# PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE BRENNAN*

FRIDAY, MAY 22, 1998

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

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THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, Justice William J. Brennan.

The Court recognizes the Solicitor General.

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Mr. Solicitor General Waxman 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 Brennan 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.

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*Justice Brennan, who retired from the Court effective July 20, 1990 (498 U. S. VII), died in Arlington, Virginia, on July 24, 1997 (522 U. S. VII).



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## RESOLUTION

William Joseph Brennan, Jr., graced the Supreme Court of the United States for thirty-four extraordinary years. Appointed to the Court on October 15, 1956, by President Dwight D. Eisenhower, Justice Brennan's years of Supreme Court service spanned eight Presidencies, seventeen Congresses, and one hundred forty-six volumes of the United States Reports. Ill-health forced Justice Brennan to retire from the Court on July 20, 1990, but not before his unique qualities of mind and heart had touched the lives of twenty-two Supreme Court colleagues—one-fifth of the Justices to have served on the Supreme Court; one hundred-twelve law clerks, each of whom became part of Justice Brennan's extended family; the full complement of the Supreme Court's support personnel—from guards to gardeners—all of whom Justice Brennan regarded, and treated, as valued friends; and countless members of the Supreme Court bar who recall with pride and affection their interaction with Justice Brennan in the search for justice.

Although death stilled Justice Brennan's heart on July 24, 1997, it did not, and could not, still his magnificent voice. Justice Brennan continues to speak to us through his life and his work in the prophetic language of the American dream. Although unanimous agreement with every aspect of a legacy as varied and vast as Justice Brennan's is impossible, as members of the Supreme Court bar, we salute his monumental contribution to the cause of individual liberty.[1]

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[1] Individual members of the Resolutions Committee have expressed personal admiration for Justice Brennan's life and career. See Floyd Abrams, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 18 (1997); Norman Dorsen, *A Tribute to Justice William J. Brennan, Jr.*, 104 Harv. L. Rev. 15 (1990); Owen Fiss, *A Life Lived Twice*, 100 Yale L. J. 1117 (1991); Gerard E. Lynch, *William J. Brennan, Jr., American*, 97 Colum. L. Rev. 1603 (1997); Frank I. Michelman, *A Tribute to Justice Brennan*, 104 Harv. L. Rev. 22 (1990); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.s Constitutional Thought*, 77 U. Va. L. Rev. 1261 (1991); Robert C. Post, *Remembering Justice Brennan: A Eulogy*, 37 Washburn L. J. xix (1997); Geoffrey R. Stone, *Justice Brennan and "The Freedom of Speech": A First Amend-*

The sweep and power of Justice Brennan's contribution to American law challenges our collective imaginations. As JUSTICE SOUTER has noted,[2] the sheer mass of the Brennan legal legacy exerts an intense gravitational pull on our jurisprudence. In the course of a remarkable tenure that fell short of Chief Justice John Marshall's by a matter of months, Justice Brennan authored 1,573 opinions: 533 opinions for the Court, 694 dissents, and 346 concurrences.[3] Justice Brennan's opinions shaped our Nation. Our ideal of democracy flows from Justice Brennan's historic opinion for the Court in *Baker* v. *Carr*, 369 U. S. 186 (1962). The ability of all Americans to participate equally in the democratic process was safeguarded and advanced by Justice Brennan's opinions in *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), and *Thornburg* v. *Gingles*, 478 U. S. 30 (1986). Our modern conception of free speech was articulated and defended by Justice Brennan's opinions in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), and *Texas* v. *Johnson*, 491 U. S. 397 (1989), and by his draftsmanship of the Court's *per curiam* opinion in *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969).[4] Our understanding of

*ment Odyssey*, 139 U. Pa. L. Rev. 5, 1333 (1991); Peter L. Strauss, *In Memoriam, William J. Brennan, Jr.*, 97 Colum. L. Rev. 1609 (1997).

[2] David H. Souter, *In Memoriam: William J. Brennan, Jr.*, eulogy delivered at the funeral mass for Justice Brennan at St. Matthew's Cathedral, Washington, D. C., on July 29, 1997, reprinted at 111 Harv. L. Rev. 1 (1997).

[3] Characteristically, Justice Brennan appears to have underestimated the volume of his judicial output. Justice Brennan's estimate of 1,360 opinions appears to be 213 short when measured against a search conducted by the marvels of modern technology.

[4] Justice Brennan's role in drafting the *Brandenburg* opinion is recounted in Morton J. Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 23 (1997). The *Brandenburg* opinion had initially been assigned to Justice Fortas. Justice Brennan accepted responsibility for drafting it when Justice Fortas left the bench. See Bernard Schwartz, *Justice Brennan and the Brandenburg Decision—A Lawgiver in Action*, 79 Judicature 24, 27–28 (1995).

Throughout his career, Justice Brennan's intense devotion to the Court as an institution was manifested by his willingness to take on the task of drafting *per curiam* opinions in appropriate cases. He drafted well over sixty *per curiam* opinions, including the Court's *per curiam* opinion in

freedom of association was shaped by Justice Brennan's opinions in *NAACP* v. *Button*, 371 U. S. 415 (1963); *Elrod* v. *Burns*, 427 U. S. 347 (1976); and *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984). Our commitment to academic freedom was defined by Justice Brennan in *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967). Our understanding of the limits placed on government's power to condition benefits on a waiver of First Amendment rights flows from Justice Brennan's opinions in *Speiser* v. *Randall*, 357 U. S. 513 (1958), and *FCC* v. *League of Women Voters*, 468 U. S. 364 (1984). Contemporary protection of the free exercise of religion begins with Justice Brennan's opinion in *Sherbert* v. *Verner*, 374 U. S. 398 (1963). Our modern understanding of the Establishment Clause, initially propounded in his separate opinion in *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963), was classically restated in Justice Brennan's opinion for the Court in *Edwards* v. *Aguillard*, 482 U. S. 578 (1987). Our commitment to equality before the law was deepened and advanced by *Cooper* v. *Aaron*, 358 U. S. 1 (1958) (opinion signed by all the Justices),[5] *Green* v. *County School Board*, 391 U. S. 430 (1968); *Keyes* v. *School Dist. No. 1*, 413 U. S. 189 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); and *Craig* v. *Boren*, 429 U. S. 190 (1976). Our contemporary understanding of procedural fairness was shaped by Justice Brennan's opinions in *Jencks* v. *United States*, 353 U. S. 657 (1957); *Bruton* v. *United States*, 391 U. S. 123 (1968); *In re Winship*, 397 U. S. 358 (1970); and *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Our approach to collective bargaining, and the rights of the individual employee

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*New York Times* v. *United States*, 403 U. S. 713 (1971) *(per curiam)*. See David Rudenstine, *The Day the Presses Stopped: A History of the Pentagon Papers Case*, 301-20 (describing Justice Brennan's role in drafting the *per curiam* opinion).

[5] Justice Brennan's central role in drafting the opinion in *Cooper* v. *Aaron* is described in Richard S. Arnold, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 5 (1997). See also Richard S. Arnold, *A Tribute to Justice William J. Brennan, Jr.*, 26 Harv. C. R.–C. L. L. Rev. 7 (1991).

in that process, was influenced by Justice Brennan's opinions in *Communications Workers of America* v. *Beck*, 487 U. S. 735 (1988), and *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970). The architecture of our contemporary federal court structure was shaped by Justice Brennan's opinions for the Court in *Byrd* v. *Blue Ridge Rural Electric Coop*, 356 U. S. 525 (1958), and *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), and our modern understanding of the preeminent role of federal courts as guarantors of individual liberty is based on Justice Brennan's opinions for the Court in *Fay* v. *Noia*, 372 U. S. 391 (1963); *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978); *Bivens* v. *Six Unknown Agents*, 403 U. S. 388 (1971), and *Cooper* v. *Aaron*, *supra*.

When he wrote in dissent, Justice Brennan spoke to the future. His sustained and passionate efforts to persuade the Court that capital punishment cannot survive contemporary moral scrutiny;[6] his concern that non-textual fundamental personal rights inherent in human dignity be respected;[7] his defense of the writ of *habeas corpus;*[8] his efforts to preserve

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[6] *E. g., Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976); *McCleskey* v. *Kemp*, 481 U. S. 279, 320 (1987). Justice Brennan's belief that the death penalty violated the Constitution was so intense that, during the last fifteen years of his tenure, Justice Brennan, joined by Justice Marshall, expressed personal opposition to the death penalty in every death case, including denials of certiorari. Justice Brennan's last public statement, made to his colleagues, friends, family, and admirers at the celebration of his 90th birthday in the Supreme Court chamber, was a plea to continue fighting against the death penalty.

[7] *E. g., Michael H.* v. *Gerald D.*, 491 U. S. 110, 136 (1989); *Cruzan* v. *Missouri Dept. of Health*, 497 U. S. 261, 301 (1990). Justice Brennan was more successful in using the Equal Protection Clause to protect "fundamental" non-textual rights. See *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972) (invalidating ban on distribution of contraceptives to unmarried couples as violation of equal protection of the laws); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (invalidating durational residence requirement for welfare eligibility as a discriminatory interference with the right to travel).

[8] *E. g., Stone* v. *Powell*, 428 U. S. 465, 502 (1976); *Teague* v. *Lane*, 489 U. S. 288, 326 (1989).

the wall between church and state;[9] his defense of free speech in those relatively rare settings when he was unable to persuade a majority of the Court to embrace his vision of the First Amendment;[10] his endorsement of carefully targeted affirmative action;[11] his scholarly effort to reinterpret the Eleventh Amendment[12]—all stand as reminders of what seemed unfinished business to Justice Brennan.

