

# JUDGING REPUTATION: REALISM AND COMMON LAW IN JUSTICE WHITE'S DEFAMATION JURISPRUDENCE

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## INTRODUCTION

### I. SOME REALISM ABOUT *SULLIVAN*

- A. *Damron*
- B. *Sullivan's* Contested Legacy
- C. Kalven on the "Central Meaning" of *Sullivan*
- D. Justice White on the "Central Meaning" of *Sullivan*
  - 1. Re-Reading *Sullivan* and Its Progeny
  - 2. Focusing on the Conduct Being Protected
  - 3. Revisiting History
  - 4. Tort Liability and Freedom of the Press

### II. LOCATING JUSTICE WHITE'S DEFAMATION OPINIONS WITHIN HIS CONSTITUTIONAL JURISPRUDENCE

- A. Consistency
- B. Pragmatism
- C. Judicial Psychology
- D. The New Deal, Realism, and the Common Law

## CONCLUSION

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\* Professor, Vanderbilt University Law School. Law Clerk to Justice White, October Term 1992. For very helpful comments, thanks to Allison Marston Danner, Mark Brandon, Lisa Bressman, Rebecca Brown, Julie Faber, Sheldon Halpern, Ashley Jones, Tom McCoy, David Meyer, Richard Nagareda, Bob Rasmussen, Suzanna Sherry, Christopher Yoo, and Ben Zipursky. Remaining errors are mine.

sure that collective action through government remained feasible. He would not allow the First Amendment, nor any other constitutional provision, to entitle the powerful to dominate the government. His opinion in *Red Lion*, his approach to commercial speech, and his consistent defense of campaign finance legislation provide a testament to his view that the First Amendment need not mean dominance by the powerful.

In short, an appreciation for the ordinary citizen, both as an individual facing powerful forces and as a majority of "the people" in whose name government acted, is central to Byron R. White's free speech jurisprudence. As a result, Justice White can be considered a populist with a small "p," one who was concerned with protecting the individual citizen from the sometimes overwhelming forces found in government and commercial enterprises.