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A Justice for All Seasons

By Joel M. Gora

WILLIAM J. Brennan Jr. celebrates two milestones this year: his 80th birthday and his 30th anniversary as an associate justice of the Supreme Court. The latter occasion will place him in a select circle; in this century only Hugo L. Black and William O. Douglas have served as long. His tenure has encompassed seven presidencies, and his hundreds of opinions span 120 volumes of the U.S. Reports.

His three decades on the Court have witnessed turbulent changes in the nation and the world. The Court itself has experienced both the extraordinary developments of doctrine associated with the Warren Court and the major retrenchments identified with the Burger Court.

On the Warren Court, Brennan was at the center of innovation; under the regime of Chief Justice Burger, Brennan is a prominent dissenter, writing more often for history than for the Court.

No one could have foreseen this development in 1956, when President Eisenhower, adhering to a policy of appointing distinguished and moderate appellate court judges, but not unmindful of the electoral advantages, named Justice Brennan—a Northern, urban, Irish Catholic Democrat—to the Supreme Court. Raised in Newark, N.J., as one of eight children of a self-made, well-respected public official, Brennan was an honors graduate of the University of Pennsylvania and of Harvard Law School. After graduation in 1931, he joined a prominent Newark law firm and specialized in the emerging field of labor law.

Following wartime military service as a manpower troubleshooter and negotiator, Brennan returned to law practice in Newark and became involved in drafting major changes in the New Jersey judiciary as part of a new state constitution. Decades later, he would play a major role in urging the use of state constitutions as an additional source of protection for individual rights. In 1949, he was appointed to the state trial court and, in rapid succession, to the appellate court and in 1952 to the New Jersey Supreme Court, a collegial tribunal where Brennan developed the consensus-building skills that would characterize much of his work on the Supreme Court.

The Court that Justice Brennan joined had no clear direction or identity. The school desegregation decisions had not yet been implemented, and concepts like affirmative action had not even been articulated. First Amendment doctrine was mostly a function of ad hoc decision-making as the Court grappled with the issues posed by Communist Party advocacy and association. The rights of the accused, too, were determined by case-by-case adjudication, and the major reforms that would protect defendants against the excesses of local law enforcement were years away.

Notions of using the Constitution to protect private choice on intimate matters such as contraception, abortion and sexual privacy or preference would have seemed visionary. Problems raised by grossly malapportioned state legislatures were viewed as political questions not subject to constitutional measure. Indeed, constitutional restraints seemed largely irrelevant to the conduct of government at the state and local levels.

Through a blend of pragmatism and principle, with an ebullient, gregarious and easy personal manner, Justice Brennan helped change all that.

Landmark opinions

Within a decade, Justice Brennan would write for the Court such landmark opinions as *NAACP v. Button*, 371 U.S. 415 (1963), which recognized public interest litigation as a valid form of political advocacy; *Sherbert v. Verner*, 374 U.S. 398 (1963), which prevented governments from penalizing religious freedom by withholding benefits from religious observers; *Fay v. Noia*, 372 U.S. 391 (1963), the case that dramatically expanded the scope of federal habeas corpus review of state criminal convictions; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which protected citizen-critics of public officials from punitive defamation suits and in the process effected major reforms in First Amendment doctrine and perception; and *Baker v. Carr*, 369 U.S. 186 (1962), which held that challenges to malapportionment were constitutionally justiciable under the equal protection clause and changed the face of American politics for all time.

The aggregate impact of *Button*, *Sullivan* and *Baker* has been to make possible the major issue movements of the past 20 years—civil rights, equal rights, environmental protection, consumer protection and the anti-war movement—by safeguarding legal and citizen advocacy of causes and ensuring responsive legislatures. Justice Brennan also would play a major role in making the protections of the Bill of Rights available to criminal defendants in state and local proceedings.

Having had that impact would be career enough for most justices. But in Justice Brennan's case, it was only the tip of the iceberg.

