, I have found that the portrait was as a small lighted candle by which the Biographies could for the first time be read, and some human interpretation be made of them; the Biographed Personage no longer an empty impossible Phantasm, or distracting Aggregate of inconsistent rumors,—in which state, alas his usual one, he is worth nothing to anybody, except it be as a dried thistle for Pedants to thrash, and for men to fly out of the way of),—but yielding at last some features which one could admit to be human.

\textit{Id.}

\textsuperscript{57} "He looked the way a Justice of the Supreme Court should look . . . . He was tall and powerful. I think a jowl also helps a Justice of the Supreme Court, and White had an impressive jowl." F. FRANKFURTER, \textit{supra} note 15, at 481. "[T]he factor which impressed people most was his bulk. He was a monumental man, six feet tall, weighing two hundred pounds, and with the skeleton which made his bulk give the impression of massive strength rather than of sloppiness." 2 K. UMBREIT, \textit{supra} note 29, at 366.

\textsuperscript{58} According to the painstaking researches of Marie Windell, Archivist, Archives and Manuscripts Department, Earl K. Long Library, University of New Orleans, Rosenthal actually painted several portraits of White, including at least one from real life. \textit{Ex rel.} Marie Windell (Nov. 23, 1982).

\textsuperscript{59} White, quoted in a letter from John Hessin Clarke to Newton D. Baker (Jan. 21, 1932), \textit{reprinted} in H. WARNER, \textit{The Life of Mr. Justice Clarke: A Testament to the Power of Liberal Dissent in America} 133 n.6 (1959).
there is a family story that one summer while vacationing in Cobourg, Ontario, the Chief Justice was asked by a friend why on earth the Court in a recent case had let a dreadful smuggler go free. "Well," replied White, "it must have been because I kept remembering the bottoms of my wife's trunks every time we came home from Europe." The blessing of romance came late in life to White, but when it hit him, White set an example we would all do well to follow. The story goes that each afternoon, returning home from his daily walk, the Chief Justice would invariably bring his wife a single red rose.

White left cigars at the homes of his colleagues; he carried candy in his pockets for little children; "his heart was as that of a little child," according to Attorney General Wickersham's testimony when he unveiled the bronze statue of White, five years after his death. Those who knew the Chief Justice personally avouched his deep religious convictions and the essential goodness of the man. "You know," White told Solicitor General John W. Davis, "I am one of these men who thinks that somewhere, sometime I must give an account of the deeds done in the body." But, he continued, his jowls shaking vigorously, "My brother Holmes doesn't believe in anything: If you say to him, this is right and that is wrong, he will say, 'Now you are using terms that I don't know anything about.'" According to Chief Justice Taft, Edward Douglass White:

had a great heart, full of sympathy for mankind. He had an un-failing courtesy and a sweetness of manner which endeared him to all with whom he was associated. The strength and ruggedness and dignity of his character were stamped in his face, and these

60. Quoted in W. SHIRAS, supra note 48, at 130.
61. K. UMBREIT, supra note 29, at 383.
63. Childless himself, White loved children. The New York Times reported at White's death that Louisiana's great Chief, ponderous as his frame was, could easily be cajoled by agile little girls into joining their game of drop-the-hankerchief. Taft is Expected to Succeed White, N.Y. Times, May 20, 1921, S 1, at 1, col. 2.
64. G. WICKERSHAM, supra note 36, at 30.
65. Attorney General Daugherty referred to White's deep religious beliefs during the memorial proceedings: "His great mind had penetrated far enough into spiritual things to understand the smallness of man in the infinite purpose of God." 257 U.S. at xxiii. As it happened, White was not afraid to ask God's help in untying a judicial knot: "Sometimes the Chief Justice would bring to conference cases on which he could reach no decision. Here is a difficult case, he would say with a gesture of despair. 'God help us!'" Interview with Charles Evans Hughes (May 15, 1946), quoted in 1 M. PUSEY, CHARLES EVANS HUGHES 282-83 (1951).
67. Id.
things but lent a peculiar charm to his gentleness and kindly manner. He was a gentleman of the old school.68 Taft, as I have said, succeeded White as Chief Justice, ninth and tenth in Marshall’s line.

VIII

Mr. Chief Justice and members of the court, you have been very patient with me. Biographers tend to fall in love with their subjects, and it has been a joy for me to study Louisiana’s Chief Justice. His life is an inspiration. Quite plainly, I consider it a high honor to be counted as one of White’s brothers at the bar of this court.69

IX

Those who know Dickens’s novel The Cricket on the Hearth will see much of the cricket spirit in White. He himself referred to the book when he told of his change of heart toward “Old Glory” at a gathering of the American Bar Association in Washington on the occasion of White’s twentieth anniversary on the Supreme Court. “Do you recall the toymaker and his blind daughter,” White asked the group,

created by the great genius of Dickens . . . in “Cricket on the Hearth,” where with a tenderness which may not be described . . . the father pictured to the blind one whom he so much loved his environment as one of prosperity and affluence? Let us listen to her as she places her hand upon his threadbare gray coat, which she deemed from his description to be one of some rich fabric, and hear her question, “What color is it, father?” “What color, my child? Oh, blue—yes—yes, invisible blue.” And now with the mists of the conflict of the Civil War cleared from my vision, as my eyes fall with tender reverence upon that thin gray line, lo, the invisible has become the visible, and the blue and the gray, thank God, are one.70

