

PROCEEDINGS IN THE SUPREME COURT OF THE
UNITED STATES IN MEMORY OF
JUSTICE WHITE*

MONDAY, NOVEMBER 18, 2002

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS,
JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Court in tribute to our late colleague and friend, Justice Byron R. White.

The Court recognizes the Solicitor General.

The Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting today of the Bar of this Court, Resolutions memorializing our deep respect and affection for Justice White were unanimously adopted. With the Court's leave, I shall summarize the Resolutions and ask that they be set forth in their entirety in the records of the Court.

Those of us who argued before Justice White, representing all shades of opinion at the bar, respected his impeccable preparation and acute interrogations. We realized that oral argument was not simply a tribute that tradition paid to due process but, at least for him, a means for clarifying his un-

*Justice White, who retired from the Court effective June 28, 1993 (509 U. S. ix), died in Denver, Colorado, on April 15, 2002 (535 U. S. v).

derstanding of the case in all of its ramifications. Many of us feared his questions far more than the arguments of our adversaries. He cut to the heart of a case, but also sharply identified the consequences of a theory that was more convenient than durable. Lawyers who refused to come face to face with what he viewed to be the pivotal issue in a case could be met with a withering stare or abrupt dismissal. Yet his questioning was never cruel or punitive. He expected the best presentation from the best advocates, and he manifested compassion for those who had been propelled by their cases from run-of-the-mine practice in local courts to the unfamiliar terrain of the highest Court in the country.

When he was asked at his confirmation hearings to define the constitutional role of the Supreme Court, he replied simply: "to decide cases." To those who watched and read his work over three decades, the statement was a credo. He saw the appropriate limits of his position more readily than its dramatic possibilities. The habit of mind that invoked constant questioning and probing could, and did, produce reconsideration in the light of changes in other doctrinal areas or in the development of the law that vexes judges most, the law of unintended consequences. But when the dots of more than a thousand opinions are connected, unmistakable patterns emerge. Two stand out in bold clarity: respect for the scope of congressional power and skepticism over the occasional primacy exercised by the judges in addressing social issues through their authority over the constitutional text. Perhaps no Justice in the second half of the twentieth century was more committed to a generous understanding of Article I than Justice White, and none spoke more forcefully defending congressional authority in cases involving separation of powers. He reserved his most eloquent defense of judicial restraint for the occasions when the courts were invited to use their authority to create novel constitutional rights under the rubric of the Due Process Clauses.

Both themes rested on an intellectual foundation committed to the rule of law. He believed in law, both as an authoritative expression of the social will through the legiti-

mate organs of government and as central to the vitality of a free society. He did not view the courts as first among equals in law-making: those directly responsible to the electorate, be they town council or legislature, bore the first burden and the ultimate responsibility for mediating the often conflicting desires of a community. And in an age when cynicism toward government became endemic, Justice White believed in the good faith of police officers, school boards, local officials, juries and administrators charged with a public trust. Public officials, without exception, were accountable under law for transgressions, but they were allowed a practical discretion to perform their civic duties.

Justice White had an enormous impact in a number of areas other than those already mentioned, including jurisdiction, criminal procedure, procedural due process, the First Amendment, labor law, antitrust, and federal pre-emption. He was a team player who incessantly sought opportunities to contribute to the institutions and enterprises to which he attached himself. He esteemed public service as a lawyer's highest calling and warmly encouraged clerks, students, and friends to contribute their talents and energies to the common good. Service was, for him, its own reward. Few public figures in recent memory have cared so little about their popularity or even the judgment of history: he measured himself by his own extraordinary standards, filled each "unforgiving minute with sixty seconds worth of distance run," and was satisfied that ultimate judgment lay beyond temporal realms. Although he guarded his personal privacy energetically, he was not withdrawn: his acts of kindness and compassion, especially in times of personal crises, touched many here and elsewhere but were, by instinct and design, seen by few. And at his heart's deep core, always, was his family—his devoted wife of more than a half-century, Marion, his two children, Charles Byron (Barney) White, and Nancy Lippe, and six grandchildren, who remember him as "Grandpa Justice."

Those among us who knew him have not yet entirely reconciled our loss. We miss his generous sympathy and broad

comprehension of the world, his indefatigable curiosity, his warmth, his wickedly dry sense of humor, and, for some of us lucky enough to know him well, his crushing handshake, which focused his strength, friendship, and intensity into one bracing moment. We are comforted with the thought that death takes a man but does not fully extinguish a life, that he lives on in his family, in his vast legion of close friends, in others whom he touched, and in still others for whom he was a courageous public servant who never flinched when the stakes were the greatest.

