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SPECIAL SECTION

GAZING INTO THE FUTURE: THE 100-YEAR LEGACY OF JUSTICE WILLIAM J. BRENNAN

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How should Justice William J. Brennan, Jr., be remembered in 2056, one hundred years after he joined the United States Supreme Court, or in 2090, one hundred years after he left it?

There is no set convention for how we evaluate the success or failure, the greatness or mediocrity, of our Supreme Court Justices. This is the case even in their lifetimes, let alone decades later. Yet there are some constants in Brennan's legendary judicial career that may guide the way to evaluating his legacy.

The Brennan legacy[1] likely exists in multiple forms. First, as a philosophical matter, Brennan did more than perhaps any

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1. The role Justice Brennan played during thirty-four years on the Supreme Court, his influence, and his legacy are discussed more fully in Seth Stern and Stephen Wermiel, *Justice Brennan: Liberal Champion* (Houghton Mifflin Harcourt 2010). A full discussion of Brennan's views on religion and the First Amendment can, for example, can be found in *Liberal Champion* at 162–77, his views on the death penalty and the Eighth Amendment at 409–30, and his views on gender equality and the Equal Protection Clause at 385–408. And a full discussion of his views on human dignity can be found in Stephen J. Wermiel, *Law*

other Justice to frame the paramount value of the Constitution and of the rule of law in terms of protecting individual human dignity. Second, in some specific areas of law Brennan contributed or advanced concrete tests and ideals that already seem to have become bedrock principles. Finally, there are areas of contemporary law in which Brennan's contributions will continue to frame the debate, even if their grasp is eroding.

This essay will examine the influence of Brennan on five facets of American law: government liability and accountability; freedom of speech; separation of church and state; the death penalty; and equality. In each of these fields, as with his entire body of Supreme Court jurisprudence, Brennan developed an overarching driving force that may be his most lasting contribution to legal thought in the United States—the idea that the Constitution, the courts, and indeed, the government itself should be dedicated to the principle of advancing individual human dignity. More than any Justice in history, Brennan advanced the idea that, as he said, "[f]rom its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[2]

In the years before Justice Brennan joined the Court, there were rare, sparse references to human dignity or individual dignity as a constitutional value that grew more frequent in the Warren Court era. But Brennan made human dignity a focal point, first of speeches,[3] and then of his Court opinions, albeit more often in dissent than in majority opinions.[4] For Brennan, although the question of how the Constitution protected and advanced human dignity remained somewhat amorphous, the value of human dignity was a driving force behind providing greater protection for the rights of criminal defendants; finding the death penalty to be cruel and unusual punishment in

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and Human Dignity: The Judicial Soul of Justice Brennan, 7 Wm. & Mary Bill Rts. J. 223 (1998).

2. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

3. Brennan began to develop the concept of law and human dignity in his first James Madison Lecture, delivered at New York University Law School in 1961. *See* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. Rev. 761, 771 (1961).

4. *See e.g. Goldberg*, 397 U.S. at 264–65; *U.S. v. Stanley*, 483 U.S. 669, 684 (1987) (Brennan, J., dissenting); *O'Lone v. Shabazz*, 482 U.S. 342, 368 (1987) (same).

violation of the Eighth Amendment; and advancing equality for different populations in American society.[5]

Since Justice Brennan left the Court in 1990, a number of Justices have discussed the concept of human dignity in their opinions.[6] Although none has embraced the concept as broadly as Brennan did, Justice Kennedy has advanced the idea with greatest frequency, perhaps most powerfully in his opinion striking down the Texas anti-sodomy law.[7]

There is little doubt that Justice Brennan took great pride in helping to make the concept of protecting human dignity a part of the constitutional fabric. As he said in a 1987 speech, "[t]he vision of human dignity embodied in our Constitution throughout most of its interpretive history is, at least for me, deeply moving. It is timeless. It has inspired citizens of this country and others for two centuries."[8]

