IN MEMORIAM

THE PULSE OF LIFE IN JUSTICE BRENNAN'S JURISPRUDENCE

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When he was appointed to the United States Supreme Court in 1956, he likened himself to "the mule that was entered in the Kentucky Derby. I don't expect to distinguish myself," he demurred, "but I do expect to benefit from the association with so many who collectively and individually do so much."[1] His colleagues on the Warren Court included such legal giants as Hugo Black, Felix Frankfurter, William O. Douglas, and Chief Justice Earl Warren. Pundits warned the public not to expect too much from William J. Brennan, Jr. by comparison. He was, after all, a political appointment, a relatively unknown New Jersey state judge, chosen because President Dwight D. Eisenhower felt his re-election bid needed a boost from northeastern Catholics. *Time* magazine introduced Brennan to its readers as "[a]n affable, story-telling Irishman,"[2] and "much-sought after-dinner speaker."[3] *Life* called him "a genial, outgoing, even garrulous man, much more like a successful toastmaster than a sobersided jurist."[4]

By the time he retired some thirty-four years later, however, Brennan had established himself as the seminal justice of the twentieth century. In May 1984, the conservative *National Review* conceded begrudgingly,

> Today, after more than a quarter-century of service on the High Court—a tenure exceeded by only a handful of Justices—William Brennan remains a figure largely overlooked by the public. Yet an examination of Brennan's opinions, and his influence upon the opinions of his colleagues, suggests that there is no individual in this country, on or off the Court, who has had a more profound and sustained impact upon public policy in the United States for the past 27 years.[5]

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1. William J. Brennan, Jr., Remarks at the Meeting of the Federal Bar Association, Washington, D.C. (Nov. 29, 1956) (transcript on file with author).
2. *The Ninth Justice: A Happy Irishman*, TIME, Oct. 8, 1956, at 25, 25.
3. *Id.*
4. *A Fine Judge Ready for His Biggest Job*, LIFE, Oct. 29, 1956, at 115, 115-16.
5. Stephen J. Markman & Alfred Regnery, *The Mind of Justice Brennan: A 25-Year Tribute*, NAT'L REV., May 18, 1984, at 30, 30.

Justice David H. Souter, who succeeded Brennan in 1990, has asserted, "One can agree with the Brennan opinions and one may disagree with them. But their collective influence is an enormously powerful defining force in the contemporary life of this republic."[6] According to Souter, "The fact is that the sight and sound and thought of our contemporary world is in a great measure the reflection of Justice Brennan's constitutional perceptions."[7]

William Joseph Brennan, Jr., was born on April 25, 1906, the second of eight children of Irish Catholic immigrants. His father arrived in New Jersey from his native County Roscommon in 1893. The elder Brennan shoveled coal in Ballantine's Brewery in Newark, rose through the ranks of the labor movement, and eventually gained elective office, becoming Newark's public safety director, the city's most powerful public official.

As a boy, Justice Brennan earned money by milking cows and delivering milk, pumping gas, and making change for rush hour trolley car commuters. Later, he worked his way through the University of Pennsylvania's undergraduate Wharton School of Finance and Commerce. With the support of his first wife, the former Marjorie Leonard, he graduated from Harvard Law School in 1931.

After law school, he became the first Catholic hired on a permanent basis by Pitney, Hardin & Skinner, the top corporate firm in his hometown of Newark. World War II interrupted his successful law practice. During the war, Brennan served as one of the army's top labor trouble-shooters and procurement officials. At war's end, he separated from the service at the rank of full colonel—having been awarded the Legion of Merit.

He began his judicial career in January 1949, when New Jersey Governor Alfred E. Driscoll made him a trial judge. He distinguished himself as an administrative reformer, and was elevated by Driscoll to the state's highest court in March 1952. He served there until he was called to President Eisenhower's attention following the retirement of United States Supreme Court Associate Justice Sherman Minton in 1956.

Justice Brennan died on July 24, 1997, at the age of 91. He is survived by his second wife, the former Mary Fowler; three children from his first marriage, William Joseph III, Hugh Leonard, and Nancy; and his grandchildren. He was buried in the Supreme Court Circle at Arlington National Cemetery.[8]

Following his death, President Bill Clinton eulogized him as "one of the most influential jurists in our nation's history,"[9] lauding him as "the

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6. David Souter, Remarks at the Harvard Club of Washington, D.C. Reception in Honor of Justice William J. Brennan, Jr. (Sept. 30, 1992) (on file with author).

7. *Id.*

8. For a discussion of Justice Brennan's life and work, see HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR (1995); KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993).

9. David G. Savage, *Death of a Liberal Icon: Justice William J. Brennan Jr. Shaped Constitutional Law Through Personality, Perseverance and Vision*, A.B.A. J., Sept. 1997, at 30, 30 (quoting President Clinton).

staunchest, most effective defender of individual freedom."[10] The President declared that Justice Brennan's "devotion to the Bill of Rights inspired millions of Americans, and countless young law students, including [himself]."[11]

At Brennan's funeral at St. Matthew's Cathedral in Washington, D.C., on July 29, 1997, the President told the assembled mourners:

> As a young man growing up in the South, I lived through the shame of segregation. I know what it meant when the Supreme Court spoke unanimously and said Little Rock Central High School must open its doors to all. Then, I knew things would never be the same. Now, I know that this transformation was written into our law by Justice Brennan. He became a hero to me, a model for law and service, a real belief to me that if the law could serve justice and equality, then 25 years ago, young people like Hillary and me could go into the law, because we thought, like him, we could make a difference by upholding the Constitution's dignity and meaning and working to make it more real in the lives of all Americans.[12]