On behalf of the Bar of the Supreme Court, it is my privilege to present to the Court the Resolutions adopted today so that the Attorney General may move their inscription on the Court's permanent record.

RESOLUTION

The members of the Bar of the Supreme Court have met today to honor the memory of Byron R. White, Associate Justice of the Supreme Court of the United States, who died April 15, 2002, in Denver, Colorado, and to record their appreciation of the man and of the public servant.

When President John F. Kennedy nominated him to the Court, the President declared that Byron White had "excelled in everything he has attempted—in his academic life, in his military service, in his career before the Bar, and in the federal government." "Few among us deserve such accolades," Justice Lewis F. Powell would later observe, "but President Kennedy did not exaggerate Byron White's achievements."

Byron Raymond White was born June 8, 1917, in Fort Collins, Colorado, but grew up in the small town of Wellington eleven miles away. His father managed a lumber yard. Wellington's economy was dominated by sugar beets, a crop demanding constant attention and back-breaking work, and both White and his older brother, Clayton S. (Sam) White, worked beet fields after school and during the summer from the time they could wield a hoe. Winters were harsh, spring brought strong winds off the front range, and sum-

mers were hot and dry. Character was shaped in the relentless competition between the land and the elements: self-reliance was not an abstraction.

By graduating first in his class from the tiny local high school, like his brother before him, Byron White earned a full-tuition scholarship to the University of Colorado. There he was a star in three sports (football, basketball, baseball), president of the student body, a junior selection to Phi Beta Kappa, and, again like his brother before him, a Rhodes Scholar. His performance during his senior year is still statistically one of the most impressive in the history of intercollegiate football, capped by All-America honors and brilliant play in the second Cotton Bowl. So great was the press interest in the young scholar-athlete that the New York Basketball Writers' Association created the first National Invitational Basketball Tournament largely as a showcase for White and his teammates. White delayed his matriculation at Oxford to accept the highest salary ever offered to a player in the National Football League. Following the 1938 season, he spent two terms at Oxford studying law, but he returned home when World War II broke out in September 1939. He spent a year at Yale Law School, won the Cullen Prize for the highest grades in his first year, then took a leave of absence in each of the two succeeding fall terms to continue to play professional football, which financed his legal education, helped support the medical education of his older brother, and provided a retirement nest egg for his parents.

With the onset of World War II, White tried to enlist in the Marine Corps with the objective of becoming a fighter pilot, but he failed the colorblindness test and had to settle for Naval intelligence. He served with distinction, especially on Admiral Arleigh M. Burke's staff, and was awarded a Bronze Star. He provided intelligence analysis that was critical to the success of the Battle of Leyte Gulf in 1944, and Burke later wrote that White's performance when the *U. S. S. Bunker Hill* was burning at sea represented the epitome of courage, physical strength, and selflessness in a

crisis. After the war, White returned to Yale, where he graduated first in his class and proceeded to a clerkship with Chief Justice Fred M. Vinson during October Term 1946. The Term included a number of watershed cases¹ that would serve, in ways he could not then imagine, as a precursor to future duty when he became the first former clerk to be appointed to the Court.

When the clerkship ended, White faced the choice of where to practice law. Many of his fellow clerks stayed in Washington, but the pull of home and family was too strong, and he returned to Colorado to practice in Denver. His marriage to Marion Lloyd Stearns, daughter of the President of the University of Colorado, on June 15, 1946, meant that all of his extended family were within a 50-mile radius of Denver, as were a wealth of friends and the favored pastimes of his youth, especially fly-fishing and hiking in the foothills. For more than a decade, White enjoyed a widely varied practice ranging from real estate, corporate work, antitrust, and labor law to tax and litigation, including complex antitrust cases and simple one-day trials. He represented large businesses, such as Boettcher & Company, the Denver National Bank, and the Ideal Cement Company, as well as small companies and individuals. He also devoted enormous amounts of time to community service, including the Social Science Foundation at Denver University, Boy Scouts of America, the Urban League, the Denver Welfare Council, the YMCA, the Denver and Colorado Bar Associations, and the Denver Chamber of Commerce, and to numerous charities, principally the United Fund, Camp Chief Ouray for Children, the Rhodes Trust, and Rose Memorial Hospital. A registered Democrat, he declined constant invitations to stand for public office and confined his political work to the grass-roots

