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"Cheers!"
A Tribute to Justice Byron R. White

*John Paul Stevens*

Chief Justice Rehnquist likes to test law clerks' knowledge of trivia by asking them to list all of the Supreme Court Justices whose names are colors. Although few remember all five, the names of Hugo Black and Byron White always come readily to mind. The links between those two great names shed light on Justice White's unique contributions to the Supreme Court, and help to explain his unparalleled knowledge of the traditions of the Court.

The year 1937 was notable for both men. In the fall of 1937, Hugo Black became the 77th member of the Court. Although his appointment was particularly significant because it was President Roosevelt's first, it was probably less newsworthy than the exploits of the man who was destined to join him on the bench twenty-five years later. For 1937 was the season in which one of football's all-time greats made one sensational play after another, averaging thirty-one yards on his punt returns, punting the ball eighty-four yards without a roll, and running and passing for more offensive yardage than any other player in the college game. Byron White was not only a star on offense, whether carrying the ball, passing it, or blocking for a teammate, but also a great defensive player. Unlike today's stars, who exhibit flashes of brilliance at specialized tasks for a few minutes at a time, he regularly played the full sixty minutes of each game. He was just as effective in the last minute as in the first.

The character of White's career as a Justice has been remarkably similar. His judicial skills, like his athletic skills,
are exceptional and diverse. He is decisive, independent, articulate and uncommonly intelligent. He is diligent, thorough and cooperative, always discharging his responsibilities promptly and carrying more than his share of the Court's workload. Moreover, his skills were just as effective when he retired in 1993 as when he came to the Court in 1962. He was a regular sixty-minute team player during his entire career.

Justice White unquestionably has more first-hand knowledge about the internal workings of the Supreme Court and character of its Justices than any other living person. At the time of his retirement, there had been only 106 members of the Court. He was the 93rd, and of course worked closely with each of the next thirteen appointees as well as with the brethren he joined in 1962. Moreover, while serving as a law clerk to Chief Justice Vinson during the October 1946 Term, he wrote memoranda about in forma pauperis petitions that were regularly reviewed by a Court whose most senior member, Justice Black, was its 77th Justice. He thus had a working relationship with well over a quarter of the judges who have ever served on the Court. His relationship with Justice Black, which began during Byron's clerkship and was renewed after his appointment to the Court, is especially significant, because it made Justice White privy to oral traditions that date back to Black's appointment in 1937.

In 1937, shortly after Justice Black received his commission, a defendant who had been sentenced to death in Connecticut tried to persuade the Court that any action that "would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state." With only Justice Butler noting a dissent, the Court rejected that categorical submission. In his opinion for the Court, Justice Cardozo recognized that "the domain of liberty,

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2. Although some of my colleagues prefer the statutory term "Justice," I have always thought it fitting to use the title selected by the framers of Article III. Moreover, Justice Frankfurter, perhaps the best informed student of the history of the Court, described us as "judges." See, e.g., Adamson v. California, 332 U.S. 46, 62 (1947) (Frankfurter, J., concurring).

3. Justices Black, Douglas and Frankfurter were on the Court when Justice White was a law clerk and also when he became a Justice. The only two Justices appointed after those three with whom Byron did not serve were Justice Minton and Justice Whittaker, whom Byron succeeded.

withdrawn by the Fourteenth Amendment from encroachment by the states" had been "enlarged by latter-day judgments to include liberty of the mind as well as liberty of action," but concluded that it did not embrace the double jeopardy claim asserted by the defendant, Palko. Although the specific holding in that case has been superseded by additional "latter-day judgments," reliance on the judicial process to define the contours of the domain of liberty protected by the Fourteenth Amendment has survived.

That approach has, however, been subjected to serious criticism. Ironically, despite the fact that Justice Black had joined the Palko opinion, it was he who became its strongest and most effective critic. It was in the 1946 Term of the Court, while Byron White was clerking for the Chief Justice, that Justice Black wrote his famous dissent in *Adamson v. California*,

expressly endorsing the thesis that the petitioner had advanced in Palko. His analysis of the legislative history of the Fourteenth Amendment had convinced him that it was specifically intended to incorporate the entire Bill of Rights.