His impact on the law was monumental. Throughout the Warren Court's liberal heyday, Justice Brennan served as the Court's chief spokesperson on such diverse and emotionally charged issues as racial integration, freedom of speech and of the press, the proper relationship between church and state, and obscenity.[13] Later, during the more conservative Burger and Rehnquist Courts, he continued to achieve major successes,[14] but he found

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10. *Id.*

11. Lyle Denniston et al., *Brennan, Long a Liberal on High Court, Dies at 91*, BALTIMORE SUN, July 25, 1997, at 1A, *available in* 1997 WL 5521858 (quoting President Clinton).

12. William J. Clinton, Remarks at the Funeral of Justice Brennan (July 29, 1997), *in* U.S. NEWSWIRE, July 29, 1997, *available in* 1997 WL 5714445.

13. According to Yale University law professor Owen Fiss, Chief Justice Warren recognized Brennan's intellectual gifts early on. It was the Chief Justice's prerogative when he voted with the majority on a given matter to assign the writing of the opinion. Time and again, Warren used this power to make Brennan what Fiss called "the justice primarily assigned the task of speaking for the Court." Owen Fiss, *A Life Lived Twice*, 100 YALE L. J. 1117, 1119 (1991). According to Fiss,

> Brennan could be trusted to choose his words in a way that would minimize the disagreement among the justices not only to avoid those silly squabbles that might interfere with the smooth functioning of a collegial institution, as the Court most certainly is, but also to produce a majority opinion and strengthen the force of what the Court had to say. Only five votes are needed for a decision to become law, but the stronger the majority and broader the consensus, the more plausible is its claim for authority.

Id. at 1120.

14. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (establishing that gender-based classifications are subject to stricter scrutiny under the Fourteenth Amendment's Equal

himself dissenting with greater frequency.[15] Undaunted, he came to relish his role as the conservative Courts' leading dissenter. The dissent, he stated, is "offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."[16] He expressed his view of the role played by dissents and dissenters as follows:

> The most enduring dissents are the ones in which the authors speak, as the writer Alan Barth expressed it, as "Prophets with Honor." These are the dissents that often reveal the perceived congruence between the Constitution and the "evolving standards of decency that mark the progress of a maturing society," and that seek to sow seeds for future harvest. These are the dissents that soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.[17]

In all, Justice Brennan wrote 533 majority opinions, 346 concurrences, and 694 dissents, a prodigious legacy that reflects his dazzling intellectual versatility and vision,[18] as well as his phenomenal self-discipline and capacity for hard work.[19] His judicial opinions fill some forty feet of shelf space.[20] In

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Protection Clause than that which had been provided under the mere rational basis test); Keyes v. Denver Sch. Dist. No. 1, 413 U.S. 189 (1973) (making clear that school desegregation was a nationwide obligation, not confined merely to the South); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that state welfare payments cannot be terminated without according recipients a hearing at which they can appear in person, present evidence, and cross-examine witnesses).

15. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting) (stating that the death penalty is cruel and unusual punishment prohibited under the Eighth Amendment); Milliken v. Bradley, 418 U.S. 717, 781 (1974) (Marshall, J., dissenting joined by Brennan, J.) (arguing that school district boundaries should not serve as barriers to the desegregation of the nation's schools); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62 (1973) (Brennan, J., dissenting) (advocating that education is a fundamental right warranting the application of strict scrutiny to any classification that affects that right).

16. William J. Brennan, Jr., In Defense of Dissents, Mathew O. Tobriner Memorial Lecture, Hastings College of Law, University of California 4 (Nov. 18, 1985) (transcript on file with author).

17. *Id.* at 5.

18. Fiss explains Brennan's emergence as the intellectual leader of the Warren Court as follows:

> Law is a blend of the theoretical and the technical, and though there were others as gifted as Brennan in the formulation of a theoretical principle, there was no one in the ruling coalition . . . who had either the patience or the ability to master the technical detail that is also the law. Everyone on the Court, law clerk and justice alike, admired Brennan's command of vast bodies of learning, ancient and modern. He knew the cases and the statutes, and how they interacted, and understood how the legal system worked and how it might be made to work better. Among the majority, he was the lawyer's judge.

Fiss, *supra* note 13, at 1120.

19. Justice Brennan's daughter Nancy recalled her girlhood memories of her father's work habits in a 1989 interview for *Constitution* magazine. She told interviewer Donna Haupt:

addition, his official files in the Library of Congress occupy roughly 346.8 linear shelf feet, and consist of approximately 305,000 items that span the length of this service on the Court—early drafts of opinions, memorandums from law clerks or among the justices, correspondence, and so on. According to Justice Souter, "the sheer number, the mass of opinions" written by Brennan has created what Souter calls "the gravitational pull of the Brennan total," which is alone enough to project his influence well into the next century and perhaps beyond.[21]

What emerges from this vast body of work are what I call the seven salient features of his jurisprudence. They are as follows:

First, an insistence that the United States Constitution should be read as a living document and interpreted in light of modern sensibilities and circumstances, a doctrine he referred to as "contemporary ratification." This view contradicts directly those who emphasize the need to discern the original intent of the Framers in interpreting the Constitution. In fact, Brennan maintained that professed adherence to the original intention of the framers was "little more than arrogance cloaked as humility."[22] He once explained:

> It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All to often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions and hid their differences in cloaks of generality.

