Justice Byron R. White: The Last New Dealer

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Enigmatic. Inscrutable. Justice Byron R. White, to many, is a puzzle. A lifelong Democrat, campaign manager in Colorado for John Kennedy's election in 1960, civil rights frontiersman in Robert Kennedy's Justice Department, President Kennedy's first appointment to the Court. And yet, conservative, dissenter in *Miranda v. Arizona*[1] and *Roe v. Wade*,[2] author of *Bowers v. Hardwick*,[3] the Republicans' unanticipated revenge for President Eisenhower's appointment of Justice Brennan only seven years before. This is the conventional jurisprudential/political cut on the 95th member of the Supreme Court of the United States. Puzzle unsolved. Enigma remains.

But some puzzles remain unsolved because we walk away from them too quickly. Justice White's contributions to the Court are too significant, too numerous, and too sustained to dismiss so easily. Nor will it do, as those hostile to his most publicized judicial writings tend to do, to simply say good riddance. It is unfair and insensitive to dismiss an entire generation of legal work by a highly influential Justice much admired by judicial colleagues who cut across philosophical lines.

Recall Justice Douglas' comment placing Byron White into the select category of Justices whom Douglas dubbed "great." Justice White stood for things, he was clear and admirably consistent in those stands, and he didn't try to fawn, aggrandize himself, or play to the bleachers—the press, or for that matter, anyone else. He never sought judicial glory. The athletic whiz, superhero of the gridiron, the man with the resume of the century, never worked the law schools or the salons of the legal establishment.

Part of Justice White's modesty, strangely enough, is that he is shy. Socially awkward, I have heard some say. And a tough, no-nonsense judge. During the mid-1970's, when I observed him from the law clerk galleries, he seemed to delight in nailing counsel to the wall. I think he softened in manner and style as the years went by, moving into his eighth decade with a more graceful, more patient approach to counsel at the podium. But whether his style

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1. 384 U.S. 436 (1966).
2. 410 U.S. 113 (1973).
3. 478 U.S. 186 (1986).

and temperament changed or not, two constants remained: Justice White was and is a very smart, able lawyer, and he was no equivocator when it came to the substance of the Court's work. My armchair opinion is that his approach was a function of a rugged independence of mind rather than a lack of charm. He did not politick within the Court to get votes or otherwise win over those who were less secure in their own views. Solid moorings kept him in port, safely in harbor, not to be beaten about by waves out in the open sea. He didn't need to "grow." He was full grown when he arrived at the Court in 1962.

Justice White's maturity of thought had much to do with ideas that were once quite lovingly familiar to liberals. Before the emergence of the rights culture, strongly shared views among those who participated in—or, in Justice White's case, observed—the constitutional revolution wrought by the New Deal was that government was a force for good and should be given a chance to work to solve people's problems. The New Dealers saw the baleful influence of a rights-oriented, libertarian Court standing in the way of government efforts to better the lot of the American people, and they didn't like it.

Such views are perhaps a generational thing, but they are rooted firmly in a philosophical outlook that was well developed and consistently followed. Yes, Justice White would rebuff new constitutional challenges to traditional social mores, as in *Bowers v. Hardwick*,[4] just as he would reject constitutional arguments preventing government from increasing its efficiency through the legislative veto device[5] or the Gramm-Rudman-Hollings plan to reduce the federal deficit.[6] He trusted the people and, consequently, their elected representatives. The American people had good common sense, and social pathologies were unlikely to prevail, at least for long. So too, law enforcement should be given a chance to work. It was up to the people, not judges, to devise an operations manual for local police departments. His dissent in *Miranda*[7] was a classic in this respect.

Justice White may well have been the last true believer in government. As I write, notions of reinventing government are being bandied about, so perhaps we are returning to the underlying ideals of Justice White's world, the New Deal—government can and should solve the problems of the people. While that hangs in the balance, what prevails now on the Court is not a culture of deference to the administrative state. Far from it. But in Justice White's day and Justice White's mind, things were different. In *Red Lion Broadcasting Co. v. FCC*,[8] the justices were called to consider a First Amendment challenge to

4. 478 U.S. 186 (1986).
5. INS v. Chadha, 462 U.S. 919 (1983).
6. Bowsher v. Synar, 478 U.S. 714 (1986).
7. 384 U.S. 436 (1966).
8. 395 U.S. 367 (1969).

