

# Tributes

## A Tribute to Justice Byron R. White

John Paul Stevens<sup>†</sup>

“For reasons stated in an opinion filed with the clerk, the judgment of the court of appeals is affirmed. Our opinion is unanimous.”

That is how Byron White typically made an oral announcement of his opinion for the Court. Occasionally, however, he would summarize his opinion extemporaneously. In the legislative veto case in which he was one of two dissenters,<sup>1</sup> his oral statement of his position was so persuasive that it prompted an unplanned oral response from the author of the majority.

It was during my first Term on the Court that Byron taught me that his straightforward expository style could be extremely convincing. On March 24, 1976, the Court heard argument in the *Buffalo Forge* case,<sup>2</sup> which involved the *Boys Markets*<sup>3</sup> exception to the Norris-LaGuardia Act.<sup>4</sup> After our conference, the Chief Justice assigned me the opinion reversing the judgment of the Second Circuit. After I circulated my draft of a majority opinion, Byron prepared a dissent that persuaded two of our colleagues to change their votes. The opinion of the Court that was handed down on July 6, 1976, was therefore his to announce, and it was an affirmance rather than a reversal.

Potter Stewart was not one of the Justices who changed his vote in response to Byron’s draft dissent in the *Buffalo Forge* case. I believe,

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1. *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting).

2. *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397 (1976).

3. *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970) (permitting a federal district court to enjoin a labor union from striking—in breach of a no-strike provision of a collective bargaining agreement—over a grievance that the union had agreed to arbitrate).

4. 29 U.S.C. § 104 (2000).

however, that Byron's opinion in an earlier case, *Griswold v. Connecticut*,<sup>5</sup> had a significant impact on Potter's appraisal of a constitutional issue of profound importance—the doctrine of substantive due process—in later cases. The basic issue raised in *Griswold* was whether the Federal Constitution contains a substantive constraint on a state's power to prohibit the use of contraceptives by married couples.<sup>6</sup> Connecticut's answer to that question was succinctly stated in its brief on the merits:

#### SUMMARY OF ARGUMENT

The decision of the General Assembly of Connecticut that the use of contraceptives should be banned is a proper exercise of the police power of the state.<sup>7</sup>

By a 7-2 vote, the Court rejected that submission, relying on three quite different rationales: a right to marital privacy created by the "penumbras" emanating from various parts of the Bill of Rights,<sup>8</sup> a right to marital privacy protected by the Ninth Amendment,<sup>9</sup> and the substantive content of the Due Process Clause itself.<sup>10</sup>

Justice Stewart's dissent, like Justice Black's,<sup>11</sup> rejected all three rationales,<sup>12</sup> viewing the liberty protected by the Due Process Clause as extending only to a guarantee against vague statutes and procedural unfairness.<sup>13</sup> While Justice White also rejected the first two rationales advanced in support of the Court's holding, he, like Justice Harlan,<sup>14</sup> concurred in the Court's judgment.<sup>15</sup> In doing so, Justice White relied squarely on the proposition that the Clause itself protects a realm of personal liberty that the state may not regulate without substantial justification.<sup>16</sup>

In *Roe v. Wade*,<sup>17</sup> a later case involving the constitutionality of a Texas statute prohibiting abortions, which was also decided by a 7-2 vote, the roles of Justices Stewart and White were reversed. Of the four opinions supporting the Court's judgment, it was Justice Stewart's that

5. 381 U.S. 479 (1965).

6. *Id.*

7. Brief for Appellee at 9, *Griswold* (No. 496).

8. *Griswold*, 381 U.S. at 484 (Douglas, J.).

9. *Id.* at 499 (Goldberg, J., concurring).

10. *Id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 502 (White, J., concurring in the judgment).

11. *Id.* at 527 (Black, J., dissenting).

12. *Id.* at 527-31 (Stewart, J., dissenting).

13. *Id.* at 528.

14. *Id.* at 499-502 (Harlan, J., concurring in the judgment).

15. *Id.* at 502-07 (White, J., concurring in the judgment).

16. *Id.* at 502-04.

17. 410 U.S. 113 (1973).

unambiguously relied on the doctrine of substantive due process.<sup>18</sup> Potter began by recognizing, as he had already done earlier in *Griswold*,<sup>19</sup> that Justice Black's opinion for the Court in *Ferguson v. Skrupa*<sup>20</sup> had "purported to sound the death knell for the doctrine of substantive due process."<sup>21</sup> Despite this supposed death knell, Potter argued that "the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment."<sup>22</sup> Potter supported this statement with citations to Justice White's opinion in *Griswold*, and to the series of cases on which Justice White had relied in that opinion.<sup>23</sup> In his dissent, Byron did not disavow those cases, although he obviously construed them more narrowly than Potter did.<sup>24</sup>

Potter and Byron again disagreed with one another about the proper analysis of the next substantive due process issue to confront the Court after *Roe*, but this time it was Potter who took the narrower view. *Moore v. City of East Cleveland* involved the validity of an ordinance that permitted a grandmother to share her home with two grandchildren if they were brothers but not if they were cousins.<sup>25</sup> The net result of the six opinions analyzing the issue was a judgment invalidating the ordinance.<sup>26</sup> Potter and Byron both dissented, but for quite different reasons. In Potter's view, no constitutionally protected interest in liberty had been infringed,<sup>27</sup> whereas Byron refused to give the term "liberty" such a "crabbed construction."<sup>28</sup> In Byron's opinion, the infringing legislation was sufficiently justified by the city's interest in limiting the number of people who can occupy a single-family residence.<sup>29</sup>

Cases like *Griswold*, *Roe*, and *Moore* illustrate the inevitability of disagreement among independent and thoughtful judges charged with the task of interpreting broad language in the constitutional text. Students of those opinions sometimes infer that such disagreements are partly due to personal friction or disrespect. Nothing could be further from the truth. Indeed, I have often thought that Tranio's reference to litigating advocates applies with equally full force to members of our Court: "[A]s adversaries do in law—[we]

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18. *Id.* at 171 (Stewart, J., concurring).

19. 381 U.S. at 528 (Stewart, J., dissenting).

20. 372 U.S. 726 (1963).

21. *Roe*, 410 U.S. at 167 (Stewart, J., concurring).

22. *Id.* at 168.

23. *Id.* at 167-71.

24. White's dissent from the holding in *Roe* is found in *Doe v. Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting).

25. 431 U.S. 494 (1977).

26. *Id.*

27. *Id.* at 536-37 (Stewart, J., dissenting).

28. *Id.* at 547 (White, J., dissenting).

29. *Id.* at 550-51.

[s]trive mightily, but eat and drink as friends.”<sup>30</sup> Byron was a true friend of those with whom he sometimes mightily disagreed. That judgment is supported by “opinions” filed by retired Chief Justice Burger, retired Justices Brennan and Blackmun, and myself in the *Brigham Young University Law Review*.<sup>31</sup>

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30. WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW* act 1, sc. 2, ll. 278-79, in 2 *THE COMPLETE OXFORD SHAKESPEARE* 481, 491 (Stanley Wells et al. eds., 1987).

31. Tribute, “Cheers!”: *A Tribute to Justice Byron R. White*, 1994 *BYU L. REV.* 209.