69. When White was called to the Supreme Bench, it was suggested to him that he would lose touch with the lawyers of Louisiana. He replied, “I do not consider anything that concerns the bar of New Orleans as separate from my life. On the contrary, every association and tie of friendship is rooted in Louisiana, to which I consider I belong, and from which I hope never to be separated.” Quoted in Dart, supra note 3, at 11.
70. White, The Supreme Court of the United States: Response of the Late Chief Justice White to Toast at the Annual Banquet of the American Bar Association at Washington, Oct. 22, 1914, 7 A.B.A.J. 341, 342 (1921). Throughout his judicial career, Justice White rarely accepted speaking engagements; to have done so would have interfered with judicial duty:
Doubtless White's words will never fade from the memory of those who were privileged to hear him."

X

I must add a personal word and then I am finished. There is a passage in Dicken's The Cricket on the Hearth: A Fairy Tale of Home, as the book is known, that to my eyes portrays the essence of White the man:

And all was Caleb's doing; all the doing of her simple father! But he too had a Cricket on his Hearth . . . . For all the Cricket Tribe are potent Spirits, even though the people who hold converse with them do not know it (which is frequently the case);

Chief Justice White's exalted conception of the duties of his high office is illustrated by a story told by the Richmond Times-Dispatch. "A delegation of Atlanta citizens called on Chief Justice White at ten o'clock in the morning, without notifying him. Luckily for them, he was at home and received the delegation cordially in his study. The object of the delegation was to invite the new head of the nation's most august tribunal to speak in Atlanta within a few weeks. The Chief Justice expressed his appreciation of the invitation, but made it evident from the outset that he could not accept it. To show that he was sincere in his declination, he exhibited some of his work to the visitors, saying: 'I want all of you to realize and appreciate what none of you and very few lawyers appreciate.'

"He crossed the room and pointed to a pile of paper-back books, placed by the side of his desk chair. There were two huge piles of books three or four feet high—some thin, some thick—twenty or thirty of them in all. Pointing to his heap Chief Justice White said: 'That, gentlemen, is why it is impossible for me to leave Washington. Those books represent the records in the cases we have heard this week, and it is only Thursday now. There will be others. They must be read. They must be studied. I went to bed at one this morning, and I arose again at six. I have been working on these records. That is the sort of life I have led for seventeen years on the bench.'"

The Re-organized Supreme Court, 23 Green Bag 55, 56 (1911).

71. One other public utterance, an introduction of the Lord Chief Justice of England before the American Bar Association's annual meeting in Montreal, Canada, in 1913, reveals White's civilian upbringing and highlights Chief Justice White's conservative faith.

Epitomizing the result of the experience of Rome, and illumined by the teachings of Christianity, the Institutes define justice or law as the giving to every one that which is his due, and jurisprudence as the knowledge of all things human and divine, the power to distinguish between right and wrong. When analyzed, these conceptions give the clearest apprehension of the rudimentary truths underlying all constitutional systems of government and demonstrate that mere questions of municipal law are of minor importance when compared with the fundamental considerations which are at the basis of the preservation of free institutions; that is, the conservatism which is necessary to conserve representative government, the willingness of one to submit to such restraints upon his own conduct as are essential to the preservation of the rights of all. In other words, the power of a free people to restrain themselves in order that freedom may endure.

Quoted in The Honorable Edward Douglass White, 8 Bench & Bar (n.s.) 43, 44 (1914).
and there are not in the unseen World Voices more gentle and more true; that may be so implicitly relied on, or that are so certain to give none but tenderest counsel; as the Voices in which the Spirits of the Fireside and the Hearth, address themselves to human kind.\textsuperscript{72}

Mr. Chief Justice, members of the court, I want to conclude my remarks by quoting the closing part of Edward Douglass White's response to the toast of the American Bar Association, wherein Louisiana's Great Chief Justice proposed a toast of his own:

Now as I come to a conclusion may I be permitted to strike a chord for the purpose of evoking the noble harmony which underlies the toast as I at the outset interpreted it, by proposing one to the health of the American lawyer, which includes the American judge, as bench and bar are one; not alone of the judges of courts of extended jurisdiction and of last resort, but of all, however limited their jurisdiction; not alone of lawyers engaged in great affairs, but of all, however narrow may be the sphere in which they move. And in thus re-expressing the toast or rather echoing it as expressed, may I not be permitted to indulge in the heartfelt aspiration that there may be given to them all a deep and reverent purpose of faithfully discharging the duties which rest upon them, to the end that our free institutions may be preserved and may be transmitted unimpaired to those who are to come.\textsuperscript{73}

Ladies and gentlemen, may the Spirit of the Fireside and of the Hearth be with you always.

\textsuperscript{72} C. Dickens, The Cricket on the Hearth: A Fairy Tale of Home 57 (London, Bradbury & Evans, 1846).

\textsuperscript{73} White, supra note 70, at 343.