¹ *Adamson v. California*, 332 U. S. 46 (1947); *SEC v. Chenery Corp.*, 332 U. S. 194 (1947); *Harris v. United States*, 331 U. S. 145 (1947); *United States v. Mine Workers*, 330 U. S. 258 (1947); *Public Workers v. Mitchell*, 330 U. S. 75 (1947); *Everson v. Board of Ed. of Ewing*, 330 U. S. 1 (1947); *Hickman v. Taylor*, 329 U. S. 495 (1947); *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947); *Ballard v. United States*, 329 U. S. 187 (1946).

level. He once confided to a friend that he thought he could get elected to office, "Once." Too committed to his convictions, often too stubborn to compromise, and too disinclined to accommodate the press, he knew he was better placed behind the scenes than capitalizing on his early fame.

When Senator John F. Kennedy decided in 1959 to seek the Democratic nomination for President, his staff solicited White to manage the campaign in Colorado. The Senator was not well known in the West and his voting record on agricultural and reclamation issues did not endear him to those whose livelihoods depended on generous federal policies governing crop prices and water. White, who had known Kennedy first in England when Kennedy's father was Minister to the Court of St. James and then later when both were PT officers in the South Pacific, accepted the challenge and helped Kennedy make a respectable showing in the state party convention. At the national convention in Los Angeles, White became close to Robert F. Kennedy. When the Senator secured the nomination, White was named national chair of Citizens for Kennedy-Johnson. As a practical matter, the position provided Robert Kennedy with the daily opportunity to consult White for advice on campaign tactics and strategy as well as the welter of personnel judgments required by a national campaign.

After Senator Kennedy was elected, White was named Deputy Attorney General. His first task was to recruit the Assistant Attorneys General who would be the front-line officers in the Department of Justice. When White finished the task, Alexander Bickel said that "It was the most brilliantly staffed department we had seen in a long, long time" and that the quality of personnel bespoke a "vision of public service that would have done anyone proud." White also exercised unprecedented independence from Senatorial prerogative in approving United States Attorneys, and once they were in office he monitored their major cases more closely than any of his predecessors had. In addition to making staffing decisions, he was responsible for supervising the vetting of more than one hundred judges nominated dur-

ing the administration's first year. He received national attention during the Freedom Riders Crisis in May of 1961, when he organized and directed an *ad hoc* contingent of heroic federal officers to protect Dr. Martin Luther King and his supporters who faced life-threatening hostility to their protests against racial segregation.

When Justice Charles Evans Whittaker retired a year later, Byron White became President Kennedy's first appointment to the Supreme Court on April 3, 1962. White served for more than 31 years; only eight Justices have held longer tenures. He served with 20 Justices, including three Chief Justices. During his career he wrote 1,275 opinions: 495 opinions of the Court, 249 concurring opinions, and 572 dissents, including 218 dissenting from denials of petitions for certiorari. Imposing as they are, numbers are hardly the measure of the man, nor does the remarkable curriculum vitae capture either his character or his contribution to the Nation.

Those of us who argued before him, representing all shades of opinion at the Bar, respected his impeccable preparation and acute interrogations. We realized that oral argument was not simply a tribute that tradition paid to due process but, at least for him, a means for clarifying his understanding of the case in all of its ramifications. Many of us feared his questions far more than the arguments of our adversaries. He quickly could call on his deep experience at the Bar and on the Bench to focus an argument or to expose an artful diversion. He cut to the heart of a case, but also sharply identified the consequences of a theory that was more convenient than durable. Charles Fried, who served as Solicitor General from 1985 to 1989, has written, "It is not possible to have seen Justice White in the courtroom, to have argued before him, without getting a sense of a strong intelligence. He knew the case. He had worked out the intricacies He delighted in asking just the question that displayed a weakness the advocate was trying to skate over, or perhaps had not even noticed. 'Skewer' is the word that comes to mind."

Lawyers who refused to come face to face with what he viewed to be the pivotal issue in a case could be met with a withering stare or abrupt dismissal. Yet his questioning was never cruel or punitive. He expected the best presentation from the best advocates, and he manifested compassion for those who had been propelled by their cases from run-of-the-mine practice in local courts to the unfamiliar terrain of the highest Court in the country. Some of us in this room recall the young advocate in her first, perhaps only, appearance here in which she nervously read a prepared argument. Interrupted from the Bench with the comment that the Court had a “rule which frowned on reading oral arguments,” Justice White gently intervened with the reassuring observation that the “Solicitor General does it all the time.”