At the same time, he rejected any effort by the judiciary to give a different or more expansive reading to the Fourteenth Amendment's guarantee of "liberty." His disapproval of the Court's earlier use of "substantive due process" to invalidate progressive legislation had convinced him that judges should stay out of the business of trying to define the concept of liberty.

The three other opinions in *Adamson* illustrate different approaches to defining that concept. For Justice Reed, who wrote for the majority, the fact that the Court had already held that the Fifth Amendment's protection against giving testimony by compulsion did not apply in state trials was a sufficient basis for rejecting Adamson's similar claim. One can read that opinion as accepting the judge-made common law of the

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5. Id. at 327.
6. 332 U.S. at 68.
7. Id. at 71-72, 74-75 (Black, J., dissenting). The appendix to Justice Black's opinion summarizes the relevant history. Id. at 92 (Black, J., dissenting). It adequately explains the grant of power to Congress in § 5 of the Amendment, but seems to me to fall short of demonstrating that there was an express intent to make the entire Bill of Rights binding on the states without enabling legislation.
8. See id. at 79-84 (Black, J., dissenting).
10. See Adamson, 332 U.S. at 52-54.
eighteenth century, but agreeing with Justice Black's view that the concept of liberty as then defined should not be enlarged by the judicial process. At the other extreme was Justice Murphy's dissent, endorsing Justice Black's conclusion that "the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment," but disagreeing with his view that those specifics marked the outer limit of the Amendment's protection.¹¹

Justice Frankfurter expressed an intermediate position in his concurring opinion. Relying heavily on the views of the "forty-three judges" who sat on the Court during the seventy years after the adoption of the Fourteenth Amendment, he firmly rejected Justice Black's position and adhered to the view that the Amendment "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."¹² His conclusion in the particular case was adverse to the defendant, but his approach, unlike Justice Black's, recognized the importance of providing protection against abuses other "than those which had become manifest in 1791."¹³

When Justice White joined the Court in 1962, this debate about the method of defining the domain of liberty protected by the Fourteenth Amendment was still very much alive—as, indeed, it is today. Justice White quickly made his own mark on the proceedings. His contributions to the debate have been much too significant to be evaluated fully in a single article. Nevertheless, two observations may be appropriate before turning to certain other aspects of his work.

A wealth of cases attest to Justice White's refusal to imprison the concept of liberty in eighteenth century legal

¹¹. *Id.* at 124 (Murphy, J., dissenting).
¹². *Id.* at 62, 67-68 (Frankfurter, J., concurring).
¹³. *Id.* at 67 (Frankfurter, J., concurring).

As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a constitution we are expounding," so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

*Id.* at 66 (Frankfurter, J., concurring).
forms. His opinion in *Griswold v. Connecticut*,\(^ {14}\) for instance, squarely and correctly rested its conclusion that the statutory prohibition against the use of contraceptives was unconstitutional on the Liberty Clause of the Fourteenth Amendment.\(^ {15}\) Like Justice Harlan in *Griswold*,\(^ {16}\) and Justice Frankfurter in *Adamson*, Justice White expressly rejected Justice Black's view that the substantive content of the Liberty Clause is limited to the guarantees in the Bill of Rights.\(^ {17}\)

In other contexts, as well, Justice White was among the first to identify and condemn arbitrary official conduct. In areas as diverse as prison administration,\(^ {18}\) school discipline,\(^ {19}\) public employment,\(^ {20}\) and the regulation of

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15. "In my view this Connecticut law as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment." *Id.* at 502 (White, J., concurring in judgment). His opinion rested primarily on *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Despite the fact that the prohibition against the use of contraceptives in the papal encyclical *Humanae Vitae* is still supported by highly respected authority, none of the opinions in *Griswold* mentions the encyclical as the probable explanation for what Justice Stewart characterized as "an uncommonly silly law." 381 U.S. at 527 (Stewart, J., dissenting).

17. Justice White explained in a footnote that

[dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court.

*Id.* at 504, n.* (White, J., concurring in judgment).


But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment.

19. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("The Due Process Clause also forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,"
automobile safety, Justice White insisted on fair and rational treatment by the government. His opinion for the Court in Stanley v. Illinois afforded constitutional protection to an unmarried father’s interest in his child. More recently, his dissenting opinion in Michael H. v. Gerald D. rejected the traditional, narrow approach to the rights of an unmarried father.

At the same time, however, Justice White’s opinions, like those of Justices Harlan, Frankfurter, and Cardozo, demonstrate a conviction that the judicial power to define the concept of liberty is not open-ended. His evaluation of the state interests supporting abortion regulations, the prohibition of sodomy, and the bizarre zoning regulation invalidated in Moore v. City of East Cleveland, persuaded him that those deprivations of liberty were constitutional. Regardless of whether “latter-day judgments” ultimately confirm or reject his particular conclusions in those cases, his method of analysis remained faithful to the approach that other great judges have


22. Although I shall not otherwise comment on Justice White’s important opinions construing the First Amendment, I note that he agreed with Justice Black’s conclusion in the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713, 730 (1971) (White, J., concurring), while rejecting his purely textual analysis of the Amendment.

23. 405 U.S. 645 (1972).


25. There is an interesting parallel between the several opinions in that case and those in Adamson. Footnote 6 of Justice Scalia’s opinion, joined by the Chief Justice, id. at 127, takes the same approach as Justice Reed’s Court opinion, while the separate opinion of Justice O’Connor, joined by Justice Kennedy, id. at 132 (O’Connor, J., concurring in part), is like Justice Frankfurter’s in that it refuses to foreclose unanticipated future developments in the law. The dissenters’ views are, of course, closest to those expressed by Justice Murphy in Adamson. Id. at 136 (Brennan, J., dissenting).


followed in the continuing effort to understand the concept of liberty.

A similar acceptance of judicial responsibility tempered by a healthy respect for other branches of government is reflected in Justice White's opinions construing the Eighth Amendment's prohibition on the infliction of cruel and unusual punishment. His explanation in *Coker v. Georgia*\(^29\) of why a death sentence is grossly disproportionate and excessive for the crime of raping an adult woman first carefully reviewed relevant state statutes\(^30\) and the sentencing decisions of juries in comparable cases,\(^31\) but ultimately concluded that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."\(^32\) While he has joined opinions according the states broad latitude in administering capital punishment,\(^33\) Justice White also cast one of the five votes in *Furman v. Georgia*\(^34\) to invalidate the then-prevalent, open-ended statutory procedures for administering the death penalty,\(^35\) and his Court opinion in *Enmund v. Florida*\(^36\) established that such punishment must be tailored to the defendant's "personal responsibility and moral guilt." Perhaps most significantly, his recent dissenting opinion in *Harmelin v. Michigan*\(^37\) contains an effective refutation of two Justices'...
remarkable argument that proportionality should play no part in the Court's Eighth Amendment analysis.

Justice White's Fourteenth and Eighth Amendment jurisprudence does not, of course, begin to exhaust his contribution to the Court's case law. The depth and diversity of Justice White's understanding of the work of the Supreme Court is difficult to describe. He paid particular attention to the cases on the Court's original docket that seldom receive public notice. His expertise in jurisdictional matters, water rights, communications law, voting rights and a variety of other issues was exceptional. In his construction of statutes, he carefully reviewed and evaluated the relevant legislative history. Indeed, he was prepared to defend the use of legislative history against those who questioned its value, explaining that "common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."

While Justice White's contributions to the Court are fairly reflected in his extensive written opinions, other aspects of his work are less well known. He brought a concentrated attention, and a special style, to our day-to-day labors, both of which will be sorely missed.

One of the most striking features of Justice White's approach to the Court's daily operations was his unique focus on the discretionary certiorari docket. I believe that Justice White treated the Court's participation in the legislative history of the Judges' Bill—the 1925 statute giving the Court discretionary jurisdiction over most of its docket—as a commitment to Congress that if the Bill were enacted, the Court would give careful, individualized scrutiny to every certiorari petition that might thereafter be filed. His own

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Justice White went on to note:
Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.
Id. (citation omitted).
41. I have described relevant portions of that legislative history in my article about the Rule of Four. See John Paul Stevens, The Lifespan of a Judge-Made
thorough review of those petitions each week was certainly consistent with the conscientious fulfillment of such an obligation. Justice White regularly identified more petitions for discussion at conference than any other Associate Justice, and his frequent published dissents from orders denying certiorari demonstrate the depth of his concern about the discharge of our responsibility.