But it would be shortsighted to purport to measure what Justice Brennan has meant, and will mean, to American law merely by cataloguing his immense substantive contribution. A fuller assessment of the Brennan legacy calls for a celebration of the happy confluence of intelligence, legal acumen, political sophistication, and empathy that combined in Justice Brennan to forge the archetype of a Supreme Court Justice intensely committed to the protection of constitutional rights. Justice Brennan's life was the embodiment of the American dream. His judicial career was a sustained effort to allow others to share in that dream.

## Justice Brennan's Life: Living the American Dream

Justice Brennan lived the American dream.[13] Fittingly, his life spanned every decade of the American Century. He was born on April 25, 1906, to Irish immigrants, the second

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[9] *E. g., Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983) (Justice Brennan's dissent in *Marsh* is of particular interest as a statement of his belief that the Bill of Rights must be read in the light of contemporary circumstances); *Lynch* v. *Donnelly*, 465 U. S. 668, 694 (1984).

[10] *E. g., Walker* v. *City of Birmingham*, 388 U. S. 307, 338 (1967); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 762 (1978); *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U. S. 94, 170 (1973); *United States* v. *Kokinda*, 497 U. S. 720, 740 (1990); *Hazelwood School District* v. *Kuhlmeier*, 484 U. S. 260, 277 (1988); *Paris Adult Theatre I* v. *Slayton*, 413 U. S. 49, 73 (1973).

[11] *E. g., Board of Regents* v. *Bakke*, 438 U. S. 265, 324 (1978) (concurring in judgment in part and dissenting in part).

[12] *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 247 (1985).

[13] Much of the biographical material in this tribute is drawn from an affectionate and informative biographical sketch of the Justice's life written by his grandson. William J. Brennan IV, *Remembering Justice Brennan: A Biographical Sketch*, 37 Washburn L. Rev. vii (1997).

of eight children. Both his parents, William J. Brennan, Sr., and Agnes McDermott, emigrated from County Roscommon to the United States because, as Justice Brennan recalled, they "saw a chance for a better life in America."[14] They met in Newark, New Jersey, at a time when the Irish were not a welcome presence. Job postings often warned, "No Irish Need Apply," and some shop doors bore signs reading, "No Dogs or Irish Allowed." The senior Brennan found work as a coal stoker in the Ballantine Brewery, and quickly became active in the nascent labor union movement. The Justice came of age as his father was organizing workers to fight for better wages and conditions, and rising to local prominence as a powerful and extraordinarily popular reform politician, becoming Newark's Director of Public Safety.

> "What got me interested in people's rights and liberties," Brennan would later recall, "was the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we were never without. We always had something to eat, we always had something to wear. But others in the neighborhood had a harder time."[15] Reflecting on his legacy in his last public statement, Justice Brennan summarized his career by pointing out that "these rulings emerged out of everyday human dramas. . . . At the heart of each drama was a person who cried out for nothing more than common human dignity."[16]

"Everything I am," Justice Brennan once said, "I am because of my father."[17] "With my dad," Brennan said, "you

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[14] Sean O Murchu, "Lone Justice: An Interview with Justice William Brennan, Jr.," Irish America (June 1990), at 28.

[15] Nat Hentoff, "Profiles: The Constitutionalist," The New Yorker, Mar. 12, 1990, at 46.

[16] William J. Brennan, Jr., "My Life on the Court," in *Reason & Passion: Justice Brennan's Enduring Legacy* 19 (E. Joshua Rosenkranz & Bernard Schwartz eds. 1997).

[17] Jeffrey T. Leeds, "A Life on the Court," N. Y. Times Magazine, Oct. 5, 1986, at 26.

had to be doing something all the time, working at something."[18] It was the elder Brennan's idea that Bill Jr. go into law. "He was going to make a lawyer out of me, by golly," the Justice chuckled many years later.[19] Asked once whether his father would have been surprised by his appointment to the Supreme Court, Brennan earnestly replied, "No, he would have expected it."[20]

The Justice graduated from Barringer High School in 1924. A high school classmate recalled, "Bill took home so many academic prizes from school, none were left for the rest of us."[21] In 1928, Brennan graduated from the University of Pennsylvania's undergraduate Wharton School of Finance and Commerce, with honors in economics. Just before he graduated, he married Marjorie Leonard, whom he had met during his sophomore year at Wharton at the Cotillion of the East Orange Women's Club, and to whom he was deeply devoted for fifty-four years, until her death in 1982. Foreshadowing the complex man he was to become, Brennan rebelled against parental authority by secretly eloping with Marjorie, but he made certain that they were very properly married in Baltimore Cathedral.

Brennan went off to the Harvard Law School, while Marjorie stayed in Newark working to help pay his tuition. At Harvard, Bill Brennan was a workaholic. Quiet, unassuming, unknown to classmates who later rose to great prominence in academe, Brennan's academic performance earned him acceptance by Harvard's Legal Aid Society, where he represented the poor in a variety of civil cases, an experience that he recalled fondly over the years. It was at the Legal Aid Society that he experienced firsthand the power of the law to affect the lives of the weak.

During Brennan's second year of law school, in 1930, his father died suddenly of pneumonia. Brennan contemplated

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[18] O Murchu, *supra*, at 28.

[19] Leeds, *supra*, at 26.

[20] Leeds, *supra*, at 26.

[21] "An Experienced Judge for the Supreme Court," U. S. News & World Report, Oct. 12, 1956, at 71–72.

leaving law school, but Harvard awarded him a scholarship to allow him to finish his studies. He waited tables at a fraternity house and performed odd jobs to make ends meet. It was the height of the Great Depression when Brennan graduated from law school in 1931. His father's sudden death had left the family in financial straits. It fell to the Justice to help support his mother, his wife, and six siblings. Brennan contemplated hanging out a shingle as a union lawyer, but his economic responsibilities made that course impossible. Instead, he accepted an offer from Pitney, Hardin & Skinner, the most prestigious law firm in Newark, where he had clerked for a summer. Brennan was the first Catholic lawyer hired by the firm. He was assigned to practice labor law, cast in what must have initially seemed the incongruous role of representing management. As he had in law school, Brennan worked long hours, often into the early hours of the morning. He distinguished himself as a talented labor negotiator, and became the firm's first Catholic partner in 1937.

In July, 1942, at the advanced age of 36, Brennan volunteered for the army. Marjorie and his first two children, Bill III and Hugh, moved to the Washington, D. C., area where Brennan's expertise as a labor troubleshooter was needed by the Army's Ordnance Division. He was commissioned a major, but within a year was promoted to lieutenant colonel, and shortly thereafter was appointed chief of the Ordnance Department's Civilian Personnel Division. During 1943–1944, Brennan was assigned to Los Angeles, where he oversaw the massive influx of women into civilian defense jobs, organizing a complex support structure of day care, housing, health, and transportation. Despite significant housing shortages in the Los Angeles area, Col. Brennan refused to take the easy route of commandeering the homes of interned Japanese-Americans. In 1945, it was Brennan's responsibility to oversee the furlough of soldiers in Europe after the defeat of Hitler. Despite pressure from industry and from Congress, Brennan refused to favor workers in certain occupations over others. In one congressional hearing, Brennan

defended his decision, explaining that "to the extent you make an exception for a single soldier there is somebody eligible for discharge whose discharge is delayed."[22] Brennan left the Army in 1945 at the rank of full colonel after being awarded the Legion of Merit.

The Justice returned to his old law firm, continuing to build his labor law practice at a time when labor strife was mounting. To capitalize on Brennan's growing reputation as a consummate labor lawyer, the firm added his name to the firm's masthead, which became, Pitney, Hardin, Ward & Brennan. Throughout his rapid rise to prominence as a leader of the private bar, Brennan developed a reputation as impeccably fair and gracious. He once asked a judge to postpone a hearing upon learning that his opponent's father had died. "We'll have the hearing another day," Brennan told his flabbergasted opponent.[23] Morton Stavis recalled litigating one of his first cases against Brennan: "I . . . was guilty of a number of procedural oversights. Not only did he not take advantage of them, but he went out of his way to help me correct the record so that the case would be tried fairly on the merits."[24]

Brennan carried this fair-mindedness into the public arena. Though his livelihood depended upon his management-side labor work, he spoke out in support of the right to strike and in favor of legislation to prohibit employer intimidation of union members. But he also urged labor to "accep[t] its responsibilities not to invade or trample upon the rights of other groups" and vigorously condemned racial discrimination by unions.[25]

With his prestige within the bar growing, in 1946, Brennan championed the cause of court reform, a charge led by Arthur T. Vanderbilt, who was at the time a prominent Newark lawyer and the Dean of New York University School of Law.

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[22] Hunter R. Clark, *Justice Brennan: The Great Conciliator* 32 (1995).

[23] Kim Isaac Eisler, *A Justice For All: William J. Brennan, Jr., and the Decisions that Transformed American* 54 (1993).

[24] Hentoff, *supra,* at 48.

[25] Clark, *supra,* at 37.