Justice Powell acknowledged what could appear to be impatience in Justice White’s demeanor on the bench: “If he did not like a lawyer’s argument, he often would swivel his chair around and would appear to lose interest in the argument. His recollection of detail, however, always made clear that he had been attentive, as he would remember specifics that other Justices overlooked.” Those of us who have seen the back of Justice White’s chair can take some comfort in that revelation, and it points to a substantial contribution that the Justice made to the institution that we would not otherwise know. As THE CHIEF JUSTICE has borne witness: “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, his breadth of 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.”

Whatever his influence in the conference room, it is by his opinions that he inevitably is most widely known and will be

most remembered. The corpus of his work does not represent the exegesis of a theory or the creation of a jurisprudential monument. In the words of THE CHIEF JUSTICE, there is “no Byron R. White School of Jurisprudence.” At his confirmation hearings, when he was asked to define the constitutional role of the Supreme Court, he replied simply: “To decide cases.” For some, the response was a cryptic truism, but to those who watched and read his work over three decades, the statement was a credo. From beginning to end, he saw the appropriate limits of his position more readily than its dramatic possibilities. He knew well that particular historical contingencies had placed him on the Court and that the institution was bigger than he. “We are a very small number for the freight we carry,” he was fond of saying. His job, as he saw it, was to resolve disputes: to read the briefs, to question lawyers rigorously, to find the flaws in the general statements about the law, and to see, as far as humanly possible, the consequences of each decision and its supporting rationales. “My guess,” Charles Fried has written, “is that he came closer than most justices to trying to make sense out of each case, one at a time.” Justice White’s keen intelligence was largely focused on predicting, skeptically, the consequences for other applications of the rule, and the real-world effects of a Supreme Court judgment.

The habit of mind that invoked constant questioning and probing could, and did, produce reconsideration in the light of changes in other doctrinal areas or in the development of the law that vexes judges most, the law of unintended consequences. Although no Member of the Court during his tenure was more committed to the doctrine of *stare decisis*, even with respect to decisions with which he initially disagreed—sometimes vehemently—Justice White never felt boxed into a precedential corner, even by his own opinions. “Doctrinal consistency just did not weigh heavily with him if it led to a conclusion that did not make sense,” Charles Fried has written. “With no other justice would you get so little mileage from quoting his own words back to him.”

When the dots of more than a thousand opinions are connected, patterns, remarkably free of ideological shading, unmistakably emerge. Two themes stand out in bold clarity: respect for the scope of Congressional power and skepticism over judicial creation of novel constitutional rights. Perhaps no Justice in the second half of the twentieth century was more committed to a generous understanding of Article I than Justice White. Whether construing Congress's power under the Commerce Clause or measuring the scope of remedial power under the post-Civil War amendments to the Constitution, Justice White acknowledged what he viewed to be the necessary latitude owed to Congress to exercise power under a "constitution intended to endure for ages to come, and consequently adapted to the various crises of human affairs."² Late in his career, he wrote that "The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it."³ The lesson, in his view, was one not only for the courts but also for the other branches of government enjoying constitutional power and obligations.

Justice White's views achieved their most powerful and passionate expression in the constitutional domain of separation of powers. When Congress attempted to develop new mechanisms for controlling administrative agencies that it had created, Justice White objected strenuously when the Court was unable to square the innovations with the metes and bounds of Article I.⁴ He argued powerfully in the

² *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819).

³ *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U. S. 747, 789 (1986) (White, J., dissenting).

⁴ *INS v. Chadha*, 462 U. S. 919, 967-974 (1983) (White, J., dissenting). See also *Buckley v. Valeo*, 424 U. S. 1, 266 (1976) (White, J., concurring in part and dissenting in part); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U. S. 50, 94 (1982) (White, J., dissenting); *Bowsher v. Synar*, 478 U. S. 714, 759 (1986) (White, J., dissenting).