He has fashioned concepts and developed doctrines that have become part of the very vocabulary of constitutional law. In the First Amendment area, the concerns that freedom of expression needs "breathing space" and that laws regulating speech must not produce the chilling effect of self-censorship were articulated by Justice Brennan.

In the famed Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), the only common ground that united six justices in the short *per curiam* decision that lifted the injunctions against the press was a principle stated by Justice Brennan a decade earlier: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books v. Sullivan*, 372 U.S. 58 (1963).

The "right-privilege" distinction—popularized by one of Justice Holmes' more famous epigrams ("the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman")—was rejected in a series of opinions by Justice Brennan in which he observed: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by denial of or placing of conditions upon a benefit or privilege." This concept also would play an important role in affording due process protections to recipients of social welfare benefits.

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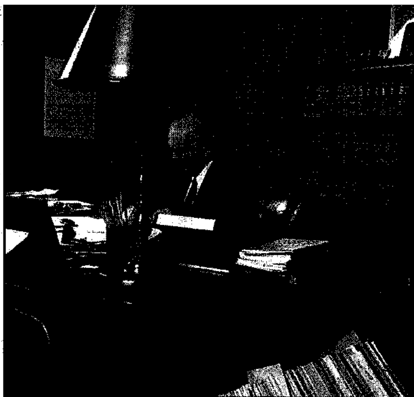

Justice Brennan's refusal in the 1963 *Button* case to allow the use of "mere labels," such as "solicitation" of legal business, to place speech outside the pale of First Amendment protection played a vital role in later cases extending that protection in cases of defamation, offensive remarks and commercial speech.

His 1966 ruling that Congress possessed the power to expand, but not restrict, the meaning of equal protection under the 14th Amendment, *Katzenbach v. Morgan*, 384 U.S. 641, drew much academic criticism. This theory was quietly reaffirmed by the Court in a 1982 opinion written by Justice Sandra Day O'Connor. *Mississippi University for Women v. Hogan*, 458 U.S. 718.

Justice Brennan's protection of personal choice regarding contraception in a 1972 case, *Eisenstadt v. Baird*, 405 U.S. 438, played an important role a year later in Justice Harry Blackmun's landmark abortion decision in *Roe v. Wade*, 410 U.S. 113 (1973).

Robust debate

Lastly, his analysis of the core purposes of the First Amendment in the 1964 *Sullivan* decision, identifying the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," coupled with his observation a year later that "speech concerning public affairs is more than self-expression; it is the essence of self-government," have informed a generation about the central meaning of freedom of expression in a democratic society.

During the early Warren years, Justice Brennan's opinions usually sought the narrow ground in order to achieve a majority. During the heyday of the Warren era, from 1962 to 1969, he was the "playmaker" for the Court, fashioning agreement on the broader statements of constitutional principle associated with that period. But even then, Justice Brennan frequently steered a pragmatic path between ad hoc resolution and absolutist doctrine—the *Sullivan* case, for example, afforded the press extensive protection from defamation suits, but not the absolute immunity that Justices Black and Douglas urged.

In the years since then, Justice Brennan's role has changed markedly. Though on occasion he still orchestrates important rulings, he is more often in dissent, frequently chiding the Court for its departure from Warren Court rulings and occasionally questioning the majority's good faith—particularly in the many cases in which Justice Rehnquist authored the Court's ruling.

He serves now as the Court's conscience, the keeper of the flame, pointing to the more enduring constitutional principles that the Court's decisions too often denigrate or ignore.

But Justice Brennan has not been unfailingly liberal. In his 1957 opinion in *Roth v. United States*, 354 U.S. 476, he ruled that obscenity, narrowly defined, was not part of "the freedom of speech," a position he altered years later, too late for a more normal First Amendment approach. Justice Brennan's 1966 ruling in the Ralph Ginzburg case, (*Ginzburg v. United States*, 383 U.S. 463), upholding an obscenity conviction because of the manner in which the materials were marketed, was, as one observer put it, "not to his credit."