Brennan fought hard to develop, and pass into law, a variety of reforms, including adaptation of federal procedural rules to the New Jersey courts, the development of an office to track court statistics, increased accountability of trial judges, and mandatory pretrial discovery and settlement conferences. The procedural reforms brought startling results, including a cleanup of the massive backlog of cases, an increase in settlements, and most importantly to Brennan, a system "assuring that right and justice shall have the most favorable opportunity of prevailing in cases that are tried."[26]

When Vanderbilt was appointed Chief Justice of the New Jersey Supreme Court, he set his mind to convincing Brennan to accept an appointment as a trial judge. After a year of cajoling, Brennan relented. In January 1949, Republican Governor Alfred E. Driscoll appointed Brennan, then 43, to the trial court. The appointment slashed Brennan's salary by two-thirds at a time when he was still helping to support his mother and numerous siblings, as well as Marjorie, his two sons, and a new infant, Nancy.

The Justice's rise through the New Jersey courts was meteoric. Shortly after Brennan took the bench, he was appointed assignment judge for Hudson County. Within a year and a half, he was elevated to the Appellate Division of the Superior Court, the state's intermediate court. Two years later, in March 1952, Governor Driscoll appointed Brennan to the New Jersey Supreme Court.

It was there that the Justice began to construct his judicial legacy. He dissented in one criminal case when a defendant was denied the right to review his written confession before trial: "To shackle counsel so that they cannot effectively seek out the truth and afford the accused the representation which is not his privilege but his absolute right seriously imperils our bedrock presumption of innocence."[27] He upheld the privilege against self-incrimination as a right that

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[26] Clark, *supra*, at 48 (quoting Brennan, "After Eight Years," *supra*, at 502).

[27] *State* v. *Tune*, 98 A. 2d 881, 897 (1953).

applied against the state, describing the privilege as "precious to free men as a restraint against high-handed and arrogant inquisitorial practices."[28]

Brennan's ardor in upholding the self-incrimination privilege was no doubt influenced by the activities of Senator Joseph McCarthy. In a 1954 St. Patrick's Day speech in Boston, Brennan attacked McCarthy, warning that " we cannot and must not doubt our strength to conserve, without sacrifice of any, all of the guarantees of justice and fair play and simple human dignity which have made our land what it is."[29] In a later speech, Brennan struck a theme that he would repeat many times. He warned that if we violate individual rights out of fear, we come "perilously close to destroying liberty in liberty's name."[30] In later years, Brennan was proud that the only Senate vote against his confirmation was cast by Senator McCarthy.

In one of the extraordinary strokes of fortune that shape our lives, Brennan attended a 1955 conference on court reform hosted by Attorney General Herbert Brownell. His lucid presentation so impressed Brownell that he marked Brennan for future high office. In 1956, upon the resignation of Justice Sherman Minton, President Dwight D. Eisenhower, influenced by Vanderbilt's strong endorsement, and Brownell's favorable assessment, appointed William J. Brennan, Jr., to the Supreme Court. Brennan himself often noted that the fact that his appointment would be extremely popular with Irish-Catholic voters in a Presidential year did not hurt. At the press conference announcing his recess appointment, Brennan gave a characteristically modest reply to a reporter's question about how he would fare as a Supreme Court Justice. Brennan predicted he would be like "the mule that was entered in the Kentucky Derby. I don't

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[28] *State* v. *Fary*, 117 A. 2d 499, 501 (1955).

[29] Clark, *supra*, at 68 (quoting William J. Brennan, Jr., Address Before the Charitable Irish Society, Boston, Massachusetts (Mar. 17, 1954)).

[30] Clark, *supra*, at 70 (quoting William J. Brennan, Jr., Address Before the Monmouth Rotary Club, Monmouth, New Jersey (Feb. 23, 1955)).

expect to distinguish myself, but I do expect to benefit from the association."

Marjorie and their daughter, Nancy, once more moved to Washington and settled into a routine that revolved around family and work. A devoted family man, the Justice would come home for dinner every night. But then, as Nancy recalled, he would "set up a green card table in the middle of the living room and spread all these piles of papers within arm's reach on the rug. He'd work until he was just too tired."[31] For the next twenty-five years, Brennan's life revolved around his family and his intense dedication to the Court.

So devoted was Brennan to his family that his legendary energy level waned only once in his tenure, when Marjorie lost a sustained battle with cancer in 1982. Brennan himself had conquered throat cancer, which almost cost him his voice, but it was Marjorie's death that sent his morale plummeting. The Justice loved Marjorie so deeply that her death was a terrible blow. His zest for life began to return in 1983 when, after wryly obtaining his daughter Nancy's consent, he married Mary Fowler, his secretary of twenty-six years. He had a new spring in his walk, renewed energy. Brennan and Mary shared a special love—and a lot of history.

Justice Brennan's years of retirement were enriched by the kindnesses of his colleagues. While his health permitted it, Justice Brennan visited the Court every day. Many of his colleagues, especially his successor, JUSTICE SOUTER, provided continuing personal warmth and friendship. JUSTICE SOUTER found time to visit with Brennan almost every day, an event that the retired-Justice often described as the high-point of his day. Justice Brennan particularly savored his 90th birthday celebration in the Supreme Court chamber, the first such celebration since Oliver Wendell Holmes, Jr., held a similar birthday celebration in 1931. In his parting conversations with friends and admirers that day Justice

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[31] Donna Haupt, "Justice William J. Brennan, Jr.," *Constitution* (Winter 1989), at 54–55.

Brennan recalled his love for the Court, and his gratitude for a life well lived. Justice Brennan died peacefully in his 92d year.

The Brennan personal traits that will be most remembered were the Justice's love of people and his ability to put himself into their shoes. Virtually everyone who encountered Justice Brennan has a story of his kindness. The bus driver who rear-ended Brennan's car in Georgetown on a drizzly day and did not realize that the gentle victim—who assured him that this kind of thing "happens every time there's a rain, and it's nobody's fault at all"[32]—was a Supreme Court Justice. The police officer who took Brennan and his son, Bill III, into custody when he found them in the pre-dawn hours, hopelessly lost, wandering on the streets, and was treated to a hearty breakfast of bacon and eggs when they finally convinced him they were who they said they were. Every law clerk, each of whom can tell countless stories of how Brennan could reassure with the characteristic grip on the arm, twinkling eyes, and the word, "Okay, pal"; and how Brennan always asked about the clerk's spouse or latest romance. Every colleague and friend who, in JUSTICE SOUTER's words, cherished "the man who made us out to be better than we were, and threw his arms around us in Brennan bear hugs, and who simply gave his love to us as the friends he'd chosen us to be."[33] Every Supreme Court employee who was amazed that Brennan would retain the details of their last conversation and stop in the halls to ask about this problem or that joyous event. As author David Halberstam has put it, "He has been in our lifetime, perhaps more than anyone else . . . , the common man as uncommon man. . . . He is a man defined by his own innate decency and kindness. . . . Bill Brennan has never forgotten the most elemental truth

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[32] Clark, *supra*, at 101 (quoting Jack Alexander, "Mr. Justice From Jersey," *Saturday Evening Post*, Sept. 28, 1957, at 133).

[33] David H. Souter, *In Memoriam: William J. Brennan, Jr.*, 111 Harv. L. Rev. 1, 2 (1997) (reprinted eulogy at St. Matthew's Cathedral, Washington, D. C.).

of social relations—in order to gain dignity it is important to bestow it on others."[34]

## Justice Brennan's Work: Preserving the American Dream for Others

Justice Brennan loved this nation. His request that "America the Beautiful" be played at the ceremony of his interment at Arlington National Cemetery reflected the intensity of that love. The Justice understood the wonder of a democratic society that could lift the son of a penniless immigrant to the highest Court in the land, and not seem to notice that anything extraordinary had occurred. Because he believed that the essence of American democracy is its commitment to respect the equal, innate dignity of every human being, Justice Brennan dedicated his judicial career to building a legal system that reinforces true democracy by preserving its indispensable building blocks—individuals living in freedom, mutual toleration and respect.

One key to the power of the Brennan judicial legacy is the harmony between Justice Brennan's life and his work. Justice Brennan lived, and judged, as a man who loved deeply and well. He was blessed with a devoted and close-knit family. He treated every person he met, regardless of station or class, with heartfelt affection and genuine respect. Through the years of passionate advocacy, in times of heady ascendancy and in anguished dissent, there were rarely harsh words in the Brennan lexicon. He acknowledged his antagonists as he embraced his adherents, as fellow human beings worthy of love, toleration and respect.

His capacity for love shaped Justice Brennan's conception of law, and his vision of judicial role. Drawing upon his religious heritage, Justice Brennan believed that every human being is endowed with an inalienable dignity that no earthly power can diminish. He fervently believed in democracy, but distinguished between a true democracy that respects

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[34] David Halberstam, "The Common Man as Uncommon Man," in *Reason & Passion, supra,* at 25.

the dignity of the individual, and mere majoritarianism that subordinates individual dignity to group will. He believed that the United States Constitution, especially the Bill of Rights and the 13th, 14th, and 15th Amendments, was designed to assure that the American experiment in democracy does not erode into majoritarian tyranny by ignoring the kernel of individual dignity at the core of every human being. He believed that judges, especially federal judges, and above-all Supreme Court Justices, had, and have, a solemn and unavoidable duty to interpret the majestic generalities of the Constitution and the Bill of Rights in the light of contemporary circumstances. Finally, he believed that no real conflict exists between vigorous judicial protection of individual rights, and the American conception of democracy envisioned by the Founders, a democracy premised on individual dignity and mutual toleration. Indeed, in the absence of vigorous judicial protection of human rights, Justice Brennan feared that the true democracy envisioned by the Founders could not flourish.