Northern Pipeline case that “at this point in the history of constitutional law” the Court should not have “look[ed] only to the constitutional text” to determine Congress’ power “to create adjudicative institutions designed to carry out federal policy.”⁵ A year later, he defended the legislative veto as an “indispensable political invention that . . . assures the accountability of independent regulatory agencies, and preserves Congress’ power over lawmaking.”⁶ In these and other cases, he emphasized that the constitutional text could not be understood intelligently without regard to its own historical development and to a practical appreciation of the machinery of government created and developed under its authority. Whether based in the Necessary and Proper Clause or in the expansive view of congressional capacity recognized from the earliest days of the nation, new schemes of governing were no less legitimate or constitutionally inappropriate to Justice White than the mechanisms that had been bitterly contested but ultimately ratified under the New Deal. Justice White took a capacious view of the Supreme Court’s jurisdiction over state court decisions, and he was the leading authority on the scope of the Voting Rights Act, to which he applied a broad reading in service of access by minorities to the electoral process. Where Congress spoke clearly and within the canonical scope of its historic powers, his opinions provided muscular support for upholding Congress’ actions.

“Judges have an exaggerated view of their role in our polity,” Justice White has been quoted as saying. That is not to say that he was reluctant to exercise what he viewed to be his responsibility or that he doubted the capacity of courts to develop doctrine interstitially, as Justice Oliver Wendell Holmes, Jr., famously said.⁷ But Justice White was dubious at best when the courts were invited to create novel constitutional rights under the rubric of the Due Process Clauses.

⁵ 458 U.S., at 94.

⁶ 462 U.S., at 972–973.

⁷ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

He did not subscribe to a formula packaged as “a living constitution,” “original intent,” “plain meaning,” or some other catechism: “[The liberty guaranteed by the Due Process Clause of the Fourteenth Amendment] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary imposition and purposeless restraints.”⁸ The continuum was not open-ended, however, and was restrained in his view by the constitutional architecture that places primacy in democratically accountable bodies and correspondingly assigns a subsidiary role to courts: “That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat that process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution [T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.”⁹

Justice White’s conception of his role was almost intuitive, bred in the bone rather than created or fully asserted. He believed in law, both as an authoritative expression of the social will through the legitimate organs of government and as central to the vitality of a free society. Unlike many in his era, he did not view the courts as first among equals in law-making: those directly responsible to the electorate, be they town councils or legislatures, bore the first burden and

⁸ *Moore v. East Cleveland*, 431 U.S. 494, 542–543 (1977) (White, J., dissenting), quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

⁹ 431 U.S., at 544.

the ultimate responsibility for mediating the often conflicting desires of a community. Accordingly, the first obligation of courts was to facilitate those judgments and not to question them as a matter of habit, sentiment, or impulse. And in an age when cynicism toward government became endemic, Justice White believed in the good faith of police officers, school boards, local officials, juries, and administrators charged with a public trust. "To be sure," as Kate Stith-Cabranes has written, "the assumption was rebuttable; the confidence could be broken. But he never expected (or demanded) perfection, for he well understood that neither human beings nor any institutions they create can be flawless." Public officials, without exception, were accountable under law for transgressions, but they were allowed a practical discretion to perform their civic duties.

Now is neither the place nor the time for a comprehensive catalog or assessment of Justice White's specific contributions to the various fields that fall within the Supreme Court's jurisdiction. Suffice to say that he had a profound impact in a number of areas other than those already mentioned, including jurisdiction, criminal procedure, procedural due process, the First Amendment, labor law, antitrust, and federal pre-emption. From his earliest days on the Court, he also made himself expert in fields that were alien to his colleagues or with which they enjoyed little direct experience, such as water rights, Native American sovereignty, and boundary disputes. He was, in private life and in public service, a team player who incessantly sought opportunities to contribute to the institutions and enterprises to which he attached himself. He esteemed public service as a lawyer's highest calling and warmly encouraged clerks, students, and friends to contribute their talents and energies to the common good.

When he announced his retirement March 19, 1993, effective at the end of Term, he was in many respects at the height of his powers and enjoying good health. He could have continued to serve for several more years. When suggestions were made that he might be planning to stay on the

Court long enough to establish the record as the longest-sitting Justice, many of us suspected that his decision to retire might be accelerated so that no hint of vanity could cloud his continued service. Justice White was committed to both the integrity and the dignity of the Supreme Court and fastidiously avoided what he viewed as even the smallest potential blemish on the institution. Life-long friends marveled, for example, that he declined offers of lifts from airport to fishing camp, for fear that he could later be accused of accepting gratuities from potential litigants, even when the “potential litigants” were fully retired and disengaged from their businesses.