That same year, his decision that the compulsory extraction of blood samples from a suspected drunk driver did not amount to "testimonial compulsion" and thus was not barred by the privilege against self-incrimination drew dissents from the Court's liberal wing.

Throughout these periods, however, there has been a remarkable consistency to Brennan's views of constitutional principles. The guiding vision he consistently invokes is "the constitutional ideal of libertarian dignity protected through law." The principles that inform this vision are manifest in his jurisprudence.

Individual autonomy

First is a commitment to individual autonomy and privacy. He has been a vigorous champion of Fourth Amendment rights against unreasonable search and seizure and of the Fifth Amendment privilege against self-incrimination, which together create "nothing less than a comprehensive right of personal liberty in the face of governmental intrusion." *Lopez v. United States*, 373 U.S. 427 (1963)(dissent). Accordingly, he has bitterly opposed the recent erosion of the Fourth Amendment-based exclusionary rule and of the protections associated with the *Miranda* decision.

Concern for individual autonomy also can be seen in Justice Brennan's opinions in the areas of sexual freedom, family planning and the right of intimate association, which reflect his appreciation of a domain of personal choice, a sanctuary free from official coercion or compulsion. Finally, Justice Brennan's development of First Amendment barriers to self-censorship reflects a similar sense that individuals must be left free to engage in speech and association.

Equality is another component of libertarian dignity, and Justice Brennan has been a vigorous advocate of eliminating all forms of second-class citizenship. He has written key decisions in the area of school desegregation that provide the lower courts with effective remedial tools. He has written movingly against laws that discriminate against minorities by imposing a majority's views of appropriate family living arrangements and uses of language. Justice Brennan has been in the forefront of judicial efforts to secure constitutional equality for women.

His 1973 opinion holding that gender classifications were, like race and national origin, suspect and subject to strict scrutiny fell one vote short of commanding a majority of the Court. *Frontiero v. Richardson*, 411 U.S. 677. Three years later, he fashioned a consensus on the slightly less demanding standard of review for gender-based distinctions that the Court has employed ever since to invalidate most such laws. *Craig v. Boren*, 429 U.S. 190. In a *tour de force* in 1982, Justice Brennan persuaded a majority to join him in holding that laws that deprive illegal alien children of a free public education help to perpetuate a permanent underclass and are inconsistent with our principles of equality under law. *Plyler v. Doe*, 457 U.S. 202. And, of course, his reapportionment decision in *Baker v. Carr* made a critical contribution to the goal of equal political rights.

Human dignity is another foundation of Justice Brennan's vision. He has insisted that laws allocating social welfare benefits comport with the requirements of due process and equal protection. Employing principles of equal treatment, he wrote for the Court in 1969 that since such laws condition "the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life," a one-year residency waiting period, which both deprived people of necessities and hampered their ability to move into the community, would be subject to strict constitutional scrutiny. *Shapiro v. Thompson*, 394 U.S. 618.

A year later, in *Goldberg v. Kelly*, 397 U.S. 254, he persuaded the Court that individuals claiming a statutory entitlement to welfare assistance were entitled

by due process to a hearing before a decision could be reached that they no longer were eligible for benefits, a principle that was quickly applied to other government largesse and licenses. While these decisions have been buffeted considerably by later Burger Court rulings, their sense of decency and dignity survives.

His concern for human dignity also has caused Justice Brennan to dissent in all cases involving the imposition of the death penalty. As he recently put it: "The calculated killing of a human being by the State involves, by its very nature, an absolute denial of the executed person's humanity. The most vile murder does not, in my view, release the State from constitutional restraints on the destruction of human dignity."

Official accountability

But one pervasive theme informs Justice Brennan's vision of libertarian dignity: the concept of official accountability. This theme may be his most enduring contribution to constitutional law. It takes three basic forms: procedural, judicial and political.