A second key to the power of Justice Brennan's legal heritage was his mastery of the lawyer's art. He was a brilliant legal craftsman. The classic Brennan opinion speaks to us, not in the abstract language of moral philosophy or with the arrogance of government command, but in the logical and institutional cadences of a master lawyer seeking to find the angle of repose between two seemingly irreconcilable positions. Justice Brennan's great individual rights opinions are not assertions of absolute truth; rather, they are institutional blueprints for assuring that only the weightiest assertions of group need can ever restrict the enjoyment of fundamental individual rights. A mark of Justice Brennan's legal genius, and a source of his enduring influence, was his repeated ability to enunciate complex doctrinal formulations designed to establish an institutional balance weighted heavily in favor of individual freedom; a balance that preserves fundamental individual rights in most settings, without making it impossible for the majority to impose narrow restraints when absolutely necessary. The "thickness" of Justice Brennan's char-

acteristic constitutional analysis was designed to reflect the complexity of the tension between individual right and group need; to erect a sophisticated legal matrix for resolving that tension; and to explain why, in doubtful cases, the resolution should favor the right of the individual over the wishes of the group.

Yet another mark of Justice Brennan's mastery of the lawyer's craft was his ability to grasp the interrelationships within an entire body of law. There was no such thing as an *ad hoc* Brennan decision. He was able to conceive each opinion as part of an institutional whole. Justice Brennan's intense effort to understand the purpose of the statute or constitutional provision before him allowed him to view each case as an opportunity to advance the organic enterprise of which it was a part. The resulting jurisprudence is a work of remarkable coherence.

A third key to the power of Justice Brennan's voice was its candid acceptance of responsibility. He embraced the obligation of reading the Constitution in the context of our times. Justice Brennan acknowledged that hard choices existed in deciding the difficult cases before him, but he refused to obfuscate those choices by resort to legal fictions, or to deflect personal criticism by ascribing his decisions to others. He rejected what, to him, was the false comfort of delegating the Constitution's meaning to persons living in other times. He accepted responsibility for interpreting the Constitution in the context of the world in which he lived, and of giving the document's ambiguous words a meaning consistent with evolving notions of human dignity. But his great individual rights opinions were not exercises in subjectivism. They were disciplined efforts to read the Constitution purposively in an effort to advance the document's underlying values in a way that Justice Brennan believed was most faithful to the covenant between the Justices of today and the founding generation. Time and again, Justice Brennan plumbed the manifest purpose underlying a provision of the Bill of Rights, considered how best to advance that purpose in the context of the modern world, and forged brilliant constitutional doc-

trine making it possible for millions of contemporary Americans to find shelter under a tree of liberty planted over two hundred years ago.[35]

## Justice Brennan and the First Amendment

When Justice Brennan joined the Court in 1956, the excesses of the McCarthy era were threatening to overwhelm the parchment barriers of the First and Fifth Amendments. Over the next thirty-four years, the Court, led by Justice Brennan, presided over a revolution in First Amendment doctrine, providing effective constitutional protection for the freest market in ideas the world has ever seen.

Justice Brennan's characteristic approach to First Amendment issues was to ask why the Founders wanted a Free Speech Clause in the Constitution in the first place. His answer was twofold. First, Justice Brennan believed that free speech was indispensable to democratic governance. He understood that democratic self-government is imperilled in the absence of robust and uninhibited discussion of issues

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[35] Justice Brennan left a rich non-judicial record of his judicial philosophy. A representative sampling includes William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N. Y. U. L. Rev. (1961); William J. Brennan, Jr., *The Supreme Court and the Meikeljohn Interpretation of the First Amendment*, the Alexander Meikeljohn Lecture at Brown University, reprinted in 79 Harv. L. Rev. 1 (1965); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan, Jr., *Address at the Dedication of the Samuel I. Newhouse Law Center*, reprinted in 32 Rutgers L. Rev. 173 (1979); William J. Brennan, Jr., *Speech Delivered at the Text and Teaching Symposium, Georgetown University* (Oct. 12, 1985), reprinted in *The Great Debate: Interpreting Our Written Constitution*, 11 (Paul G. Cassell ed. 1986); William J. Brennan, Jr., *In Defense of Dissents*, 37 Hastings L. J. 427 (1986); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N. Y. U. L. Rev. 535 (1986); William J. Brennan, Jr., *The Equality Principle: A Foundation of American Law*, 20 U. C. Davis L. Rev. 673 (1987); William J. Brennan, Jr., *Reason, Passion, and the "Progress of the Law,"* 10 Cardozo L. Rev. 3 (1988); William J. Brennan, Jr., *Foreword to the Symposium on Capital Punishment*, 8 Notre Dame J. of Law, Ethics & Pub. Policy (1994).

of public concern. Second, Justice Brennan recognized that self-expression is an integral element of human dignity. Respect for the equal dignity of each human being, Justice Brennan believed requires toleration of individual self-expression, even when the expression is deeply unpopular.

Armed with a purposive account of the Free Speech Clause, Justice Brennan proceeded to construct a sophisticated institutional structure dedicated to the preservation and advancement of its underlying values. He began haltingly in *Roth* v. *United States*, 354 U. S. 476 (1957). Rejecting arguments claiming either that sexually explicit speech had virtually no protection, or that it was absolutely protected, Justice Brennan attempted to broker an institutional compromise in *Roth* by positing a small category of unprotected speech—obscenity—that fails to advance any of the underlying purposes of the First Amendment, while providing full First Amendment protection to sexually explicit material like *Ulysses* and *Fanny Hill*. Justice Brennan, the great lawyer, ultimately rejected the attempt of Justice Brennan, the great statesman, to forge an institutional compromise because it proved impossible to define unprotected obscenity with sufficient precision.[36] But the analytic approach pioneered in *Roth*, an approach that rejects absolutes, that seeks to accommodate seemingly irreconcilable positions by building complex institutional structures designed to protect speech that advances underlying First Amendment values, while permitting narrow regulation when absolutely necessary, became the signature Brennan approach to the First Amendment.

The Brennan approach bore more enduring fruit in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), which tailored libel law to the underlying values of the First Amendment. Faced with an effort to use state libel laws to muzzle robust

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[36] Justice Brennan signaled the abandonment of his effort to define unprotected obscenity in his dissent in *Paris Adult Theatre I* v. *Slayton*, 413 U. S. 49, 73 (1973). He never was able to persuade a majority of his colleagues to join him in declaring an end to the experiment.

press coverage of the civil rights movement, Justice Brennan, writing for the Court, once again rejected arguments at the extremes claiming either that all libel laws violated the First Amendment, or that libel was a categorical exception to the First Amendment. Instead, the Justice elaborated a complex doctrinal model designed to insulate speech about public figures (and, he believed, public issues)[37] from liability in the absence of "actual malice," while permitting traditional libel law to govern private speech that did not implicate democratic governance. The power of the *New York Times* opinion is twofold. First, Justice Brennan's rejection of absolutist approaches led to the elaboration of a complex institutional structure that seeks to accommodate the competing positions, while providing effective First Amendment protection to speech relevant to democratic governance. Second, and more generally, Justice Brennan's lucid explanation of the deep purpose of the free speech guaranty persuaded a generation, providing the intellectual underpinnings for First Amendment analysis in the years to come. No opinion has been more influential in shaping the reality of our contemporary free speech world, nor more sophisticated in bringing the lawyer's art to bear on a First Amendment problem.

Justice Brennan's mastery of the interplay between First Amendment values and the institutional structures needed to protect them is at the core of *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)*. *Brandenburg* reflects a classic Brennan effort to develop legal doctrine strongly weighted in favor of individual freedom, but sufficiently flexible to permit regulation when absolutely necessary. Government restriction of speech is possible, wrote Justice Brennan for the Court in *Brandenburg*, but only if the censor meets an extremely stringent burden of justification. *Bran-*

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[37] See *Curtis Publishing Company* v. *Butts*, 388 U. S. 130, 172 (1967); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971); and *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), for Justice Brennan's views on speech about "public" or "newsworthy" issues.

*denburg* made clear that casual justifications for censorship rooted in the old "bad tendency" test cannot survive First Amendment scrutiny. While *Roth* and *New York Times* provide institutional solutions for specific areas of speech, *Brandenburg* offers a general theory applicable across the spectrum of free speech analysis that protects speech unless the government can prove an overwhelming need for regulation. When in doubt, *Brandenburg* directs that we err on the side of free speech.

Justice Brennan's approach to free speech culminated in his historic opinions for the Court in *Texas* v. *Johnson*, 491 U. S. 397 (1989), and *United States* v. *Eichman*, 496 U. S. 310 (1990), upholding the right to burn the American flag as an act of protest. Expressive flag burning must be presumptively protected, reasoned Justice Brennan, both because it communicates ideas relevant to democratic self-governance, and because it is an act of individual self-expression. If, Justice Brennan continued, the majority wishes to suppress such communicative activity, it must demonstrate an overwhelming social need. Mere disagreement with the message, or anger at the boorishness or offensiveness of the messenger, can never suffice.

Justice Brennan's flag burning opinions do more than close a doctrinal cycle that began a half-century earlier in *Stromberg* v. *California*, 283 U. S. 359 (1931). The identities of the five Justices who formed the majority in the *Johnson* and *Eichman* cases—JUSTICES Brennan, Marshall, Blackmun, SCALIA, and KENNEDY—demonstrate that expansive free speech protection is neither a "liberal" idea, nor "conservative" idea. It is an American idea that is Justice Brennan's most enduring gift to the Nation.

