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A Tribute to Justice Byron R. White

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When Byron R. White first took his seat on the Supreme Court on April 16, 1962, he was one of the youngest appointments to the Court in this century, and the first former Supreme Court law clerk to become a Justice. In the course of his thirty-one-year tenure on the Court, he served with three Chief Justices and twenty Associate Justices during the administration of eight Presidents. By the time he stepped down from the bench on June 28, 1993, he had authored more than 450 majority opinions for the Court.

Since the announcement of his retirement, journalists, scholars, and commentators have analyzed the White personality, jurisprudence, and legacy. Some have described Byron White, for example, as a "very hard, tough-minded, well-reasoned" jurist. Others portray him as "non-doctrinaire"—a jurist without ideology or social agenda who decides each case narrowly and on its own merits. I think these views have a good deal of truth in them. As the members of the Court wrote to Justice White on the occasion of his retirement: "...you have exhibited a firm resolve not to be classified in any one doctrinal pigeonhole. The important decisions which you have authored for the Court in virtually every field of law will remain as a testament to your years of service here."

The First Amendment is just one area of the law in which Justice White's opinions for the Court have changed the legal landscape. These opinions also demonstrate how his judicial work defies easy categorization. In the well-
known Red Lion Broadcasting Co.\(^2\) case, decided in 1969, Justice White held
for the majority that Federal Communications Commission regulations
implementing the “fairness doctrine” did not violate the First Amendment.
Three years later, in *Branzburg v. Hayes*,\(^3\) Justice White wrote the Court’s
opinion determining that the First Amendment did not afford journalists a
testimonial privilege against appearing before a grand jury to answer questions
relevant to criminal investigations. In 1979, Justice White authored the opinion
in *Herbert v. Lando*\(^4\) for the Court, holding that the First Amendment did not
bar a plaintiff seeking to prove actual malice in a defamation action from
inquiring into the editorial process and the publisher’s state of mind.

In 1981, Justice White’s majority opinion in *Borough of Mount Ephraim*\(^5\)
held that a local unit of government could not exclude all commercial live
entertainment from its boundaries without violating the First Amendment. One
year later, in *New York v. Ferber*,\(^6\) Justice White wrote the opinion for the
Court holding that child pornography—even though not obscene—is not
entitled to First Amendment protection as free speech. In *Hazelwood School
District v. Kuhlmeier*,\(^7\) Justice White’s majority opinion ruled that the First
Amendment does not protect student speech inconsistent with a school’s basic
educational mission. In 1991, writing for the Court in *Cohen v. Cowles Media
Co.*,\(^8\) Justice White held that the First Amendment does not prohibit an
anonymous source from recovering damages for a publisher’s breach of a
promise of confidentiality.

Justice White authored countless other landmark opinions in countless
fields of law—constitutional and otherwise. That no “Byron R. White School
of Jurisprudence” remains behind only serves to underscore his unique
influence on the Court during the years of his lengthy service. Those of us
who daily served with him likely have a greater appreciation for his
contributions than can be obtained by simply reading his opinions or tallying
his votes in cases decided during his tenure. Given the force of his powerful
intellect, the breadth of his experience, and his institutional memory, Justice
White consistently played a major role in the Court’s discussion of cases at its
weekly conferences. His comments there reflected not only his meticulous
preparation and rigorous understanding of the Court precedent bearing on the
question, but also pithily expressed his sense of the practical effect of a given
decision. Justice White’s views carried great weight with the Conference for
those reasons.

\(^3\) 408 U.S. 665 (1972).
\(^6\) 458 U.S. 747 (1982).
\(^7\) 484 U.S. 260 (1988).
Byron White came as close as any of his colleagues whom I knew to
meriting Matthew Arnold’s encomium to Sophocles: he “saw life steadily, and
saw it whole.” 9 His counsel will be missed in the Courtroom, halls and
Conference Room of the Court he revered and served so long and well.

9. MATTHEW ARNOLD, To A Friend, in THE POEMS OF MATTHEW ARNOLD 110, line 12 (Miriam Allott