Those published dissents, however, tell only part of the story. What they do not reveal is the significant number of occasions on which a draft dissent from denial of certiorari remained unpublished, because it actually persuaded one or more of Justice White's colleagues to change a vote from a "deny" to a "grant." Often, then, it was Justice White's unpublished eloquence that was responsible for a grant of certiorari, and with it, the reversal of an unjust conviction or an incorrect interpretation of a federal statute. While I have adhered to a contrary practice, and refrained from circulating dissents from denial of certiorari, I must acknowledge that Justice White's successes in this area are a strong argument for the value of such dissents.

Justice White enjoyed oral arguments. As was apparent to everyone present, he had a complete mastery of the controlling issues of argued cases. When a petitioner's oral presentation relied on a theory that differed from the written brief, Justice White could be expected to identify that difference in his questioning of counsel. Similarly, when a respondent put forth a new reason for affirming, the Justice typically would ask whether counsel was prepared to defend the rationale adopted by the court below. His questions were usually terse—an apparent gruffness often masking a subtle wit—but they inevitably revealed his perceptive and thorough preparation.

In the 1946 Term, when Byron was a law clerk, draft opinions were mechanically produced in the Court's own print shop. When a draft was completed, the author would distribute one copy to each Justice. Sometimes the receiving Justice would ask his law clerk (each Associate Justice had just one clerk) for comments on the draft; more frequently, if he was satisfied with it, the Justice would simply return the draft to

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*Rule, 58 N.Y.U. L. Rev. 1, 14-16 (1983).*

its author with the hand-written message, "Please join me," noted on the draft itself.

The print shop has been replaced by the computer, and single copies and single law clerks have been replaced by multiple copies and multiple law clerks. Prompt and direct responses from joining Justices to authors are now less frequent. Suggestions for improvements, with copies to the entire Court, as well as a reluctance to join until others have responded, have sometimes produced delays much longer than any occasioned by the now-obsolete printing presses. Even the "please join me" formula seems anachronistic, appearing as it now does in a separate letter omitting the object of the sentence.

Nevertheless, Justice White, like other of the most senior members of the Court, has maintained some of the traditions of the past. He generally responded to opinion drafts quickly and straightforwardly, joining without reservation when he was in general agreement with the authoring Justice. And while younger Justices now tend to reply to drafts with more grammatically correct comments such as "I would be pleased to join your opinion," Justice White still used the traditional "please join me" when he endorsed the dissent he asked me to write in the Court's most recent misadventure in the land of antitrust.43

Traditionally, the release of a Court opinion is preceded by an oral announcement by its author. Chief Justice Burger, who was responsible for many changes that made the Court a happier and more efficient work-place—ranging from xerox copiers and word processors to hall carpeting and a bench reshaped to enable the two most junior Justices to see and hear each other during oral arguments—considered those oral statements a waste of valuable time. Accordingly, he would merely announce the number or name of the case and the fact that the judgment had been affirmed or reversed. Justice White, unlike most other members of the Court, shared the Chief's views and followed his practice for several years. At the

43. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993) (affirming setting aside of jury verdict for plaintiff in antitrust case); id. at 2598 (Stevens, J., dissenting). Justice White and I privately shared the opinion that Brooke Group was a case that would not only have been decided differently by the Court he joined in 1962, but most likely would have been unanimous as well. A jury verdict commanded more respect from the Court then than it does today.
very end of his career, however, he made an unforgettable impression on the rest of us by returning to his original practice and announcing his opinions from the bench. While most oral announcements consist of reading from a prepared text with the arid flavor of a syllabus, Byron spoke extemporaneously with the clarity, simplicity, and charm that characterizes the most effective advocate.