In a statement released on the day Justice White announced his retirement, he said in part: “It has been an interesting and exciting experience to serve on the Court. But after 31 years, Marion and I think that someone else should be permitted to have a like experience.” No other Member of the Court had ever mentioned a family member in making a retirement announcement, and the inclusion of Marion White was both deliberate and heartfelt. For a half-century, they were a devoted and energetic partnership, whether raising a family, traveling to circuit conferences and law school moot courts, or fly-fishing in their beloved Rockies. Both were deeply rooted in the rocky soil of the Colorado front range, and they treated both Washington and Denver as home. Neither distance nor time ever separated them from the intimacy of life-long friendships or family ties, especially with their children, Charles Byron (Barney) White and Nancy White Lippe, and six grandchildren, who remember him as “Grandpa Justice.” Travels to public events were the only glimpses that the public enjoyed of what was otherwise an intensely private couple, aside from the odd sighting at a Kennedy Center or Wolf Trap concert or in the galleries of the art museums, especially the Phillips Collection and the National Gallery, that they both loved so well.

Justice White treasured his private life and guarded it with what to some was breathtaking verve. As a young

man, he had been catapulted uncomfortably into the public eye primarily because of his athletic prowess. That experience, plus innate modesty and shyness, made him allergic to the transparent celebrity that became the norm for public figures during his times in government. Few public figures in recent memory have cared so little about their popularity or even the judgment of history. Service, for him, was its own reward. Justice White remained secure in the values that were forged early in life on the lonely high plains and confirmed as a young professional: He measured himself by his own extraordinary standards, filled each “unforgiving minute with sixty seconds worth of distance run,” and was satisfied that ultimate judgment lay beyond temporal realms. To those who were fortunate enough to penetrate the wall of separation between public and private, he was, in the words of someone who knew him for most of his life, “remarkably tender and instinctively generous but neither wished to acknowledge it or have it recognized.” No account of the man is complete without acknowledging the countless acts of kindness and quiet compassion that touched so many, especially during times of personal crises, but were, by instinct and design, seen by so few.

We are assembled not to compromise a jealously guarded privacy but to celebrate a life dedicated to public service and the highest standards of integrity and performance. Those of us who knew him have not yet entirely reconciled our loss. We miss his generous sympathy and broad comprehension of the world, his indefatigable curiosity, his warmth, his wickedly dry sense of humor, and, for some of us lucky enough to know him well, his crushing handshake, which focused his strength, friendship, and intensity into one bracing moment. We are comforted with the thought that death takes a man but does not fully extinguish a life, that he lives on in his family, in his vast legion of close friends, in others whom he touched, and in everyone for whom he was a courageous public servant who never flinched when the stakes were the greatest.

WHEREFORE, IT IS RESOLVED, that we, the Bar of the Supreme Court of the United States, express our deep sense of loss upon the death of Justice Byron R. White, that we acknowledge our professional debt to him for his decades of extraordinary public service, and that we gratefully acknowledge his contributions to our profession, to the law, to the Court and to the Nation; it is further

RESOLVED, that the Chairmen of our Committee on Resolutions be directed to present these Resolutions to the Court with the prayer that they be embodied in its permanent records.

THE CHIEF JUSTICE said:

Thank you General Olson. The Court recognizes the Attorney General of the United States.

Attorney General Ashcroft addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of the Court met today to honor the memory of Byron R. White, Associate Justice of the Supreme Court from 1962 to 1993.

Byron White exemplified what President Kennedy described as the “new generation of Americans” called to public service in the 1960s—a generation “born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage.”¹⁰

The son of parents who had not graduated from high school, Byron White grew up in the small town of Wellington, Colorado, where, as he put it, “we were all quite poor, although we didn’t necessarily feel poor.” He learned early the value of hard work, discipline, and sacrifice, toiling in the

¹⁰ *Public Papers of the Presidents of the United States: John F. Kennedy: Containing the Public Messages, Speeches, and Statements of the President Jan. 20 to Dec. 31, 1961* 1 (1962).

sugar beet fields from the time he could wield a hoe, and earning the grades to qualify for a full academic scholarship to the University of Colorado. There, he excelled as a scholar, athlete, and leader. Upon graduation, he faced the choice of studying at Oxford as a Rhodes Scholar or playing in the National Football League. He found a way to do both.

At the outset of World War II, Byron White interrupted his studies at Yale Law School to join the United States Navy. He served with distinction in Naval intelligence in the Pacific, displaying courage, strength, and selflessness under fire, and earning a Bronze Star.

Byron White returned from the War to complete his legal education and to marry Marion Stearns, who would become his lifelong companion and confidante, as well as the mother of their children, Barney and Nancy.