> Dad would come in every night with a full briefcase and spend the time before dinner talking with my mother and listening to the news. We almost invariably ate between 6 and 6:30 and then one of two things happened. Either he'd go up to the den and sit at his old desk that was falling apart. Or, more commonly he 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, until 9:30 or 10.

Donna Haupt, *Justice William J. Brennan, Jr.*, CONSTITUTION, Winter 1989, at 50, 54-55.

In addition, Ms. Brennan remembered that on Saturday and Sunday mornings, the Justice would usually "be at the card table by 8:30 or 9, working through most of the day." *Id.* at 55.

20. By Justice Brennan's own calculation, he wrote 461 majority opinions, 425 dissents, and 474 "other" opinions. WILLIAM J. BRENNAN, JR., *My Life on the Court, in* REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 17 (Rosenkranz & Schwartz eds., 1997) [hereinafter REASON & PASSION]. I do not know the basis of his calculation. My count is based on a search of the Westlaw data base using the judge field (ju)—i.e., "ju(brennan)"—for his majority opinions, concurrences, and dissents. At any rate, according to the Justice, his opinions, "all bound neatly in red," occupied "forty-odd shelf feet" in his chambers at the Supreme Court. *Id.*

21. *Id.*

22. William J. Brennan, Jr., The Constitution of the United States: Contemporary Ratification, Text and Teaching Symposium at Georgetown University, Washington, D.C. (Oct. 12, 1985), *in* 27 S. TEX. L. REV. 433, 435 (1986).

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> Current Justices read the Constitution in the only way we can: as twentieth-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.[23]

Second, he was deeply committed to the belief, rooted in his conception of substantive due process,[24] as well as in his spiritual precepts,[25] that the object of the Constitution is to protect and advance human dignity, which he ranked alongside liberty as one of the two "true measures of freedom."[26] And human dignity, in his view, can only be achieved through full opportunity and the eradication of bias. He stated: "'The supreme value of democracy is the dignity and worth of the individual; hence a democratic

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23. *Id.* at 435, 438.

24. Brennan asserted that the Court should apply the Fourteenth Amendment's Due Process Clause in accordance with the views expressed in Justice Frank Murphy's dissent in *Adamson v. California*, 332 U.S. 46 (1947). *See* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 769 (1961). In contrast to the total incorporationist position advocated by Justice Black, which was that "due process" was limited to those rights specifically enumerated in the federal Bill of Rights, Murphy had, in Brennan's words, "indicated that the door may be opened to still more" rights under the Due Process Clause. *Id.* Murphy wrote in his dissent in *Adamson*:

> I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

Adamson v. California, 332 U.S. at 124 (Murphy, J., dissenting).

25. The social teachings of the Catholic Church have always "'put the dignity of the person at the center of her social messages.'" Lucia Ann Silecchia, Address, *On Doing Justice & Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163, 1168-69 (1997) (quoting Pope John Paul II); *see also* CATECHISM OF THE CATHOLIC CHURCH 468 (1994) ("Social justice can be obtained only in respecting the transcendent dignity of man.").

On the one hand, Brennan believed strongly in the separation of church and state. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). In fact, his mammoth concurrence in *Schempp* still stands as one of the most powerful articulations of the doctrine that a wall separating church and state should be not only be maintained but kept high.

At the same time, however, his "separationist" views did not preclude him from studying and using religious tenets and canon law doctrine to inform and to supplement his understanding of the Constitution. Personally, his friends described him as a catholic with a small "c," a decent person, and God-fearing, but not a zealous individual. *See* CLARK, *supra* note 8, at 109-10.

26. BRENNAN, *supra* note 20, at 21.

society is a commonwealth of mutual deference—a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture or class.'"[27]

Third, he embraced a multidisciplinary approach to the law and constitutional interpretation, rejecting the notion that law can somehow isolate itself and yet still achieve "greater perfection in the study of the human condition."[28] He insisted:

> He is an unwise lawyer who rejects what can be learned from history and sociology and psychology.
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> . . . The mind of the layman unfamiliar with the judicial process supposes it to exist in the air, as a self-justifying and wholly independent process. The opposite is of course true, that judicial decision must be nourished by all the insights that scholarship can furnish and legal scholarship must in turn be nourished by all the disciplines that comprehend the totality of human experience.[29]

Fourth, he believed the Constitution should be interpreted with both reason and passion. By reason, he meant with tactical skill and acumen. By passion, he meant that judges should never forget that they are framing not just abstract legal principles, but decisions that have a very real impact on human lives. In fact, he asserted, "In the bureaucratic welfare state of the late twentieth century, it may be that what we need most acutely is the passion that understands the pulse of life beneath the official version of events."[30] He maintained, "The characteristic complaint of our times seems to be not that government provides no reasons, but that its reasons often seem remote from the human beings who must live with their consequences."[31]

Fifth, he was committed to judicial activism with a zeal borne of confidence in the correctness of his view as to the appropriate role of judges and the courts under our constitutional form of government. He opposed those who urged judicial self-restraint in the face of what he saw as grievous wrongs that compelled redress, such as pervasive race and gender discrimination, malapportionment, and the arbitrary or capricious denial or withholding from citizens of essential government benefits.[32] He declared:

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27. William J. Brennan, Jr., Law and Social Sciences Today, The Gaston Lecture at Georgetown University, Washington, D.C. 2 (Nov. 25, 1957) (on file with author) (quoting Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 212 (1943)).