While I was already well acquainted with Justice White’s charm, having first met him during World War II when we both served in the Navy, it was during my first Term on the Court that Byron taught me how persuasive he can be. I was assigned the task of preparing the majority opinion in *Buffalo Forge Co. v. United Steelworkers*, a case presenting the question whether a federal court could enjoin a sympathy strike pending an arbitrator’s decision as to whether it violated the no-strike clause in the parties’ collective bargaining agreement. After I prepared what I thought was an unanswerable draft, Byron wrote a dissent that was not only an adequate answer, but also sufficiently persuasive to change the outcome of the case. Nor was that the only time that I authored a proposed majority opinion that eventually became a dissent from an opinion of the Court announced by Justice White. Indeed, his practice of writing dissents that turned into majorities persisted into his last Terms as an active Justice.

Byron was equally effective in the conferences that I attended. As a relatively senior Justice, he was one of the first to speak, and usually did so without any notes, always stating the issues fairly and accurately. Typically, his position in the case was both firm and unambiguous. On rare occasions, however, he expressed a willingness to join a majority for either result, believing that a clear ruling on the legal issue was more important than the outcome in the particular case. More rarely still, he stated his intent to reexamine the case in the light of what might be written by those firmly committed to one position or another. Even without such an expression at conference, Justice White always was willing to listen, and never hesitated to acknowledge that further study had changed his mind. Obviously, that was not a frequent occurrence, but his candor on those rare occasions was both memorable and admirable.

44. 428 U.S. 397 (1976).
Our work involves a great deal of correspondence, usually hand-delivered with copies for each member of the Court. Some of those letters are detailed discussions of debatable points in a circulating draft opinion; some are nothing more than routine votes on noncontroversial issues. Occasionally, they concern personal matters, such as a plan to recognize a forthcoming birthday with an appropriate toast. In Byron's case, such an occasion was doubly significant, because it also gave us an opportunity to express our affection for his wife, Marion, whose birthday is the same as his.

The internal letters that Byron circulated would often conclude with the one word, "Cheers." While that word always conveyed a warm and friendly message, it occurs to me that it also accurately describes my appraisal of Byron's entire magnificent career. Despite our differences on a variety of issues of varying importance, when he first told me of his intent to retire, my immediate, spontaneous, and heartfelt response was to urge him not to do so. The decision having been made, however, I have only this to say: "Cheers."

Warren E. Burger*

I was a colleague of Byron White for seventeen years on the Supreme Court, and during that period we agreed far more than we disagreed. Since Justice White's retirement, various persons have been at great pains to classify him as either "conservative" or "liberal." I have never been quite sure what the writers or speakers mean in the use of each of those terms. Reflecting on my seventeen years of almost daily association with Byron White, however, I look back on some of his opinions and dissents that would lead me to reject the idea that he is a "conservative," notwithstanding his well-established positions on abortion and other high-profile issues that catch the public's eye, but are not representative of the Court's work, or that he is a "liberal." The term "legal realist" comes more near to describing him than any of the others.

Byron White's dissent in *Miranda v. Arizona* is revealing. The decision in that case was not altogether revolutionary. For my part, I had always admired the British system of justice

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and thought their judicial system and professional legal system were the best in the world. On numerous occasions, particularly in lectures at law schools, I had advocated that we adopt the British system of having the arresting police officer give a warning to the person arrested, which is similar to, but not precisely, the *Miranda* warning. I thought that this was only fair and that it would save a lot of trouble in the long run. But *Miranda* went beyond the British rule,² so I tended to agree with Justice White's dissent in that case. In a dozen years on the Court of Appeals for the District of Columbia Circuit, I had frequently written dissenting opinions expressing thoughts similar to those of Justice White in his *Miranda* dissent.³

What is especially significant about Justice White's dissent in *Miranda*, for what it says about his approach to the law in general, is his criticism of the majority’s methodology. There, he wrote: "Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice . . . . [This] Court should not proceed to formulate fundamental policies based on speculation alone." He had made the same point before. In an earlier dissent he criticized the Court for imposing its own philosophical predilections upon State legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.⁵

It is probably these of White's views that confound the academic writers searching for convenient labels. Justice White was cognizant of his role as an Article III judge on the Court to decide "cases" and "controversies," not to expound grand theories of law as a law professor might; it is useful for academics to explore new theories, and that task is best left to them.