Justice Brennan was not content with re-defining the substantive elements of free speech protection. As a superb lawyer, he understood that the real world value of free speech protection, however defined, largely depends on the procedural matrix within which the substantive norms are embedded. Like a general deploying troops for battle, Justice Brennan's opinions defend the core of free speech by

building a series of procedural ramparts designed to protect the citadel. He eliminated the threat of criminal libel in *Garrison* v. *Louisiana*, 379 U. S. 64 (1964). He pioneered the First Amendment overbreadth doctrine in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), and *Gooding* v. *Wilson*, 405 U. S. 518 (1972). He explained the special First Amendment dangers of standardless discretion in *City of Houston* v. *Hill*, 482 U. S. 451 (1987), and *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U. S. 750 (1988). He warned about the real world consequences of "chilling effect" in *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963). He insisted on speedy judicial review procedures in *Freedman* v. *Maryland*, 380 U. S. 51 (1965). He required First Amendment due process in *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), and *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). And, he inveighed against the danger of prior restraints in his separate opinion in *New York Times* v. *United States*, 403 U. S. 713, 724 (1971) (the Pentagon Papers case).

Nor was Justice Brennan content to protect speech without providing judicial support for the relationships and institutions central to a vibrant First Amendment community. As with his opinions protecting speech itself, Justice Brennan resisted the lure of absolutist positions, leaving open the possibility of regulating First Amendment institutions under a rigorous showing of extremely serious social need. Building on Justice Harlan's path-breaking decision in *NAACP* v. *Alabama*, 357 U. S. 449 (1958), Justice Brennan charted the modern contours of freedom of association. In *NAACP* v. *Button*, 371 U. S. 415 (1963), writing for the Court, he held that lawyers and clients have a First Amendment right to associate freely in order to pursue litigation to advance a client's interests. In *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Rutan* v. *Republican Party*, 497 U. S. 62 (1990), Justice Brennan wrote for the Court holding that government may not penalize employees for associating with the wrong political party by allocating non-policymaking jobs on the basis of political affiliation. But, in *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), he wrote a classic Brennan individ-

ual rights opinion that asked why we care about freedom to associate in the first place. In *Roberts,* Justice Brennan held that, properly understood, freedom of association was designed to protect close-knit individual or political relationships, and did not shield impersonal economic organizations like the Jaycees from laws banning gender discrimination.

Justice Brennan viewed the press as critical participants in a system of free expression, but he was reluctant to accord the press preferred legal status. For example, in his dissent in *Dun & Bradstreet* v. *Greenmoss Builders,* 472 U. S. 749, 774 (1985), Justice Brennan rejected the notion that media defendants are entitled to more favorable treatment than non-media defendants in libel cases. Rather than accord the press a preferred legal status, Justice Brennan argued that both the press and the public enjoy a broad First Amendment right of access to important public institutions in order to assure an informed public. In his concurrences in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U. S. 555, 584 (1980), and *Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 572 (1976), Justice Brennan argued that the "structural" role of the First Amendment justified a broad right of access to criminal trials for both the press and public. Similarly, in *Globe Newspaper Co.* v. *Superior Court,* 457 U. S. 596 (1982), Justice Brennan wrote for the Court in invalidating a law mandating the closure of criminal trials involving sex offenses against minors. Characteristically, however Justice Brennan declined to endorse an absolute right of access, holding open the possibility that, in an appropriate case, "countervailing" interests might be sufficiently compelling to reverse the presumption of openness created by the First Amendment. In the Justice's final opinion for the Court, *Metro Broadcasting, Inc.* v. *FCC,* 497 U. S. 547 (1990), he recognized the importance to a vibrant First Amendment of enhancing diversity in ownership and control of the electronic press.

Justice Brennan understood that freedom of academic inquiry is central to the underlying values of the First Amendment. In *Keyishian* v. *Board of Regents,* 385 U. S. 589

(1967), his opinion for the Court provided the modern rationale for intense First Amendment protection of academic freedom, establishing the constitutional precedent that shields higher education from undue government interference.

Justice Brennan recognized that government interference with free speech could take the form of the carrot as well as the stick. Writing for the Court in *Speiser* v. *Randall*, 357 U. S. 513 (1958), he pioneered the unconstitutional conditions doctrine, holding that California could not condition the grant of a property tax exemption on the execution of a loyalty oath. In *FCC* v. *League of Women Voters*, 468 U. S. 364 (1984), he applied the unconstitutional conditions doctrine to invalidate efforts to condition government aid to public television stations on a waiver of the stations' First Amendment rights to produce privately financed editorials.

Justice Brennan also recognized that a vibrant system of free speech must protect listeners as well as speakers. In his path-breaking concurrence in *Lamont* v. *Postmaster General*, 381 U. S. 301, 307 (1965), the first case to declare an act of Congress unconstitutional under the First Amendment, Justice Brennan explicitly recognized that listeners have a separately cognizable First Amendment right to receive information, even from foreign speakers who enjoy no First Amendment rights of their own. Similarly, in *Blount* v. *Rizzi*, 400 U. S. 410 (1971), Justice Brennan, relying on the hearer's independent First Amendment rights, invalidated an excessively broad restriction on receiving information through the mails.

Finally, Justice Brennan understood that a robust system of free expression depends on the ability to assemble funds needed for effective speech. In *Riley* v. *National Federation for the Blind*, 487 U. S. 781 (1988), Justice Brennan wrote for the Court invalidating an excessively broad regulation of charitable solicitation of funds. In a portion of the Court's *per curiam* in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), authored by Justice Brennan, he insisted that restrictions on campaign financing be analyzed as if they were restrictions

on speech itself. In *FEC* v. *Massachusetts Citizens for Life*, 479 U. S. 238 (1986), Justice Brennan wrote for the Court in striking down an effort to limit the campaign spending of a small, antiabortion advocacy group. But, in his concurring opinion in *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 669 (1990), the Justice supported the constitutionality of a state ban on election spending by profit-making corporations, arguing that a ban on election spending from the corporate treasury was justified to prevent organizations amassing great wealth in the economic marketplace from gaining an unfair advantage in the political marketplace.

Justice Brennan treated religious freedom as an integral aspect of his First Amendment vision. In *Sherbert* v. *Verner*, 374 U. S. 398 (1963), he laid the foundation for modern protection of the free exercise of religion by requiring government to establish a compelling interest before interfering with religious conscience. Justice Brennan also sought to maintain the "wall" between church and state. In *Edwards* v. *Aguillard*, 482 U. S. 578 (1987), Justice Brennan wrote for the Court in holding that efforts to mandate the teaching of "Creation Science" in the Louisiana public schools violate the Establishment Clause. His concurring opinion in *Abington School District* v. *Schempp*, 374 U. S. 203, 230 (1963), and his dissents in *Marsh* v. *Chambers*, 463 U. S. 783, 795 (1983), and *Lynch* v. *Donnelly*, 465 U. S. 668, 694 (1984), argue for strict separation of church and state in order to preserve a vibrant private religious life free from state interference.

Justice Brennan's contribution to contemporary First Amendment law is unparalleled.[38] He re-defined its substantive contours, built its procedural ramparts, preserved

[38] Justice Brennan's son estimates that his father wrote eighty-two majority opinions in free speech cases. William J. Brennan, III, *Brennan on Brennan: The Justice's Views on the Structural Role of the First Amendment*, New Jersey Lawyer, p. 6 (August/September 1994).

its nurturing institutions, and placed its future in densely argued, brilliantly crafted doctrinal formulations linked directly to the underlying values of the First Amendment. When one compares the anemic First Amendment law that Justice Brennan faced in 1956, with the fully-developed system of free expression that Justice Brennan's opinions bequeath to the nation, it becomes clear how lucky James Madison was to have had William Brennan as his lawyer.

## Justice Brennan and Equality

At the heart of Justice Brennan's jurisprudence is a profound commitment to the law's obligation to treat each person equally. Although that commitment to equality suffuses Justice Brennan's entire judicial career, it finds particular voice in four sets of Brennan opinions: opinions that seek to achieve and defend equal participation in democracy; opinions seeking to enforce racial equality before the law, especially in an educational context; opinions defining and implementing gender equality; and opinions defending affirmative action.

Justice Brennan believed that democracy requires that each citizen be accorded equal political status. He understood that rational variants of majority rule exist that treat citizens unequally, but he rejected the notion that the American experiment in democracy would adopt such an unequal structure. Accordingly, after years of malapportionment had resulted in a political system where the votes of some counted far more than the votes of others, Justice Brennan viewed the resulting unequal distribution of political status as an affront to democracy. His intense belief in political equality as the organizing principle for a true democracy is the heart of his historic opinion in *Baker* v. *Carr*, 369 U. S. 186 (1962), paving the way to the "one-person one-vote" doctrine. Chief Justice Earl Warren believed that *Baker* v. *Carr* was the most influential decision handed down during

his tenure because it re-shaped the contours of American democracy.[39]

Justice Brennan was not content merely to define an abstract norm of political equality. He understood the need for institutional reinforcements that would make the equal participation principle a reality for millions of Americans who had been excluded by generations of discrimination from full participation in the democratic process. Unlike the First Amendment area, where Justice Brennan helped forge the supporting institutional structures from the provisions of the Constitution itself, Congress provided crucial institutional mechanisms for assuring equal participation in the democratic process by enacting the Voting Rights Acts of 1965 and 1982. In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), Justice Brennan's opinion upheld the constitutionality of portions of the 1965 Act that prohibited literacy tests as a bar to voting, recognizing the imperative of overcoming years of sophisticated resistance to the enfranchisement of racial minorities. The voting rights partnership between Congress and the Court was a brilliant success, leading, for the first time since Reconstruction, to the widespread political participation of African-Americans in the states of the old Confederacy, and to a resurgence of political participation by minority groups throughout the United States. In *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), Justice Brennan's opinion for the Court established the ground rules for judicial consideration of a claim for vote dilution added in the 1982 Act, beginning the difficult process, still unfinished, of assuring that minority groups enjoy an equal opportunity to elect candidates of their choice.