the FCC's "fairness doctrine." A principal objection to that doctrine—which required broadcasters to play "fair" by presenting views opposed to their own—was the possibility that it would cause broadcasters to engage in self-censorship: to meet their duty of fairness, they would ensure that no duty would ever be triggered; that they would substitute for their possibly single-minded coverage no coverage at all. These are powerful objections. They are answered in the Court's opinion, authored by Justice White, with citations to two New Deal era decisions and a brusque admonishment that it was by then settled that "the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in the general program format and the kinds of programs broadcast by licensees."[9] *Red Lion* arises at the crossroads of conflicting liberties—the speech rights of broadcasters and those of the dissenting public. To Justice White, it was clear that fateful collisions between these rights could be averted by stationing in the midst of their intersection not a cop, but a traffic control specialist, expertly trained, public-minded, and zealous in the performance of his duties. If in an age of skepticism the entire tone of *Red Lion* resonates with an almost quaint ring, it is the echo of the New Dealer's faith in government.

The Justice's critics might naturally be expected to applaud *Red Lion*—or at least its pro-regulatory result—while decrying his handiwork in other individual liberty versus governmental power cases. That reaction seems to reveal a political agenda, rather than a fully worked out, consistent approach to the role of the judiciary in a democratic society. But even if I am wrong about the Justice's critics, I am nonetheless confident about Justice White's well-thought, consistent views. Yes, views change over time. But with that obvious exception, it was rare that one would find Justice White embracing, in short order, flatly contradictory positions. He knew what he thought and didn't bounce from one position to another—which is a polite way of saying that he was principle-oriented, rather than result-oriented.

Take separation of powers again, where his views come shining through with remarkable consistency. Compare the positions of the Justices in two cases raising in short succession very similar issues of very basic principles—*CFTC v. Schor*[10] and *Morrison v. Olson*.[11] Justice White unerringly and faithfully followed his chosen principle: Congress could vest the CFTC with certain limited Article III adjudicatory powers, and it could confer on an "independent counsel" powers that were at the core of executive authority. For a study in contrast, examine those Justices who dissented in *CFTC* v. *Schor*, holding that there could be no dilution of judicial power

9. *Id.* at 395.
10. 478 U.S. 675 (1986).
11. 487 U.S. 654 (1988).

conferred by Article III, period—not even tiny, seemingly innocuous, steps—but who later joined in Chief Justice Rehnquist's majority opinion in *Morrison*, which sustained baby steps of divesting executive power. Justice White suffered from no such inconsistency.

Jurisprudence aside, Justice White also had the keenest sense of the Court's institutional responsibilities. The Court's docket has shrunk considerably in recent years, as the Justices have complained that the merits docket doesn't have the meat of bygone years. Some Court observers, including me, are skeptical of this. But through all that, Justice White has been like an ancient prophet, a judicial Jeremiah—albeit a more polite, less eschatological one—urging the Justices to do their solemn duty. "Decide cases that need to be decided," he seemed to be saying to his eight colleagues. His repeated dissents from denials of certiorari represent an outpouring, more in sorrow than anger, of a roll-up-the-sleeves Justice. The White homily seemed to be this: We are here to do a job, and let's get on with it; and that job includes keeping the body of federal law reasonably harmonious and uniform.

Justice White seemed wonderfully mature and diligent in his voting behavior on certiorari. I was impressed with his feet-on-the-ground approach that most lawyers out in the real world representing real clients with real problems would admire. Not every First Amendment claim to walk through the Supreme Court doors needed to crowd out a plain old vanilla case that real courts of law wrestle with day in and day out. Indeed, maybe, just maybe, there would be plenty of room for both if the Court were willing to play the full four quarters of the game, rather than calling the game off shortly after halftime.

Now this is not to say that Justice White took constitutional claims lightly. He was, after all, in the majority in many of the free speech and free press cases of note, including the watershed decision *New York Times v. Sullivan*.[12] But he had an old-fashioned work ethic driven by a deep sense of institutional responsibility. Once again, government worked. And that included the Supreme Court, of which he was immensely proud. He was upbeat and confident about it, anxious for it to fulfill its assigned responsibility of deciding cases and controversies, and yet not standing in the way of self-government.

To me, all that is admirable. But it cuts against the culture of both the legal academy and the legal salons of Washington and New York. That's a shame, for it means that the Justice who William O. Douglas called "great" is leaving without the admiration and applause that he deserves. But part of the greatness of Justice White is that he doesn't seem to care about the small chorus of bravos. He did his duty, and never seemed to worry about issuing self-promoting press releases or whether his opinions would be praised by the *New York Times* or the *Washington Post*. The great running back, NFL Rookie

12. 376 U.S. 254 (1964).

of the Year, and Rhodes Scholar played the judicial game with a lot of talent but with an even larger dose of integrity and judgment. It was an honor to argue before him. I will miss him.