28. *Id.* at 4.

29. *Id.* at 7-8.

30. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 22 (1988).

31. *Id.*

32. For a discussion of social injustices prevalent during the era in which Brennan came to power, see *infra* notes 102-03 and accompanying text.

> Judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases will not serve to enhance [James] Madison's priceless gift of "the great rights of mankind secured under this Constitution." For these secure the only climate in which the law of freedom can exist.[33]

Sixth, he asserted the primacy of the First Amendment. Asked once by an interviewer whether he had a "favorite" part of the Constitution, he replied, "The First Amendment I expect. It's [sic] enforcement . . . gives us this society. The other provisions of the Constitution really only embellish it."[34] Given these sentiments, it is entirely fitting that Brennan is best remembered for his opinions that expounded upon and expanded what he called the First Amendment's "cherished rights of mind and spirit—the freedoms of speech, press, religion, assembly, association and petition for redress of grievances."[35]

Lastly, his jurisprudence embodies a profound pragmatism, a willingness to respect and incorporate into his opinions the divergent views of his colleagues on the Court. He was fond of telling his law clerks that "five votes can do anything around here."[36] And he was always open to compromises that would enable him to garner the majorities that he needed to advance, albeit sometimes incrementally, his ultimate goals. As Brennan's long-time friend Norman Redlich, dean emeritus of New York University School of Law, has observed, "I don't think any other justice could combine his judicial skills, his legal skills, with his political skills—and I use the word political in a good sense."[37] It was his characteristic pragmatism, his political acuity, which inspired me to entitle my biography *Justice Brennan: The Great Conciliator*.

It was also this pragmatic quality which enabled him to become, in the words of University of Tulsa law professor Bernard Schwartz, "the most influential associate justice in Supreme Court history."[38] According to Schwartz, "More than any other justice, Brennan was the strategist behind Supreme Court jurisprudence."[39]

Brennan's goal was always double-edged: attract moderate justices to the liberal fold and move the Court's conservative members more to the center by having them write their opinions more narrowly. Usually, he tried to accomplish his objectives by writing his Brethren personal letters setting forth his thoughts about cases under review rather than through face-to-face confrontations or formal legal memorandums. Frequently he would rely on his

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33. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 778 (1961).

34. Haupt, *supra* note 19, at 52 (quoting Justice Brennan).

35. William J. Brennan, Jr., The Supreme Court and the Meikljohn Interpretation of the First Amendment, The Alexander Meiklejohn Lecture at Brown University (Apr. 14, 1965) *in* 79 HARV. L. REV. 1, 3 (1965).

36. Denniston et al., *supra* note 11, at 1A.

37. *Id.*

38. *Id.*

39. *Id.*

law clerks to mingle and share his thoughts with other justices' clerks. His hope was that they, in turn, would influence the justices for whom they worked.

Often, however, he engaged in direct, personal diplomacy to great effect. In 1990, the late Thurgood Marshall said of the man his grandson William was named after, "There's nobody here that can persuade the way Brennan can persuade. Brennan will sit down with you and show you where you're wrong. Well, there's nobody with that power on the Court today."[40]

Recalling his colleague of nearly twenty years on the Court, former Justice Harry Blackmun has written:

> Some commentators have described Justice Brennan primarily as a "consensus builder," able to pull five justices together to a common ground of his liking. Perhaps so. If that image compels an image of a chambers-visiting, table-pounding advocate—as, in my eyes, the description seems to do—that was not my experience with Justice Brennan. Instead, my experience with him was that he stated his case—at conference and in any opinion he circulated—in quiet but firm tones, persuasively to be sure, but never in a two-fisted, belligerent, or quarrelsome manner. He was a gentleman, first and foremost, and quite content to leave the infighting and elbow-punching to others. I cannot say that he enjoyed the infighting. He watched and, I suppose, tolerated it. Yet he could be embarrassed by it, too, as was evident to me on occasion. And who is to say that his is not the far better approach?[41]

On September 30, 1992, the Harvard Club of Washington, D.C., hosted a reception in Justice Brennan's honor in the grand ballroom of the National Press Club. Justice Souter, who, like Brennan, is a graduate of Harvard Law School, was asked by the guest of honor to serve as toastmaster for the event. Souter used the occasion to quote from an open letter to Brennan that had been written by one of Brennan's former law clerks. The letter reminisced about the irresistible personal charm which his former boss used so effectively to gain sway. It read in part:

> You were talking to someone in the hallway or stairs, a guard, a gardener, a janitor. You pick up your previous conversation with him and remember it as if he were your closest friend. You talk about him and never about yourself. You use his name in every sentence or you call him "pal." You grasp onto his arm while talking and never let go as long as the conversation lasts. We used to call it "taking the pulse."

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40. MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 367 (1992).

41. Harry A. Blackmun, *Justice Brennan's Influence on His Colleagues*, *in* REASON & PASSION, *supra* note 20, at 326, 327.