GOVERNMENT ACCOUNTABILITY AND LIABILITY

Justice Brennan had a lasting impact in changing the paradigm of government interaction with its citizens. Through a series of unrelated opinions and doctrines, he built a body of case law that, viewed as a whole, sought to make government more directly accountable to the people, altering the traditional notion that citizens seek government accountability and responsibility through the electoral process. Taken together, several areas of law in which he wrote important opinions create

5. *See e.g.* William J. Brennan, Jr., J., S. Ct. of the U.S., Remarks, *The Essential Dignity of Man* 4 (Newark, N.J., Morrow Citizens Association on Correction Nov. 21, 1961) (referring to the provisions of the Bill of Rights and noting that "[a]ll of these safeguards stem from the firm conviction of a free society that these safeguards are essential to preserve simple human dignity") (copy on file with author); *Furman v. Ga.*, 408 U.S. 238, 270–73 (1972) (Brennan, J., concurring); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (Brennan, J.).

6. *See e.g. Ashcroft v. Al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, Breyer & Sotomayor, JJ., concurring in the judgment); *Brown v. Plata*, ___ U.S. ___, 131 S. Ct. 1910, 1928 (2011) (Kennedy, J.); *Roper v. Simmons*, 543 U.S. 551, 605 (2005) (O'Connor, J., dissenting); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002) (Stevens, J.); *U.S. v. Balsys*, 524 U.S. 666, 713 (1998) (Breyer & Ginsburg, JJ., dissenting).

7. *Lawrence v. Tex.*, 539 U.S. 558, 567 (2003).

8. William J. Brennan, Jr., J., S. Ct. of the U.S., Lecture, *The Worldwide Influence of the United States Constitution as a Charter of Human Rights* 10 (N.Y., N.Y., Colum. L. Sch. Bicentennial Celebration Nov. 20, 1987) (copy on file with author).

a new vision, one that has taken hold in various forms and with different degrees of longevity and tenacity.

The facets of this vision are facilitating citizens' ability to sue local governments for liability and damages; exposing the federal government to constitutional tort actions; and broadening the reach of habeas corpus.[9] The unifying theme in each of these areas of law is that government should answer in court for the harms it causes, either by correcting the misconduct or, where necessary, by compensating those who were harmed or whose rights were violated. This line of cases helped to alter the traditional presumption that if you don't like what government is doing, your main recourse is to vote public officials out of office.

Consider these developments and their impact one at a time. In *Monell v. Department of Social Services*,[10] Justice Brennan wrote that municipal governments could be sued for damages if they violated the civil rights of individuals pursuant to local custom or policy, overruling an established precedent and giving lie to the age-old presumption that you can't sue city hall. Indeed, Justice Brennan said in *Monell* that 28 U.S.C. § 1983, originally passed as Section 1 of the Civil Rights Act of 1871, "was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."[11]

Some critics have suggested that the rule of *Monell* is difficult to administer because it is hard to tell when action is taken pursuant to a municipal custom or policy.[12] Others have faulted Brennan for an unworkable distinction that imposes liability on municipalities for injuries resulting from custom and policy, but holds municipalities immune from *respondeat superior* claims when plaintiffs are wronged by the actions of individual municipal employees or officials.[13] Still more hurdles

9. One Brennan project that failed was curbing the sovereign immunity of the states under the Eleventh Amendment.

10. 436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)).

11. *Monell*, 436 U.S. at 700–01.

12. *See e.g. Board of Commrs. of Bryan Co. v. Brown*, 520 U.S. 397, 417 (1997) (Souter, Stevens & Breyer, JJ., dissenting) (pointing out that the *Monell* requirements "may be satisfied in more than one way," and referring to three alternative theories of liability).

13. *Id.* at 430–31 (Breyer, Stevens & Ginsburg, JJ., dissenting) (noting that *Monell* has generated "a highly complex body of interpretive law").

exist in the form of qualified immunity conferred upon government officials under a variety of circumstances. These limitations and criticisms notwithstanding, however, it now seems well-established that municipal liability is an important available remedy for civil rights violations by local officials.