I found that Justice White and I were in general agreement on First Amendment issues. He never overlooked, as some members of the Court did, the difference between conduct and speech. This, of course, explains his dissenting vote in the flag-burning case. We also generally agreed on separation of powers issues, although Bougher v. Synar and Immigration & Naturalization Service v. Chadha are notable exceptions. The case that stands out in this regard is Tennessee Valley Authority v. Hill, the separation of powers overtones of which are often overlooked. There the Court, joined by Justice White, reiterated the bedrock principle of judicial restraint essential to a viable separation of powers:

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.

... [I]n our constitutional system the commitment to separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

Although in applying separation of powers concepts Justice White sometimes took, in my view, a more "pragmatic" approach than the Constitution allows, Justice White shared the view, expressed in Tennessee Valley Authority v. Hill, that policy choices were appropriately left to the political branches of government. In Bougher, he wrote: "Like the Court, I will not purport to speak to the wisdom of the policies incorporated in the legislation the Court invalidates; that is a matter for the Congress and the Executive..." That view, which Justice White stated with some frequency, might to some reflect a lack of "vision." To me, however, it reflects faithfulness to the vision of our Constitution. Justice White's contributions to the Court in his thirty-one years of service will be well- and long-

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8. 478 U.S. 714 (1986); cf. id. at 759 (White, J., dissenting).
9. 462 U.S. 919 (1983); cf. id. at 967 (White, J., dissenting).
11. Id. at 194-95.
remembered, and his steadfastness as a "realist" will be missed.

William J. Brennan, Jr.*

I am delighted to have the opportunity to add my voice to the chorus of tribute that has been lavished upon my dear friend and colleague Byron White since his retirement from the Court. While Byron and I disagreed often about the issues, we remained the closest of friends throughout the more than twenty-eight years we sat together. I remember fondly my lunches with Byron at neighborhood restaurants, and the evenings of dinner and conversation we spent at each other's homes. I still reminisce about the wonderful party that Marion and Byron hosted for Mary and me at the Court when I retired. I view Byron's unfailing friendship over the years, especially in the face of our not infrequent differences of opinion, as a testimony to the Court as an institution and to Byron White as an individual.

It is not simply that our disagreements remained cordial and that we never took them personally. Much more than that, the give and take was an indispensable part of the process and, to my mind, always productive. All of us on the Court benefitted from Byron's meticulous preparation and his clear, direct presentation of the issues at conference. His positions were always very well stated; you couldn't ignore them, and I think the need to respond to his points improved my own opinions.

This is not to say that Byron and I never found ourselves on common ground. We often did. One need look back no further than the last day of our final Term together to find an important example: Byron joined my opinion for the Court in Metro Broadcasting, Inc. v. FCC,1 which rejected an equal protection challenge to the Federal Communications Commission's minority preference policies. Byron and I also saw eye to eye in Garcia v. San Antonio Metropolitan Transit Authority,2 in which the Court held that Congress, consistent with its power under the Commerce Clause, could extend to

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* Associate Justice, Supreme Court of the United States, 1956-1990.
San Antonio municipal transit employees the protection of the wage and hour provisions of the Fair Labor Standards Act. Garcia is remembered for rejecting the "traditional governmental functions" approach to state regulatory immunity that had been adopted nine years earlier in National League of Cities v. Usery. Of course, National League of Cities had itself overruled the Court's decision still eight years earlier in Maryland v. Wirtz. I remember a former clerk of his remarking that Byron's return from the conference in which the Court decided to hear National League of Cities, presumably with a view to overrule Wirtz, was one of the very rare occasions on which the Justice became visibly disturbed with his colleagues.