Justice Brennan believed deeply in racial equality. He fought vigorously to defend the majestic principle of equal-

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[39] Earl Warren, *Mr. Justice Brennan*, 80 Harv. L. Rev. 1, 2 (1966). The special relationship between Justice Brennan and Chief Justice Warren is described in Owen Fiss, *A Life Lived Twice*, 100 Yale L. J. 1117 (1991). See also Abner J. Mikva, *Mr. Justice Brennan and the Political Process: Assessing the Legacy of Baker* v. *Carr*, 1995 U. Ill. L. Rev. 683.

ity before the law underlying *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Justice Brennan viewed *Brown*, not merely as a narrow case involving school segregation, but as the enunciation of a broad principle assuring judicial protection to members of minority groups that had been the target of sustained prejudice. Although he joined the Court two years after *Brown*, he (along with Justices Harlan and Whittaker, who also joined the Court after the *Brown* decision) embraced the *Brown* opinion explicitly in *Cooper* v. *Aaron*, 358 U. S. 1 (1958) (signed by all of the Justices). In *Green* v. *County School Board*, 391 U. S. 430 (1968), Justice Brennan, writing for the Court, finally provided the institutional mechanism for enforcing *Brown*, directing the immediate cessation of legally-imposed public school segregation "root and branch." The firmness of Justice Brennan's opinion in *Green* is widely credited with the widespread elimination of *de jure* school segregation in the ensuing year. In *Keyes* v. *School District No. 1*, 413 U. S. 189 (1973), Justice Brennan demonstrated that the principle of *Brown* was applicable to Northern schools, as well, if patterns of government decisionmaking had abetted racial segregation. While Justice Brennan was unable to persuade a majority of his colleagues that systematic inequality in financing public education violated the Federal Constitution,[40] his talent as a lawyer enabled him to assemble a majority opinion in *Plyler* v. *Doe*, 457 U. S. 202 (1982), assuring the children of undocumented aliens the right to attend public school.

During his wartime service, then-Col. Brennan had organized and observed the extraordinary contribution of women to the nation's civilian defense production effort. Forty years later, he helped chart the Constitutional guaranty of gender equality. Building on Chief Justice Burger's decision in *Reed* v. *Reed*, 404 U. S. 71 (1971), Justice Brennan, aided in no small part, as he often observed, by the then-Director of the ACLU's Women's Rights Project, Ruth Bader Ginsburg, provided a coherent theoretical basis for the

[40] *San Antonio* v. *Rodriguez*, 411 U. S. 1, 62 (1973).

Court's ban on laws discriminating on the basis of gender.[41] In his plurality opinion in *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), Justice Brennan argued that laws discriminating on the basis of gender should be subjected to the same strict scrutiny standard governing challenges to racial discrimination. In *Craig* v. *Boren*, 429 U. S. 190 (1976), and *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), Justice Brennan persuasively demonstrated why laws based on gender stereotyping were unconstitutional, and enunciated an intermediate standard of scrutiny to assist the lower courts in rooting out unfair gender discrimination. Although he did not assemble a majority for his "strict scrutiny" position in *Frontiero*, Justice Brennan's powerful defense of women's rights provided the intellectual blueprint for the systematic eradication of laws discriminating on the basis of gender, a process that culminated, fittingly, in JUSTICE GINSBURG's repeated citation of Justice Brennan in her opinion for the Court in *United States* v. *Virginia*, 518 U. S. 515 (1996), invalidating the male-only admissions policy at Virginia Military Institute. Justice Brennan extended the battle against gender stereotyping to the private sphere in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989), which held that gender stereotyping also violated Title VII. In *School Board of Nassau County* v. *Arline*, 480 U. S. 273 (1987), Justice Brennan's majority opinion extended his efforts to combat stereotyping to persons with contagious diseases, holding that a person with a history of infection with a contagious disease was entitled to protection against irrational discrimination under the Rehabilitation Act of 1973.

Justice Brennan's equality jurisprudence was rooted in the real world. He knew that despite heroic efforts by the Court to eradicate hundreds of years of racial and gender discrimination, the effects of generations of widespread discrimination could not be wiped out overnight. Accordingly, Justice Brennan supported narrowly tailored efforts at af-

[41] JUSTICE GINSBURG's affectionate appreciation of Justice Brennan's life appears at 111 Harv. L. Rev. 3 (1997).

firmative action designed either to redress past wrongs, or to assure the proper functioning of important contemporary institutions. In *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), his opinion for the Court upheld the use of broad equitable remedies to undo the consequences of past discrimination. In his partial dissent and partial concurrence in *California Board of Regents* v. *Bakke*, 438 U. S. 265, 324 (1978), Justice Brennan noted that educational quality is enhanced by diversity. Accordingly, he argued that voluntary affirmative action plans by public universities designed to achieve educational diversity are constitutional. In his opinion for the Court in *United Steelworkers* v. *Weber*, 443 U. S. 193 (1978), Justice Brennan argued that Title VII's ban on racial discrimination in employment did not preclude narrowly tailored voluntary affirmative action programs by private employers designed to redress the effects of identifiable past discrimination. In *Local 28, Sheet Metal Workers International Assoc.* v. *EEOC*, 478 U. S. 421 (1986), and *Local 93, International Association of Firefighters* v. *Cleveland*, 478 U. S. 501 (1986), Justice Brennan, who had inveighed against racial discrimination by labor unions in the 1940's, authored opinions upholding rigorous affirmative action remedies designed to redress the effects of past racial discrimination. In *United States* v. *Paradise*, 480 U. S. 149 (1987), Justice Brennan's opinion for the Court upheld rigid hiring quotas designed to redress years of blatant racial discrimination in hiring and promotion. In *Johnson* v. *Transportation Agency*, 480 U. S. 616 (1987), Justice Brennan's opinion for the Court upheld the use of voluntary affirmative action techniques by a government agency to redress the effects of clearly established past discrimination against women. In his last opinion for the Court, *Metro Broadcasting* v. *FCC*, 497 U. S. 547 (1990), Justice Brennan defended the constitutionality of FCC regulations designed to favor women and minority entrepreneurs seeking broadcast licenses.

Justice Brennan understood the complex moral and legal calculus that makes affirmative action such a difficult issue. Not surprisingly, Justice Brennan's affirmative action juris-

prudence remains controversial. But, whatever the short-term fate of Justice Brennan's efforts to defend affirmative action, his affirmative action opinions reflect his consistent concern that abstract constitutional principles like equality and free speech must be translated into the real world if our Constitution is to play its proper role in the American legal system.

## Justice Brennan and Procedural Fairness

Justice Brennan's twin concerns with individual dignity and institutional structure led him to pay extremely close attention to procedural matters, especially in settings where the individual is ranged against the power of the state. He believed that strict adherence to procedural fairness is a precondition to the effective protection of individual rights. One of his early opinions for the Court, *Jencks* v. *United States*, 353 U. S. 657 (1957), made the criminal process fairer by requiring prosecutors to provide an accused with prior statements by witnesses. In *Bruton* v. *United States*, 391 U. S. 123 (1968), he authored an opinion ruling that the Confrontation Clause precludes the use of the confession of a co-defendant in settings where cross-examination is unavailable, and, in his dissents in *California* v. *Green*, 399 U. S. 149, 189 (1970), and *Ohio* v. *Roberts*, 448 U. S. 56, 77 (1980), the Justice argued that the Confrontation Clause broadly precludes the use in a criminal proceeding of testimony not subject to cross examination. In *In re Winship*, 397 U. S. 358 (1970), Justice Brennan's opinion for the Court held that proof of guilt beyond a reasonable doubt in a criminal case is a fundamental tenet of due process of law. Justice Brennan understood that the reasonable doubt standard is needed to prevent individual defendants from being overwhelmed by the power of the state.

Justice Brennan believed that the guaranty of procedural due process of law advances two basic values: accuracy and individual dignity. Providing a hearing to an individual before significant adverse government action, believed Justice Brennan, not only minimizes the chance of error, it recog-

nizes the innate dignity of the individual by requiring the state to humanize the bureaucratic process. Justice Brennan's respect for individual dignity underlies his most important procedural decision, *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), finding significant due process requirements applicable prior to the suspension of statutory welfare benefits. *Goldberg* v. *Kelly* is a classic example of Justice Brennan's ability to knit understanding of statutory purpose, respect for constitutional principle, and empathy for the individual into a compelling opinion. He recognized, as did the parties, that a statutorily enacted welfare benefit constitutes constitutional property in some sense. The Justice's real concern was over the timing and nature of the hearing required in connection with its suspension. Evoking the program's purpose, and the shattering consequences for individuals on welfare of even a temporary suspension, Justice Brennan's opinion in *Goldberg* v. *Kelly*, requiring an extended due process inquiry before suspension of benefits, expanded the due process revolution into the civil arena, permitting millions of individuals, ranging from welfare recipients to applicants for a driver's license, to confront the bureaucratic state on more equal terms.