Byron White originally came to this Court in September 1946 as a law clerk to Chief Justice Vinson. He was the first law clerk who would later return as a Justice.

After that clerkship year, Byron and Marion White went home to their beloved Colorado. For a decade and a half, he engaged in the private practice of law, gaining the broad legal experience and honing the good judgment that would inform his future work.

In 1961, President Kennedy called Byron White back to Washington to become Deputy Attorney General, the number two position in the Justice Department. The first year of the Kennedy Administration, like the first year of the current Administration, presented unanticipated challenges. Among them was the effort of the Freedom Riders to integrate public buses and terminals in the South—an effort that was met with widespread violence and the threat of violence. Deputy Attorney General White served as the Administration's point man on the scene, directing the activities of several hundred federal marshals dispatched to restore order.

In the spring of 1962, after only fourteen months at the Justice Department, Byron White was selected for another

post: Associate Justice of this Court. At his confirmation hearing, he explained his view of the role of the judiciary in our democratic system. “It is clear under the Constitution,” he said, “that legislative power is not vested in the Supreme Court. It is vested in the Congress; and I feel the major instrument for changing the laws of this country is the Congress.”¹¹

Those words reflected a philosophy of government that would guide Justice White throughout his three decades on the bench. He had considerable faith in the ability of government—especially the National Government—to address the social and economic problems of the day. He believed, however, that doing so was principally the responsibility of the elected branches, not the courts.

Justice White advocated an expansive understanding of Congress’s powers under Article I, not only to provide a national response to emerging concerns such as racial discrimination and environmental pollution,¹² but also to adjust the mechanisms of governance itself.¹³ He perceived that “the wisdom of the Framers was to anticipate that the Nation would grow and new problems of governance would require different solutions.”¹⁴ He thus understood the Constitution to provide the National Government with “the flexibility to respond to contemporary needs.”¹⁵

¹¹ Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* 331 (1998).

¹² See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

¹³ See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 759–776 (1986) (White, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 978 (1983) (White, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92–94, 117–118 (1982) (White, J., dissenting); *Palmore v. United States*, 411 U.S. 389, 408–410 (1973) (White, J.).

¹⁴ *INS v. Chadha*, 462 U.S., at 978 (White, J., dissenting).

¹⁵ *Ibid.*

At the same time, Justice White cautioned against the Court's recognition of new private rights and new public obligations as a matter of constitutional law. "The Judiciary," he observed, "is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."¹⁶ "Whenever the Judiciary does so," he added, "it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority."¹⁷

In such circumstances, Justice White believed that the resolution of sensitive social issues generally should be left, for reasons of both constitutional design and institutional competence, "with the people and to the political processes the people have devised to govern their affairs."¹⁸ Indeed, he pointed out in his first dissenting opinion that the courts "cannot match either the States or Congress in expert understanding" of such issues.¹⁹ As one knowledgeable observer has written, "[p]erhaps no one who has ever sat on the Court has been more consistently aware that he was one participant in a large scheme for governing 250 million people, and that others—in Congress, in the executive branch, in state and local governments, on school boards, in police departments, and in important positions in the private sector—must act and decide as well."²⁰

Justice White coupled his confidence in democratic institutions with his insistence that all citizens be afforded the opportunity to participate fully and effectively in the democratic process. He joined opinions establishing the "one

¹⁶ *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting); see *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting).

¹⁷ *Moore*, 431 U.S., at 544 (White, J., dissenting).

¹⁸ *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting).

¹⁹ *Robinson v. California*, 370 U.S. 660, 689 (1962) (White, J., dissenting).

²⁰ Lance Liebman, *A Tribute to Justice Byron R. White*, 107 Harv. L. Rev. 13, 14 (1993).

person-one vote” principle with respect to legislative apportionment,²¹ and he wrote opinions extending that principle to units of local government.²²

He urged an expansive application of the Voting Rights Act in order to provide minorities with equality of opportunity to share in the political life of the Nation.²³

Justice White influenced the development of civil-rights law in other respects as well. He was the author of the Court’s landmark opinion in *Washington v. Davis*, which established discriminatory intent, not mere effect, as the standard for Fourteenth Amendment violations.²⁴ In applying that standard, however, he made clear that such intent may be discerned in a variety of ways, including by the impact of the challenged action on a minority group.²⁵ In addition, even where the claim of discrimination was made by persons not in a protected class such as race, he insisted that the distinctions drawn by a law be, in fact, based on reason.²⁶

Justice White wrote frequently, both for the Court and in dissent, in the field of criminal procedure. He cautioned against rigid constitutional rules that could unduly impede the search for truth in the criminal justice system,²⁷ and urged that considerations of “reasonableness” and “good faith” guide the application of the Fourth Amendment. He

²¹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); see also *White v. Weiser*, 412 U.S. 783 (1973) (White, J.).