The list of cases in which Byron and I found ourselves in agreement amongst a divided Court could of course continue; other noteworthy examples include NLRB v. Curtin Matheson Scientific, Inc., Frontiero v. Richardson, and Palmer v. Thompson. But the fact remains that we disagreed often, and not infrequently in the most important and controversial areas. There are perhaps few more conspicuous examples than abortion decisions such as Roe v. Wade and Thornburgh v. American College of Obstetricians and Gynecologists. Two other divisive cases that come quickly to mind are the Court's 5-4 decisions in Bowers v. Hardwick, the Georgia sodomy statute case, and Texas v. Johnson, the flag-burning decision. Still other important cases where Byron and I held opposing views are Sherbert v. Verner, in which I authored

5. 494 U.S. 775 (1990) (holding that the NLRB acted within its discretion in refusing to adopt a presumption that striker replacement workers oppose the certified collective-bargaining agent).
6. 411 U.S. 677, 678 (1973) (plurality opinion) (establishing gender as a suspect classification for purpose of the Due Process Clause of the Fifth Amendment).
7. 403 U.S. 217, 240 (1971) (White, J., dissenting) (concluding that the city council's closing of public pools in Jackson, Mississippi to avoid a desegregation order was a denial of equal protection).
12. 374 U.S. 398 (1963) (applying strict scrutiny and invalidating the
the opinion for the Court and Justice White joined the dissent; 
*Branzburg v. Hayes*,\(^\text{13}\) where our roles were reversed; and 
*Washington v. Davis*,\(^\text{14}\) in which Justice White and I wrote 
respectively for the Court and in dissent. I also took issue with 
Byron's opinion for the Court in *Gaffney v. Cummings*,\(^\text{15}\) 
which he once described as his favorite case.\(^\text{16}\) On these and 
so many other occasions, Byron and I were able to "agree to 
disagree," maintaining a close and constant friendship through 
nearly three decades together on the Court. 

For nearly two of those three decades, Byron and I sat next 
to each other on the bench, which put me in a particularly 
opportune spot to enjoy his sharp wit. Many was the time that 
he enlivened a dull session of oral argument with a quip about 
an awkward attorney or a tedious case. Byron was often 
discrete enough to pass me a note, but sometimes he simply 
leaned over and spoke to me in what he liked to think was a 
whisper. Byron never did learn how to whisper. I also 
remember that Byron would address me from time to time as 
"Billy," which I must say was an unusual but quite agreeable 
moniker. (My good friend Justice Harlan was not so felicitous 
when I occasionally slipped and greeted him as "Johnny," 
which would always cause the color to drain from his face.) I 
also owe a special debt of gratitude to Byron for being generous 
enough to allow me to purloin one of his secretaries, Mary 
Elmore, who has been with me now for almost eleven years. 

In the end, no survey of opinions, no collection of 
anecdotes, no words of tribute, can fully capture Justice White's 
weighty contribution to the Court and to the country. Byron 
served with the utmost integrity and distinction during a 
tenure longer than that of all but eight Justices in the history 
of the Court. The words President Kennedy spoke upon 

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\(^\text{13}\) 408 U.S. 665 (1972) (holding that the First Amendment does not prevent 
a grand jury from compelling news reporters to reveal confidential facts and 
strings).

\(^\text{14}\) 426 U.S. 229 (1976) (requiring proof of intentional discrimination, 
notwithstanding a showing of disparate impact, in order for black applicants to the 
District of Columbia police department to sustain a claim under the equal 
protection component of the Due Process Clause of the Fifth Amendment).

\(^\text{15}\) 412 U.S. 735 (1973) (allowing greater deviations from population equality 
for state legislative districts than for congressional districts).

\(^\text{16}\) David Lauter, *The Justices List Their Most Memorable Cases*, NAT'L L.J., 
Nov. 25, 1985, at 5.
nominating Justice White to the Court in 1962 are no less true today—this rugged individualist from Colorado truly has "excelled in everything he has attempted." I trust "retirement" will give Byron an opportunity to enjoy the same portion in some new and exciting endeavors, and I wish him and Marion every happiness.

Harry A. Blackmun*

Because Justice White is the senior among us, he has been a member of the Court every day that any of the rest of us has served here. His wisdom and gentle prodding have been of great assistance. One may not always agree with his conclusions, but those conclusions have been firmly and steadfastly and confidently held. That, indeed, is the way the system works and was intended to work.

We are the better because of his presence among us all these years. That presence will be sorely missed.

17. Statement by the President upon Appointing Byron White to the Supreme Court, PUB. PAPERS 283, 283 (Mar. 30, 1962).