In a second line of government-accountability cases, Brennan literally created the notion of constitutional torts, enabling individuals to sue the federal government for violations of rights guaranteed by the Bill of Rights. The lead case was *Bivens v. Six Unknown Named Agents*,[14] in which the Court held that an implied right of action to remedy wrongs caused by the actions of federal officials existed directly under the Fourth Amendment.

This cause of action was expanded to other amendments by Brennan,[15] and it has since been expanded in lower federal courts as well. As in the case of *Monell*, the *Bivens* doctrine has encountered hostility in more conservative courts and has faced a wide array of procedural hurdles. In particular, questions arise with some frequency about the relationship between the *Bivens* cause of action and the Federal Tort Claims Act and the degree to which Congress has specified that claims against the federal government and its employees should be pursued in actions brought under the statutory remedy.[16] Still, *Bivens* actions are a force to be reckoned with in the arena of federal government accountability, and seem likely to remain so.

Finally, few undertakings meant more to Brennan than trying to make habeas corpus a meaningful, effective remedy by which, for the most part, convicted criminals could assert that their rights were violated in one or more stages of law-enforcement investigation or in prosecution and trial. In *Fay v. Noia*,[17] Brennan wrote that federal courts should be able to review state criminal convictions unless defendants engaged in "deliberate bypass" by failing to first raise their claims in state court. This standard created a vigorous habeas process for some years, giving defendants a means of complaining about—and

14. 403 U.S. 388 (1971).

15. *See Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

16. *See e.g. Hui v. Castaneda*, 559 U.S. 799 (2010).

17. 372 U.S. 391 (1963).

attempting to remedy—errors and unconstitutional procedures in state proceedings.

The Court has since overruled or limited parts of *Fay*, and Congress has also restricted the scope of federal courts' habeas review of state-court proceedings.[18] But to the extent that habeas remains and will remain an important, if limited, means of holding government accountable, Brennan deserves much of the credit.

THE FIRST AMENDMENT

Brennan's influence on freedom of speech was profound and seems likely to last well into the future. His legacy for religious freedom may be an example of an area of law in which his view, although perhaps no longer carrying the day, may long frame the debate about separation of church and state.

It is possible to argue that no one has done more than Brennan to cement the view that the First Amendment requires a democratic society to accept a high degree of sometimes unwanted—even offensive—speech in order to support genuinely free expression. Perhaps more than any other Justice, Brennan moved the Court's paradigm beyond the famous standard positing that free speech does not include the right of "falsely shouting fire in a theater and causing a panic."[19] Brennan saw clearly that this test did not protect enough speech to foster a system of genuinely free expression.

Brennan led the Court in a direction that now seems established and likely to last well into the future: protecting a broad range of speech even when it is offensive, because that is the only way to promote genuine debate and open expression in a free society. The First Amendment, he wrote for the Court in 1964, reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and

18. *See Coleman v. Thompson*, 501 U.S. 722, 747–48 (1991) (noting that "deliberate bypass" standard was superseded by requirement that plaintiff show cause and prejudice); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending federal statutory scheme to make obtaining federal habeas relief more difficult).

19. *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (Holmes, C.J.) (also articulating famous "clear and present danger" test).

wide-open."[20] A remarkable twenty-five years later he would reiterate that view, writing for the Court in *Texas v. Johnson*[21] that laws prohibiting the burning of the American flag as a form of protest violated the First Amendment. "If there is a bedrock principle underlying the First Amendment," he said there, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[22]

How can we be sure of the longevity of this approach—promoting genuine free expression by accepting a range of speech so broad that it includes even highly offensive speech? Well, there's this: A far more conservative Court, led by Chief Justice John G. Roberts, Jr., applied Brennan's standard to find First Amendment protection even for the deeply offensive and highly controversial protests by a religious group at the funerals of dead soldiers.[23] Articulating a vision of free speech that Brennan himself could well have written a generation earlier, Roberts wrote that

> [s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[24]

While it is of course difficult to know how the values of our society will evolve or change in coming decades, conservatives' solid embrace of this free-speech vision, and their continuing to build on its foundation of liberal support, makes this doctrine a very strong candidate for transcendent value as part of Brennan's legacy.