> As you part, you reiterate how delighted you are to have seen him. And he believes he has made your day just by talking to you. He feels that way not because you put on a good act but because it is true.[42]

As another former Supreme Court law clerk who met Brennan during the late 1950s has concluded, "He had an incredibly outgoing and friendly personality which went hand in hand with his consummate political skill. It is easy to understand how he became a great influence on the Court with such a personality to go along with his strong intellectual capacity."[43] According to conservative Justice Antonin Scalia, "Even those who were most in disagreement with him loved him."[44]

Brennan, for his part, was modest, which is a rare and immensely attractive virtue in a powerful man. Before his death, he provided the following assessment of his life's work:

> The truth, which I cannot stress strongly enough, is that I served on a court of nine. The strides we made on the Court during my tenure we made as a team. The majority opinions that bear my name could not have existed without my colleagues' input and votes. I was never alone, except occasionally in dissent. And there is no 'Brennan legacy' that can be teased out and considered on its own merits.[45]

Four of his many opinions, which literally changed the course of history, exemplify best the salient features of his jurisprudence, combined with his uncanny skill at building consensus on the Court. The first is *Cooper v. Aaron*,[46] in which he cobbled together from among his colleagues an unprecedented expression of support for racial integration. The second is *Roth v. United States*,[47] which shows the influence of canon law doctrine on his thinking, but in the end sublimates it to his belief in the primacy of the First Amendment. Third is *Baker v. Carr*,[48] the most comprehensive exposition of his judicial activism. And fourth is *New York Times Co. v. Sullivan*,[49] which brings together his profound dedication to the First Amendment freedoms with his unwavering commitment to racial equality.

Cooper, one of his earliest decisions, thwarted early white supremacist efforts to undermine the Court's 1954 ruling in *Brown v. Board of Education*,[50] which had outlawed racial segregation in the nation's public schools. It involved the case of the "Little Rock Nine," African American students

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42. David Souter, Remarks at the Harvard Club of Washington, D.C., Reception in Honor of Justice William J. Brennan, Jr. (Sept. 30, 1992) (on file with author).
43. Letter from Alan C. Kohn to Hunter R. Clark (July 16, 1993) (on file with author).
44. Denniston et al., *supra* note 11, at 1A.
45. BRENNAN, *supra* note 20, at 17-18.
46. Cooper v. Aaron, 358 U.S. 1 (1958).
47. Roth v. United States, 354 U.S. 476 (1957).
48. Baker v. Carr, 369 U.S. 186 (1962).
49. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
50. Brown v. Board of Educ., 347 U.S. 483 (1954).

who had been barred from entering Central High School in the Arkansas capital on orders of Governor Orval Faubus. Faubus's actions, and similar tactics undertaken by his segregationist cohorts across the south, were part of a concerted campaign of "Massive Resistance" to *Brown*.

In an extraordinary display of solidarity that has not since been repeated, the *Cooper* opinion was signed by all nine justices. But it was written principally by Brennan, who had circulated a first draft for his colleagues' comments, then painstakingly incorporated into numerous subsequent drafts their views and words until the ideas and perspectives of all nine were melded into a single, forceful voice.[51] The ruling reasserted boldly the supremacy of the federal judiciary in interpreting the United States Constitution, and reiterated the Court's commitment to racial equality.

Cooper declares:

> [T]he federal judiciary is supreme in the exposition of the law of the Constitution . . . .
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> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . . A Governor who asserts a power to nullify a federal court order is similarly restrained. . . .
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> . . . State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.[52]

Roth, another of his early decisions, put an end to the kind of official censorship that had placed many of the world's great books off limits to American readers. *Roth* came at a time when the courts were in desperate need of guidance as to the relationship between obscenity and First Amendment freedom, for entirely too many criminal convictions for possessing or distributing obscene materials were based on works of obvious literary value were, in fact, based on some of the world's great books. Prior to *Roth*, titles that had been banned as obscene in various parts of the United States included such classics as *An American Tragedy* by Theodore Dreiser,

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51. According to Chief Judge Richard S. Arnold:

> It is well known that Justice Brennan wrote the Court's opinion in *Cooper v. Aaron*, or most of it, at any rate. (The Justice told me that Justice Black wrote the opening paragraph, and that Justice Harlan inserted into the last paragraph the statement that the three new Justices who had come to the Court since the first opinion in *Brown v. Board of Education*, Justices Harlan, Brennan, and Whittaker, were fully persuaded of the correctness of the opinion.)

Richard S. Arnold, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 6-7 (1997) (footnote omitted).

52. Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

Antic Hay by Aldous Huxley, *Ulysses* by James Joyce, *Elmer Gantry* by Sinclair Lewis, *All Quiet on the Western Front* by Erich Maria Remarque, *Casanova's Homecoming* by Arthur Schnitzler, *Strange Fruit* by Lillian Smith, and *Memoirs of Hecate County* by Edmond Wilson.[53]

On the one hand, Brennan found obscene materials personally abhorrent.[54] He adhered to the canon of his catholic faith, which was that obscenity was wrong, the "certain effect" of obscene literature being "the incitement to illicit sexual thought, or activity."[55] He believed that this illicit thought and activity included disrespect for, and violence against, women. These were among the reasons why he concluded on behalf of the Court in *Roth* that "obscenity is not within the area of constitutionally protected speech or press."[56]

At the same time, however, he was concerned with protecting speech designed to bring about political and social changes desired by the American people. He expressed in *Roth* his belief that "All ideas having even the slightest social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties . . . ."[57]

Moreover, he worried that censors would ban not just obscene works, but also any work that discussed or involved sex, no matter how tastefully or tangentially. He was careful, therefore, to distinguish between sex on the one

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53. *See* Anthony Lewis, *Sex and the Supreme Court*, ESQUIRE, June 1963, at 82, 82; *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 745-46 (Kermit L. Hall ed., 1992) (discussing government censorship of books and *Roth*'s impact).

