Justice William J. Brennan, Jr.: A Justice for All Seasons

Joel Gora

Follow this and additional works at: https://brooklynworks.brooklaw.edu/faculty

Part of the Courts Commons, Judges Commons, and the Legal Biography Commons

Recommended Citation

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.
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.

June 15, 1986 • Volume 72 19
Justice Brennan's refusal in the 1965 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.


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 unfaithfully 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 princi-
ple that was quickly applied to other
government largesse and licenses. While
these decisions have been buffeted con-
siderably by later Burger Court rulings,
their sense of decency and dignity sur-
vives.

His concern for human dignity also has
cast 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
consitutional restraints on the destruc-
tion of human dignity."

Official accountability
But one pervasive theme informs Jus-
tice Brennan's vision of libertarian digni-
ty: the concept of official accountability.
This theme may be his most enduring
contribution to constitutional law.
It takes three basic forms: procedural, judi-
cial 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 protect-
ing 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 proce-
dures before government benefits may be
withheld or withdrawn from a presum-
ably entitled beneficiary; in criminal law,
articulating the need for having lawyers
present at lineups; for requiring Miranda
warnings, and for an independent magis-
trate to safeguard Fourth Amendment
protections against unreasonable search-
es and seizures.

In the Leon case in 1984, Justice Bren-
nan 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 defec-
tive warrant simply because the police
requested one. Justice Brennan summa-
rized 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

Justice Brennan also seeks official ac-
countability through vigorous judicial re-
view. He has been a champion of in-
creased access to the federal courts and
the primary Court advocate of an expan-
sive 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 citi-
zens." 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

Justice Brennan has been the principal
author of a number of key decisions vita-
Izizing 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 feder-
al officials who violate citizens' rights.
Bivens v. Six Unknown Named Agents,

In recent years he has vehemently pro-
tested the federal courts' excessive use of
abstention, standing and other "door-
closing" devices because he views those
courts as the "primary and powerful reli-
ces 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 govern-
ment's accountability to the courts, but to
the people. His decisions have played a
central role in expanding uninhibited dis-
cussion of public matters and in ensuring
equal participation in political deter-
minations—the dual hallmarks of a
democratic society.

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 democra-
cy: to whom shall the judges be accounta-
ble? There are, to be sure, many con-
straints on the Court—constitutional,
institutional, precedential and pro-
fessional—but these mark the outer
boundaries of judicial power. In the main
the justices are unfettered in their inter-
pretation of the Constitution's text and
principles. This phenomenon has in-
trigued scholars, cautioned judges and oc-
casionally, as now, angered political lead-
ers 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 prin-
ciple" 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 Con-
stitution 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 cur-
rent needs. What the constitutional fun-
damentals 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 "ad-
ministers the Constitution as a sacred
trust." Through the many changes in the
Court that his tenure has encompassed,
Justice Brennan has remained remark-
ably faithful to that trust.

June 15, 1986 • Volume 72 21
INTENTIONAL BLANK
INTENTIONAL BLANK