Brennan was less successful in his effort to cement the view that the Establishment Clause requires a high, sturdy wall of separation between church and state. While it was Thomas

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20. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
21. 491 U.S. 397 (1989) (Brennan, J.).
22. *Id.* at 414.
23. *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207 (2011).
24. *Id.* at 1220.

Jefferson who first used the image of a "wall of separation,"[25] Brennan believed adamantly that the best way to protect freedom of religion in the United States was to keep religion and government separate and then to protect the ability of individuals to practice their faith. To Brennan, this view entailed keeping government almost entirely out of the sphere of religion.

Although he was no originalist, Brennan believed deeply that his approach was rooted in history, in the language of the First Amendment, and in the intent of James Madison and others who contributed to the content of the Bill of Rights. He spelled this out in his most heartfelt discussion of the issue:

> The principles which we reaffirm and apply today can hardly be thought novel or radical. They are, in truth, as old as the Republic itself, and have always been as integral a part of the First Amendment as the very words of that charter of religious liberty.[26]

As the Court has grown more conservative, this view, which Brennan espoused with much success during his tenure, has been eroded by Justices who believe that the First Amendment does not require such strict separation.[27] But to a large degree the Brennan vision of a strict separation between church and state is still the focal point for debate and decision as issues of religious freedom continue to arise.

THE DEATH PENALTY

Justice Brennan was during his tenure, and remains today, the most ardent opponent of the death penalty ever to have served on the Supreme Court. His view was that the death penalty was inherently a violation of the Eighth Amendment because it was in every respect "cruel and unusual

25. *Braunfield v. Brown*, 366 U.S. 599, 604 (1961).

26. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring).

27. At least one Brennan decision has been overruled. *See Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985)).

punishment."[28] His belief in the unconstitutionality of the death penalty became a central identifying feature of his Supreme Court tenure.

While Brennan spoke on this subject most often in dissent, sometimes joined only by Court ally Justice Thurgood Marshall, it is fair to suggest that he played an important role in educating the American people—citizens, lawmakers, and other judges and Justices—about the inequities in the implementation and enforcement of capital punishment. His doubts about the death penalty surely contributed to the moratorium movement that has been gaining ground in the states for some years and seems likely to continue expanding. His oft-expressed concerns seem clearly to have influenced other Justices, at the very least by keeping the issue in the forefront: Justice Harry Blackmun, for example, did not credit Brennan but renounced the use of the death penalty before leaving the Court in 1994.

Brennan certainly did not persuade the Court or the country to abandon capital punishment. But he was a steady source of fuel to keep the fire burning against the death penalty, and that flame seems likely to continue flickering for a long time to come.

EQUALITY

Brennan's legacy for equality in the United States is a tale of some obvious achievement. Yet it also includes some less clear outcomes.

He took the lead on the Supreme Court in bringing gender discrimination within the scope of the anti-bias umbrella of the Equal Protection Clause, explaining the need and his reasoning most clearly in 1973 and then prevailing as a matter of constitutional standards in 1976.[29] This success was clear and lasting. While today's Court does not demand quite as rigorous an explanation for gender-based government actions as it does

28. Brennan first expressed this view in *Furman v. Ga.*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring), and then held to it as long as he remained on the bench, never again voting to uphold a capital sentence.

29. *See Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

for those that are based on race, the place of gender under the equal protection umbrella seems certain to endure.

Less clear is the outlook for affirmative action intended to make up for decades of segregation and other forms of race discrimination. Brennan was a leader on the Court for more than a decade in fighting to preserve the use of affirmative action to promote diversity and to overcome the lingering effects of discrimination. But the vigorous view he espoused is not championed by today's Justices, and the use of affirmative action appears now to be hanging by a thread.

CONCLUSION

The Brennan legacy likely to stand a century from now is a substantial one: He shaped the current constitutional doctrines that seem in some areas destined to remain dominant into the future, and in other areas he framed the debate in ways that will long continue to challenge those who disagree with his interpretations. He left an important and enduring mark in the constitutional sands, one that the tides of history seem unlikely to erase.