54. Civil libertarians who were unfamiliar with Brennan's personal mores were at a loss to explain his deep-seated aversion to pornography, which they considered a contradiction of his generally liberal jurisprudence in regard to interpreting the First Amendment. For example, journalist Nat Hentoff watched Justice Brennan read the Court's decision in *Ginzburg v. United States*, 383 U.S. 463 (1966), from the bench. In *Ginzburg*, Brennan had written for a five to four majority upholding the conviction of publisher Ralph Ginzburg for sending, among other things, the obscene magazine *Eros* through the United States mail. Hentoff was confounded by the justice's demeanor. He told an interviewer:

> And Brennan, of all people, read the decision from the bench, and Brennan had been the key man on the court to get away from obscenity, let alone pornography . . . . And as he read the decision, his neck grew redder and redder and he was furious. I mean, he—he could have hit Ginzburg, I guess, except he wasn't that sort of fellow.
>
> And I asked a—a clerk, "What is this all about?" And he said, "Oh, well, Justice Brennan has a daughter, and she's of the age where he feels she might have been shaped in some way by this magazine." So even Brennan [at] a crucial point—and it didn't last beyond that decision—succumbed to his visceral feelings rather than his liberal-libertarian feelings.

Interview with Brian Lamb for *Booknotes* (C-Span television broadcast Oct. 19, 1997).

55. Maurice Amen, C.S.C., *The Church Versus Obscene Literature*, 11 CATH. LAW 21, 21 (1965).

56. Roth v. United States, 354 U.S. 476, 485 (1957).

57. *Id.* at 484.

hand, and obscenity on the other. He stressed that "sex and obscenity are not synonymous."[58] Distinguishing one from the other, he wrote:

> Obscene material is material which deals with sex in a manner appealing to the prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.[59]

To keep overzealous censors from going too far, he declared that works alleged to be obscene should be judged as a whole and not on the basis of isolated passages. He wrote that "judging obscenity by the effect of isolated passages . . . might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of freedoms of speech and press."[60]

Ultimately, what emerged from *Roth* was a set of guiding principles, a framework for judges to apply in obscenity cases. First, *Roth* defined obscenity as that which dealt with sex in a prurient manner, inciting lustful thoughts. Second, it made clear that obscenity was beyond the protection of the First Amendment. Third, *Roth* established that the standard for judging whether material was obscene was "whether to the average person, applying contemporary community standards, the dominant theme of the material *taken as a whole*, appeals to prurient interests."[61]

It was a formulation from which his liberal Brethren Black and Douglas, absolutists inclined to reject any restriction on the exercise of First Amendment freedoms, dissented. One of his two closest personal friends on the Court, conservative Justice John Marshall Harlan, II, concurred only in part, and dissented in part. His dear friend Earl Warren, a devout Baptist who Brennan referred to with affection and admiration as "Super Chief," had hoped for a sterner ruling that would have dealt the "smut-peddlers" a stronger blow. But he concurred in the majority ruling, telling his son Earl Jr., "It's the best we could do with what we had."[62]

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58. *Id.* at 487.

59. *Id.* (footnote omitted). Brennan defined as prurient "material having a tendency to excite lustful thoughts." *Id.* at 487, n.20.

60. *Id.* at 489.

61. *Id.*

62. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 220 (1983). Schwartz has asserted that much of the "confusion," the divergence of opinion among the justices in the field of obscenity, resulted from the fact that Earl Warren "did not play his usual leadership role." *Id.* at 221. According to Schwartz, "Warren was ambivalent in obscenity cases. He recognized the relationship of even the least deserving forms of expression to the First Amendment. At the same time, he could not overcome his personal abhorrence of pornography and what he called smut-peddlers." *Id.*

Liberal commentators and free speech advocates were, for their part, jubilant. Despite the fact that the *Roth* ruling declared obscenity beyond the scope of First Amendment protection, they believed the decision opened the door to freer expression because it reined in the censors. Their optimism was confirmed by the rulings that followed *Roth*. By June 1963, Anthony Lewis was prepared to proclaim in an article for *Esquire* magazine, "Applying steady pressure, nine calm men are dragging the censor, kicking and screaming, into the twentieth century."[63]

According to Chief Justice Warren, Brennan's greatest opinion was *Baker v. Carr*, decided in 1962. *Baker* established the principle of "one person, one vote" and led to the reapportionment of the nation's state legislatures to reflect more accurately modern demographics, shifting power from rural districts to the more populous cities and suburbs. Warren explained *Baker*'s significance in a 1966 article for the *Harvard Law Review*. He wrote:

> Of all of them [Brennan's opinions] and without deprecating any of them, I would say that perhaps the one which is the most fundamental and which will, in the long run, most affect the lives of all the people is his historic opinion in *Baker v. Carr*. It is the foundation upon which rest all subsequent decisions guaranteeing equal weight to the vote of every American citizen for representation in state and federal government.[64]

Justice Douglas, for his part, hailed the *Baker* ruling because in his view it rendered the doctrine of judicial self-restraint, or judicial abstinence, a dead letter.[65] The self-restraint doctrine had always been cited by conservative justices who sought to increase the number and kinds of questions deemed "political" and hence nonjusticiable by the Court. This frustrated progressives like Douglas, who felt that the Court had an obligation to act boldly to bring about needed social change. In fact, Douglas wrote in his autobiography, "Perhaps the deepest division in the Court in my time . . . concerned the 'political' question; an issue which has always plagued American law."[66]