## Justice Brennan and the Federal Courts

Justice Brennan's opinions helped shape the modern federal court system. In *United Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), his opinion for the Court developed the modern view of pendent jurisdiction, enabling federal courts to act as efficient fora for the resolution of actions involving state and federal claims. *Byrd* v. *Blue Ridge Rural Electric Coop.*, 356 U. S. 525 (1958), ruled that trial by jury must be available in virtually all damage actions in the federal courts. In *Burger King Corp.* v. *Rudzewicz*, 471 U. S. 462 (1985), and in his dissent in *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U. S. 286, 299 (1980), and his concurrence in *Burnham* v. *Superior Court of California*, 495 U. S. 604, 628 (1990), Justice Brennan championed a broad, functional vision of federal *in personam* jurisdiction. And, in *Colorado*

*River Water Conservation District* v. *United States*, 424 U. S. 800 (1976), Justice Brennan's majority opinion clarified the duty of a federal court to resolve controversies within its subject matter jurisdiction. But it was in establishing federal courts as an instrument to enforce individual rights that Justice Brennan left his most enduring mark on the Article III courts. Justice Brennan believed that the institutional attributes of the federal courts—especially lifetime tenure—rendered federal judges the natural defenders of constitutional rights against majoritarian overreaching. In a series of opinions, Justice Brennan honed the federal courts as effective fora for the enforcement of federal rights. In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court, extending Justice Douglas' opinion in *Monroe* v. *Pape*, 365 U. S. 167 (1961), construed the Civil Rights Act of 1871 to permit damage actions in federal court to redress the deprivation of federal constitutional rights by both local officials and government entities. In *Fay* v. *Noia*, 372 U. S. 391 (1963), Justice Brennan established a similar federal court enforcement presence in the context of writs of habeas corpus. Justice Brennan's expansive conception of the Great Writ permitted the district courts to function effectively for three decades as decentralized arms of the Supreme Court, enforcing the Court's criminal procedure precedents against occasionally recalcitrant state courts.

It was in the Court's historic opinion in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), that Justice Brennan's vision of the federal courts emerges most clearly. In the years immediately following *Brown* v. *Board of Education*, state and local officials swore "massive resistance" to public school integration. When mobs threatened to prevent the integration of Little Rock High School, the Supreme Court responded with a unprecedented opinion, largely drafted by Justice Brennan, and signed individually by each of the nine Justices, re-affirming the Court's adherence to *Brown*, and reasserting the primacy of the Supreme Court in interpreting the Constitution. Justice Brennan's passionate defense in *Cooper* of the critical role of the Supreme Court as ultimate interpreter of the

Constitution and protector of the rights of the weak remains among the most eloquent and expansive defenses of the judicial function in our legal heritage.

In recalling Justice Brennan's view of the role of federal courts, we should not overlook the heritage of his years on the New Jersey courts, and his strong belief in the importance of state courts as protectors of individual liberties. Justice Brennan believed that every American judge has a duty to protect human rights. Just as in *Bivens* v. *Six Unknown Agents*, 403 U. S. 388 (1971), where his opinion for the Court held that federal officials could be held liable, on common law principles, for damages resulting from violations of the Bill of Rights, so he strongly urged state judges to develop independent mechanisms for protecting rights guaranteed under state constitutions. His two forceful addresses on the subject[42] were among his best-known and influential extra-judicial statements. As the only Justice with state court experience for many of his years on the Court, Justice Brennan never forgot the crucial role of state courts in the federal system.

## Justice Brennan and Labor Law

Justice Brennan, the consummate labor lawyer, played a significant role in the evolution of American labor law. His numerous opinions construing the National Labor Relations Act and related statutes reflect both Justice Brennan's intense commitment to the individual, and his sophisticated understanding of the collective-bargaining process.[43] As with his constitutional opinions, Justice Brennan sought to capture the "spirit" of the National Labor Relations Act, and to develop a coherent body of case law reinforcing its underly-

[42] See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N. Y. U. L. Rev. 535 (1986).

[43] For a survey of Justice Brennan's labor law decisions, see B. Glenn George, *Visions of a Labor Lawyer: The Legacy of Justice Brennan*, 33 Wm. & Mary L. Rev. 1123 (1992).

ing goals. In his opinions for the Court in *International Association of Machinists* v. *Street*, 367 U. S. 740 (1961), and *Communications Workers of America* v. *Beck*, 487 U. S. 735 (1988), Justice Brennan reinforced the individual by holding that objecting employees were entitled to pro-rata refunds of portions of their agency shop fees used for political causes they opposed, or for other purposes unconnected with collective bargaining. In *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251 (1975), Justice Brennan's opinion reinforced the individual by holding that an employee is entitled to the presence of a union representative at a disciplinary investigation conducted by the employer. And, in *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822 (1984), the Court reinforced the individual by holding that the activities of a single employee in asserting a right rooted in a collective-bargaining agreement were protected as a form of "concerted activity".

Justice Brennan believed that lasting labor peace could not be obtained by government-imposed solutions. Whether the issue was the right of members of a multi-employer bargaining unit to respond to a selective strike with a lock-out,[44] the right of union members to engage in slow-downs,[45] or the right of an employer to hire replacement workers,[46] Justice Brennan sought to allow the parties to reach a freely bargained economic solution that reflects their relative economic power by assuring that each is free to use its economic weapons without government interference. Where, however, an employer sought to by-pass the bargaining process by imposing unilateral conditions,[47] or a union sought to ignore no-strike obligations accepted as part of the bargaining process,[48] Justice Brennan wrote for the Court in defending the bargaining process. Justice Brennan believed that the collective-bargaining process would work best if it were shielded from state or federal judicial interference. He

[44] *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U. S. 87 (1957).
[45] *NLRB* v. *Insurance Agents Int'l Union*, 361 U. S. 477 (1960).
[46] *NLRB* v. *Brown*, 380 U. S. 278 (1965).
[47] *NLRB* v. *Katz*, 369 U. S. 736 (1962).
[48] *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U. S. 235 (1970).

championed broad preemption of state efforts to regulate union activity which Congress had left to the free play of economic forces,[49] and sought to minimize federal judicial intervention which would delay the commencement of the bargaining process.[50]

## Justice Brennan: Archetype

Justice Brennan's contribution to American legal thought transcends even his monumental substantive achievements. It is true that he shaped the First Amendment; sketched the contours of the "one-person one-vote" rule; deepened and defended our commitment to equality; enriched our ideas of procedural fairness; taught us about the special role of the federal courts; and profoundly influenced labor law. It is equally true that his mastery of the lawyers' craft repeatedly enabled him to place his substantive insights in complex doctrinal settings designed to persuade and to deflect error in favor of freedom. But Justice Brennan's contribution is deeper than substantive outcomes or doctrinal innovations. He joins Chief Justice John Marshall and Justice Oliver Wendell Holmes, Jr., as archetypes of a conception of judging in a constitutional democracy.

Chief Justice Marshall pioneered the use of judicial review. His insight that judges, interpreting the text of a written Constitution, could effectively defend against unconstitutional action by the majority establishes Chief Justice Marshall as the founding archetype of the modern constitutional judge. Long after his substantive rulings have succumbed to the inevitable erosion of time and change, we will continue to draw inspiration from Chief Justice Marshall's grasp of institutional possibility.

Justice Oliver Wendell Holmes, Jr., helped to chart the complex relationship between judicial review and respect for

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[49] *Int'l Assn. of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U. S. 132 (1976).

[50] *Leedom* v. *Kyne*, 358 U. S. 184, 191 (1958).

the will of the majority. His lifetime of effort to develop a line between deference to the majority and respect for fundamental individual rights clarified the modern role of judicial review in a vibrant democracy. Long after Justice Holmes' substantive rulings have been amended by time, we will look to him as the archetype of an even-handed constitutional judge in a functioning democracy.

Justice William J. Brennan, Jr., adds a third judicial archetype to our constitutional heritage. Justice Brennan's lifetime of passionate effort to deploy a modern, purposive reading of the Bill of Rights in defense of the innate dignity of the individual, not as an alienated island, but as a participant in a democracy of equals, has immensely enriched our conception of judging. If Justice Holmes reminds us of our duty to democracy, Justice Brennan reminds us that true democracy requires us to fulfil our duty to the individual. Healthy debate will continue over the precise role of a constitutional judge in a vibrant democracy. But time and healthy debate can only enhance Justice Brennan's status as the archetype of a Justice passionately devoted to the enforcement of individual constitutional rights. He taught us that constitutional law, brilliantly conceived and courageously enforced, can lift the human spirit.

Wherefore, it is accordingly

RESOLVED, that we, as representative members of the Bar of the Supreme Court of the United States, express our deep sadness at the death of Justice Brennan, our condolences to the Brennan family, and our profound admiration for Justice Brennan's matchless contributions to the cause of human dignity; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court, and that the Attorney General be asked to move that they be inscribed on the Court's permanent records.

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THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. I recognize the Attorney General of the United States.

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Attorney General Reno 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 William J. Brennan, Jr., Associate Justice of the Supreme Court from 1956 to 1990. While recognizing Justice Brennan's extraordinary contributions to this Court and impact on the legal world in a wide variety of areas, I will limit these remarks to just a few examples of Justice Brennan's contributions to constitutional jurisprudence.

Justice Brennan served on this Court for 34 years. His role was central in the Court's expansion during that era of the substance of the Constitution's protection of individual rights, as well as in the Court's strengthening of the remedies available for the enforcement of those rights.

Justice Brennan's contributions to the development of the law are perhaps most striking in the Court's free speech cases. In his opinion for the Court in *Speiser* v. *Randall*, for example, Justice Brennan introduced the concept of the chilling effect. Explaining that the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.