Procedural accountability is designed to ensure a first line of defense against arbitrary official actions. Reflecting the former trial lawyer's appreciation of the role of procedural safeguards in protecting substantive rights, this theme can be seen in much of Justice Brennan's work: insisting in the First Amendment area on placing the burden of proof on the censor and not the speaker; requiring fair procedures before government benefits may be withheld or withdrawn from a presumably entitled beneficiary; in criminal law, articulating the need for having lawyers present at lineups, for requiring *Miranda* warnings, and for an independent magistrate to safeguard Fourth Amendment protections against unreasonable searches and seizures.

In the *Leon* case in 1984, Justice Brennan bitterly dissented when the Court held that the police might reasonably rely on a defective warrant simply because a magistrate issued it. *United States v. Leon*, 468 U.S. 897. Very recently, the Court declined review in a case where a magistrate had issued an arguably defective warrant simply because the police requested one. Justice Brennan summarized the operation of the two rules: "The combined message of *Leon* and the Court's refusal to grant certiorari in this case is that the police may rely on the magistrates and the magistrates may rely on the police. On whom may the citizens rely to protect their Fourth Amendment rights?" *McCommon v. Mississippi*, 106 S. Ct. 393 (1985).

Justice Brennan also seeks official accountability through vigorous judicial review. He has been a champion of increased access to the federal courts and the primary Court advocate of an expansive interpretation of state constitutions by state courts.

Linking the two approaches is his view that "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." Thus, he dramatically broadened the range of federal habeas corpus review of state criminal convictions because the Great Writ's "root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment." *Fay v. Noia*, 372 U.S. 391 (1963).

Justice Brennan has been the principal author of a number of key decisions vitalizing the statutory cause of action to redress violations of federal rights by state and local officials, and it was his ruling that fashioned a constitutional cause of action for damages against federal officials who violate citizens' rights. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

In recent years he has vehemently protested the federal courts' excessive use of abstention, standing and other "door-closing" devices because he views those courts as the "*primary* and powerful reliances for vindicating" federal rights.

Hallmarks of democracy

But perhaps Justice Brennan's most important contribution has been to foster the principles of political accountability. Democracy turns not so much on government's accountability to the courts, but to the people. His decisions have played a central role in expanding uninhibited discussion of public matters and in ensuring equal participation in political determinations—the dual hallmarks of a democratic society.

In October, Justice Brennan will have spent 30 years on the Supreme Court. He turned 80 in April. His wife, Mary, worked for the Court for 40 years.

Justice Brennan's career on the Court compels consideration of one final issue of accountability, which is the perpetual paradox of judicial review in a democracy: to whom shall the judges be accountable? There are, to be sure, many constraints on the Court—constitutional, institutional, precedential and professional—but these mark the outer boundaries of judicial power. In the main the justices are unfettered in their interpretation of the Constitution's text and principles. This phenomenon has intrigued scholars, cautioned judges and occasionally, as now, angered political leaders into calls for "strict construction."

Recently, these issues have been raised by Attorney General Edwin Meese, who, in a widely publicized speech to the American Bar Association's annual meeting last year, criticized a number of Court rulings as "more policy choices than articulations of constitutional principle" and urged, instead, a "jurisprudence of original intention." Several weeks later, Justice Brennan took the unusual step of commenting on such views at a law school symposium:

> "We current Justices read the Constitution in the only way that we can: as 20th century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time."

The democratic leap of faith that the paradox of judicial review requires, in entrusting to the justices of the Court the articulation of constitutional principles, has been amply vindicated in the case of Justice Brennan. His colleague and friend, Chief Justice Warren, remarked 20 years ago that Justice Brennan "administers the Constitution as a sacred trust." Through the many changes in the Court that his tenure has encompassed, Justice Brennan has remained remarkably faithful to that trust.

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