In *Baker*, Brennan rewrote the political question doctrine more to his liking, reducing significantly the number of subjects considered beyond the purview of the Court. In Brennan's view, the only political questions the Court need shy away from were those involving the Constitutional separation

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When pressed once by his law clerks to explain how he could be so liberal on race and other controversial issues but so puritanical in regard to sex, Warren replied, "You boys don't have any daughters yet." *Id.* He was subsequently quoted by *Newsweek* as telling a colleague who showed him a pornographic work, "If anyone showed that book to my daughters, I'd strangle him with my own hands." *Id.*

63. Lewis, *supra* note 53, at 82.

64. Earl Warren, *Mr. Justice Brennan*, 80 HARV. L. REV. 1, 2 (1966).

65. For an exposition and discussion of the origins and policies underlying the doctrine of judicial self-restraint, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

66. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 133 (1980).

of powers among the three branches of the federal government. In other words, the Court should not address matters specifically assigned either to the Congress or to the President by the Constitution. But he reserved to the Court the power to determine whether a particular subject had in fact been assigned by the Constitution to another branch.

For example, foreign relations are generally considered to be primarily within the domain of the President. Similarly, relations with the Native American tribes are principally ascribed to Congress. Yet in Brennan's view, the Court need not show blind deference to the other branches even in areas such as these. Instead, the Court should look to the facts of each case to determine whether judicial intervention is appropriate. He wrote:

> The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.[67]

Prior to *Baker*, Douglas recalled, "Some judges, notably [Felix] Frankfurter, held that apportionment of votes was not a fit business for the federal courts. The area was dubbed a 'political thicket' which the federal courts should not enter."[68] But in *Baker* the Court concluded that the alleged denial of equal protection presented a justiciable cause of action. Brennan wrote, "The right asserted is within the reach of judicial protection under the Fourteenth Amendment."[69]

In fact, under the ruling in *Baker*, a claim is justiciable whenever an asserted right or duty can be identified judicially, its breach determined judicially, and protection molded judicially. "Thus," according to Douglas, "was the bugaboo of the 'political' question put to rest."[70]

Today, according to some observers, the doctrine of judicial self-restraint remains a dead letter even among conservative jurists who profess adherence to it. As the *Economist* has pointed out:

> The Republicans rant about an "imperial judiciary" which is allegedly usurping the rightful role of democratically elected politicians. But judges are supposed to review laws that Congress writes, and to strike down those that are unconstitutional. Even Republican judges, who rail against judicial activism themselves, do not shrink from this. The present Supreme Court,

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67. Baker v. Carr, 369 U.S. 186, 217 (1962).

68. DOUGLAS, *supra* note 66, at 135 (citation omitted).

69. Baker v. Carr, 369 U.S. at 237. For a discussion of the extent to which state legislatures were malapportioned prior to *Baker*, see Thomas I. Emerson, *Malapportionment and Judicial Power: The Supreme Court's Decision in* Baker v. Carr, *in* LAW IN TRANSITION 127 (1962).

70. DOUGLAS, *supra* note 66, at 136.

> dominated by Republican appointees, struck down four acts of Congress during its latest nine-month term [1996-1997], a degree of ferocity not witnessed since the 1930s.[71]

Brennan's most famous decision followed two years after *Baker*: *New York Times Co. v. Sullivan*, decided in 1964. His ruling in that case breathed life into the First Amendment. *New York Times* established the right of journalists to criticize government officials without having to fear retaliatory libel suits which threaten freedom of the press.

The case arose when Alabama state officials, including L. B. Sullivan, a Montgomery city commissioner who was in charge of the police, sued *The New York Times* for libel in Alabama court. The libel action followed the *Times* publication, on page 25 of its Tuesday, March 29, 1960 edition, of a full-page political advertisement paid for by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. Among other things, the advertisement related the efforts of students involved in the sit-in movement, and recounted alleged acts of terrorism and intimidation perpetrated against Dr. King, his family, and his followers throughout the south.[72] The third and sixth paragraphs of the advertisement referred directly to events in Alabama.[73] The references to "Southern violators" of the Constitution arguably included Alabama officials, although none was mentioned by name.

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71. *Curiously Cautious O'Connor*, THE ECONOMIST, Oct. 4, 1997, at 38, 38. For a discussion of the conservative Burger Court's abdication of the self-restraint doctrine, see Robert F. Nagel, *A Comment on the Burger Court and "Judicial Activism,"* 52 U. COLO. L. REV. 223, 224 (1981) ("One possible explanation for the growth and consolidation of judicial power is that the changes in the membership of the Court simply did not achieve the announced purpose, that the Supreme Court remains committed to judicial activism.").

72. The first paragraph of the advertisement set the tone for what followed. It read, in part:

> As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom . . . .

N.Y. TIMES, Mar. 29, 1960, at 25.

73. The third paragraph of the *Times* advertisement stated:

> In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-locked in an attempt to starve them into submission.