²² See *Avery v. Midland County*, 390 U.S. 474 (1968) (White, J.); see also *Board of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989) (White, J.).

²³ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 658–664 (1993) (White, J., dissenting); *Port Arthur v. United States*, 459 U.S. 159 (1982) (White, J.); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (plurality opinion of White, J.).

²⁴ 426 U.S. 229 (1976).

²⁵ See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (White, J.).

²⁶ See, e.g., *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (White, J.); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 63–70 (1973) (White, J., dissenting).

²⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting).

wrote the Court's opinion in *United States v. Leon*, which declined to apply the exclusionary rule to evidence obtained by law-enforcement officers in good-faith reliance on a search warrant that was ultimately found not to be supported by probable cause.²⁸

Justice White made many other contributions to the law during his tenure on the Court, including in the areas of federal jurisdiction, the First Amendment, and the application of the federal labor, securities, and antitrust laws. But his contributions to the Nation, to the Court, and to the law extend beyond the pages of the United States Reports. Those contributions include the personal modesty of a man who, as President Kennedy put it, "excelled in everything he . . . attempted"; they include the standards of integrity, intellectual rigor, and hard work to which he held himself and others; and they include the commitment to public service that he continues, by his example, to instill in those who knew him and the many others who strive to emulate him.

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the Resolutions presented to you in honor and celebration of the memory of Justice Byron R. White be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Attorney General Ashcroft, and thank you, General Olson, for your presentations in memory of our late colleague and friend, Justice Byron R. White.

We also extend to Co-Chairmen Lance Liebman and Dennis J. Hutchinson and the members of the Committee on Resolutions, Chairman Robert Barnett and members of the Arrangements Committee, and Larry L. Simms, Chairman of today's meeting of the Bar, our appreciation for the Resolu-

²⁸ 468 U. S. 897 (1984).

tions you have read today. Your motion that they be made part of the permanent record of the Court is granted.

Byron White was nominated to the Court by President Kennedy on April 3, 1962, and was confirmed by the Senate eight days later. He was the 93rd Justice to serve on this Court and the first to have served as a Supreme Court law clerk.

During his 31 years as an Associate Justice, he wrote more than 450 majority opinions for the Court. I cannot in these brief remarks describe the breadth of important decisions written by Byron White, but looking at some of his opinions on the First Amendment's guarantee of freedom of speech and of the press gives you an idea of his legacy. In 1969, he wrote the majority decision in *Red Lion Broadcasting Co.*, holding that the FCC regulations implementing the "fairness doctrine" did not violate the First Amendment. In *Branzburg v. Hayes*, decided in 1972, he wrote the opinion holding that the First Amendment did not afford journalists a testimonial privilege against appearing before a grand jury to answer questions relevant to criminal investigations. And in 1979, he wrote for the Court in *Herbert v. Lando* that the First Amendment did not bar the plaintiff in an action for defamation from inquiring into the editorial process and the publisher's state of mind to prove actual malice. Three years later, in *New York v. Ferber*, he wrote the opinion for the Court holding that child pornography—even though it is not obscene—is not entitled to First Amendment protection. From these you will see that, as Members of the Court go, he was not moved to rapture by the mere mention of the words "First Amendment." I obviously mean no disparagement by this comment, since I voted with him in each of the three cases I mentioned in which I was a Member of the Court.

Of course, reviewing his opinions does not convey the measure of Byron White's contributions to the Court and the law. Suffice it to say that he was a tremendously influential Member of this Court during the entire period of his lengthy service on it. Those of us who served with him have the

best understanding of his contributions to the work of the Court.

He was always a major contributor to the Court's discussion of the argued cases at its weekly conference, a discussion which is absolutely essential to the writing of the opinion of the Court in the case. His observations during those discussions reflected not only an understanding of the Court's previous decisions that bore on the question, but pithily expressed his view as to what the practical effect of a particular decision would be.

Justice White was a rare combination of brilliant scholar and gifted athlete. He was an able colleague and a good friend. He came as close as any of us to meriting Matthew Arnold's encomium: he "saw life steadily and he saw it whole."