Six years later came *New York Times* v. *Sullivan*, one of the leading free speech cases of this century. Justice Brennan articulated the fundamental principle of the opinion, and one of the foundations of this Court's First Amendment jurisprudence.

In oft-quoted language, he stated that the Court considers this case against the background of a profound national commitment to the principle that debate on public issues should

be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on Government and public officials.

*New York Times* v. *Sullivan* is a characteristic example of Justice Brennan's recognition that the provisions of the Bill of Rights and the Civil War amendments embody core values and principles that remain valid even where their vindication requires significant alteration in hitherto accepted principles of State law.

In *NAACP* v. *Button*, the Court held that the State of Virginia could not prohibit NAACP lawyers from giving legal advice to citizens of Virginia. Modern conceptions of vagueness and over-breadth trace their roots to Justice Brennan's opinion for the Court in this case, which once again relied on the chilling effect rationale he had first elaborated in *Speiser*.

In the two flag-burning cases that came before the Court in Justice Brennan's last two Terms, *Texas* v. *Johnson*, and *United States* v. *Eichman*, Justice Brennan spoke for the Court in holding the statutes unconstitutional. As Justice Brennan explained in *Johnson:* Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticisms such as Johnson's is a sign and a source of our strength.

Justice Brennan was a leading exponent of the need to maintain separation of church and State under the Establishment Clause, as articulated in his influential concurring opinion in *Abington School District* v. *Schempp*.

As he explained in that opinion, it is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with, and dependent upon, the Government.

Justice Brennan also spoke for the Court in a major Free Exercise Clause case, *Sherbert* v. *Verner*, which eloquently set forth one side of the debate regarding whether strict gov-

ernmental neutrality is sufficient to satisfy the constitutional command of the Clause.

The same underlying philosophy provided the foundation for Justice Brennan's notable contribution to the jurisprudence of the Equal Protection Clause. As is by now well-known, he wrote most of the opinion, signed by all nine Members of the Court, in *Cooper* v. *Aaron.*

Justice Brennan's seminal opinion upholding the constitutionality of substantive provisions of the Voting Rights Act of 1965 in *Katzenbach* v. *Morgan* marked a crucial milestone in the struggle for equal voting rights, and in *Thornburg* v. *Gingles,* Justice Brennan again wrote for the Court in setting forth the basic analytical structure that would govern the interpretation of the amended § 2 of the Voting Rights Act.

Perhaps even more than in the area of race discrimination, Justice Brennan's application of the Equal Protection Clause in gender discrimination cases has had a lasting impact on the law. In *Frontiero* v. *Richardson,* Justice Brennan's plurality opinion recognized that statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

Although he was writing only for a plurality in *Frontiero,* the Court adopted Justice Brennan's views in *Craig* v. *Boren,* as well as his further articulation of the standard governing gender discrimination under the Equal Protection Clause. Classifications by gender must serve important governmental objectives, and must be substantially related to the achievement of those objectives.

In his ground-breaking opinion for the Court in *Goldberg* v. *Kelly,* Justice Brennan first applied due process standards to a State's decision to terminate welfare payments.

In *Shapiro* v. *Thompson,* Justice Brennan spoke for the Court in striking down longstanding State residency requirements for welfare as a burden on the right to travel.

In *Eisenstadt* v. *Baird,* Justice Brennan wrote an important opinion that was a crucial stepping stone in the develop-

ment of the right to privacy, and in *Penn Central Transportation Company* v. *New York City*, Justice Brennan set forth for the Court the fundamental analysis that continues to govern the adjudication of claims that Government regulation of private property constitutes a taking.

Justice Brennan's contributions were not limited to civil cases. He wrote for the Court in *Malloy* v. *Hogan*, holding that the Fifth Amendment's protection against compelled self-incrimination applied to the States.

In *In re Winship*, Justice Brennan, again writing for the Court, articulated the central due process principle of proof beyond a reasonable doubt in criminal cases.

In *Bruton* v. *United States*, the Court applied the Confrontation Clause to defendants who were tried jointly.

An important element in Justice Brennan's jurisprudence was his belief that remedial avenues must be available to ensure that constitutional protections can be enforced. For example, in *Baker* v. *Carr*, Justice Brennan wrote for the Court, holding that claims of malapportionment in State legislatures were justiciable.

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, Justice Brennan set forth for the Court the principles permitting implication of a cause of action directly under the Constitution.

In *Monell* v. *Department of Social Services*, Justice Brennan wrote an opinion for the Court opening the door to damage actions under 42 U. S. C. § 1983 against municipal bodies for constitutional violations.

Of course, the Court has not always accepted Justice Brennan's views and, especially in his later years on the Court, he found himself frequently in dissent. In light of the numerous areas of which Justice Brennan's work proved seminal in the development of the law in the 20th Century, the fact that the Court has not always agreed with his views should come as no surprise, but it can be safely said that, as the Court continues to address new problems in these areas, it will continue to confront the challenges presented by Justice Brennan.

Justice Brennan's judicial philosophy was based on the need for constant vigilance to apply the principles of human liberty embodied in the Bill of Rights and the Fourteenth Amendment to ever new arrangements and new institutions. His vision of the Constitution as embodying a fundamental charter of human liberty will endure and will continue to be reflected in this Court's jurisprudence.

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 William J. Brennan, Jr., 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.

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THE CHIEF JUSTICE said:

Thank you, Attorney General Reno, thank you, General Waxman, for your presentations today in memory of our late colleague and friend, William J. Brennan.

We also extend to Chairman Burt Neuborne and the members of the Committee on Resolutions, Chairman Daniel Rezneck and members of the Arrangements Committee, Judge Abner Mikva, chairman of today's meeting of the Bar, our appreciation for the Resolutions you have read today.

Your motion that they be made part of the permanent record of the Court is hereby granted.

Bill Brennan's service on this Court and his contributions to American law are an imposing achievement. He took the oath of office as a Justice of this Court on October 16, 1956, at the age of 50. After fulfilling his responsibilities under three Chief Justices and alongside 19 Associate Justices, he retired on July 20, 1990, at the age of 84.

His period of service, just a couple of months short of 34 years, is one that has been exceeded by only five other Justices in the 208-year history of this Court's existence, but Justice Brennan's profound influence on American law can't

be measured simply by counting the number of years he sat in one of the chairs behind this bench.

An accurate assessment can only be made after one has studied many of the 1,000-plus opinions he authored during his long career, many of them landmark decisions by this Court. His majority opinions alone number well over 400. These opinions, filling thousands of pages of this Court's official reports, demonstrate Justice Brennan's scholarly expertise, as well as his keen reasoning abilities.

In *Baker* v. *Carr,* for example, which the Resolutions comment on, he wrote the opinion that for the first time subjected the apportionment of State legislatures to the requirements of the Fourteenth Amendment's Equal Protection Clause.

Before this decision, controversies regarding the radically unequal voting districts that existed at the time came to the Supreme Court under what is called the Republican Guarantee Clause. The Supreme Court had declined to decide such cases because the Guarantee Clause lacked judicially manageable standards which courts could utilize in cases brought before them.

Malapportionment of State legislatures therefore had been considered political questions outside the Federal judiciary's jurisdiction and, while the Federal courts thus declined to address the problem, State legislatures were also unwilling to act, because those who benefited from the existing electoral system were the ones who were making the law.

Justice Brennan cut this Gordian knot by shifting the issue of the constitutionality of malapportionment from the Guarantee Clause to the Equal Protection Clause. His opinion in *Baker* v. *Carr* took the first step in the direction of the now well-accepted practice and principle of one person, one vote, and in so doing changed the nature of American politics forever.

Justice Brennan's opinion for the Court in *New York Times* v. *Sullivan,* also commented on in the Resolutions, has a stature in our constitutional history equal to that of *Baker* v. *Carr,* and as the Resolutions indicate, prior to the *Sullivan*

decision, slander and libel law were left to the States, with few constitutional restrictions. These rules stifled criticism of public officials, and the result was a less-informed public.

The Court in *Sullivan*, relying on freedom of speech and on what Justice Brennan called our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, sharply changed these traditional rules of libel law. The Court's opinion held that any public official who was a plaintiff in a libel case had to prove that the statements in question were defamatory, false, and made with actual malice.

These developments in libel law altered the rules of the game of American politics, and speech, as a matter of fact, making American public officials more accountable, the American media more watchful, and the American people better informed.

I've mentioned just two opinions that Justice Brennan authored that have a special place in our Nation's history. There are others that have been mentioned in the Resolution, and I'm sure still others that have not been mentioned by anyone today, because there were so many of his opinions that played an important role in the development of our law.

There are dozens of other significant opinions he wrote for the Court, and yet the great body of law for which he was responsible may be only but half of the contribution he made to this Court.

Those of us who had the pleasure of serving with Bill Brennan know what a wonderful human being he was, combining a friendly spirit with a highly analytical mind dedicated to justice. Blessed with such attributes, Justice Brennan was a force for civility and good relationship among his colleagues.

During some periods in the Court's history, differences on constitutional questions have affected personal relationships among the Justices and complicated the work of the Court. In contrast, Justice Brennan was a unifying influence on the bench, often guiding the Court to a majority or unanimous opinion.

And when the divisions on the Court on constitutional issues were too deep and broad to be bridged, Justice Brennan never allowed such disagreements to affect the way he treated his colleagues. Warm-hearted, polite, courteous, Bill Brennan inspired these same qualities in his colleagues, even those who disagreed with him.

His career exemplifies the happy truth that a judge need not be a prima donna to have a lasting influence on our country's laws. He will have a high place in the annals of this Court and in its jurisprudence.