Id. The sixth paragraph of the advertisement read as follows:

> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar

An impressive list of signatories appeared at the bottom of the page, endorsing the advertisement. Among them: Marlon Brando, Diahann Carroll, Dr. Alan Knight Chalmers, Richard Coe, Ossie F. Davis, Sammy Davis Jr., Ruby Dee, Anthony Franciosa, Lorraine Hansbury, Van Heflin, Nat Hentoff, Langston Hughes, Mordecai Johnson, Eartha Kitt, Hope Lange, John Raitt, Jackie Robinson, Eleanor Roosevelt, Robert Ryan, Maureen Stapleton, and Shelley Winters.

Alabama officials were outraged. After all, racial discrimination existed in the North as well as in the South. To them, the *Times* ad was just another example of the northern press pillorying the South to divert attention from the North's own racial tensions. Besides, the ad contained a number of factual inaccuracies which, in their minds, made the situation in Alabama appear worse than it really was.

Beyond their anger, however, Alabama politicians and their clever segregationist lawyers saw an opportunity dropped in their laps. They formulated a legal strategy designed to use the advertisement to silence King, his movement, and the northern media once and for all, and to get rich in the process.

Sullivan contended that although he had not been mentioned specifically, the police misconduct complained of in the ad and presented as fact could not have occurred if he had been performing his responsibilities properly. In other words, the ad insinuated misconduct by Sullivan as head of the police. Under Alabama libel law, he demanded a half million dollars in compensatory damages from a group of named plaintiffs that included the *Times*, Dr. King, and four African American clergymen whose names appeared on the ad. He sought to recover punitive damages, as well.

Other Alabama officials soon followed Sullivan's lead in what became a veritable parade to the courthouse. Lawsuits against other news organizations were initiated as well. Suddenly the "liberal" northern media were under heavy attack in the Alabama courts. For example, the Columbia Broadcasting System (CBS) became the target of $1.5 million in libel claims arising from its coverage of the civil rights movement.[74] Meanwhile, libel claims against the *Times* soon totaled some $5 million.[75] Not all the claims were related to the March 29 ad. The sum represented a tremendous amount of money in the

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> offenses. And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Id.

74. *See* N.Y. TIMES, Mar. 10, 1964, at 1.

75. *See id.*

early 1960s, even for a profitable and well-established publication of the *Times* stature. In fact, the newspaper's continued existence was in jeopardy.

As Brennan saw the facts of the case, Alabama's libel law was not anomalous; it was based on the customary "fair comment rule" that was on the books in most states. Under the Alabama law as applied by that state's supreme court, a publication was libelous if the words it used tended "'to injure a person . . . in his reputation' or to 'bring [the person] into pubic contempt.'"[76]

But the origins of the fair comment rule were nefarious. The rule dated back to the English doctrine of seditious libel during the centuries when the Star Chamber punished as a crime almost any criticism of the government. The First Amendment had been adopted in large part as a reaction against the seditious libel doctrine. The Founding Fathers had learned through bitter experience with tyranny that "political freedom ends when government can use its powers to silence its critics."[77] As University of Chicago Law School professor Harry Kalven Jr. observed:

> [T]he presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society, no matter what its other characteristics.[78]

From the moment Chief Justice Warren assigned him to write for the Court, Brennan knew that achieving consensus among his colleagues would be difficult. On the one hand, he would have to formulate a restriction on government power stringent enough to satisfy absolutists like Black and Douglas who, along with Justice Arthur Goldberg, favored giving the press absolute immunity from suit. On the other hand, however, he could not risk alienating more conservative justices like John Harlan who might oppose giving the press what they regarded as a blank check to defame.

He succeeded. On March 9, 1964, Brennan announced the Court's ruling from the bench, a unanimous decision in favor of the Times which established the "actual malice" test. Under this novel rule, a comment about a government official could be penalized under state libel laws only if the complaining official could prove with "convincing clarity" that the comment was made with actual malice, meaning "with knowledge that it [the comment] was false or with reckless disregard of whether it was false or not."[79]

The factual inaccuracies contained in the *Times* March 29 advertisement did not constitute actual malice, Brennan declared, because "erroneous

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76. New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964).

77. HARRY KALVEN JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 63 (1988).

78. *Id.*

79. New York Times Co. v. Sullivan, 376 U.S. at 279-80.

statement is inevitable in free debate."[80] And free debate, he explained, "must be protected if the freedoms of expression are to have the 'breathing space' that they need . . . to survive."[81]

He insisted that anything less stringent than the actual malice standard "dampens the vigor and limits the variety of public debate," a result "inconsistent with the First and Fourteenth Amendments."[82] In what would become the passage most frequently quoted from his voluminous writings, he went on to state: "Thus we consider 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."[83]

In fact, he went on to uphold not just the right but the "duty" of citizens to criticize the government.[84]

But despite their agreement as to the result, and the unprecedented extent to which Brennan's opinion gave force and effect to the guarantees of free speech and free press, the ruling did not go as far as Black, Douglas, and Goldberg would have liked. Black wrote a separate concurrence in which Douglas joined. Goldberg also concurred separately. All three expressed the steadfast belief that, as Goldberg put it, "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."[85]

Black complained:

> "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.[86]

Nevertheless, Black praised Brennan's work, for he was certain the result would alter America's future course for the better. Brennan's case files in the Library of Congress include an undated note that Black passed to him on the

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80. *Id.* at 271. The *Times* advertisement had indeed contained factual inaccuracies, albeit minor ones. For example, the African American students who had staged a demonstration at the Alabama State Capitol had sung the National Anthem, not "My Country, 'Tis of Thee." *Id.* at 258-59. Also, the dining hall on the Alabama State College campus had never been padlocked, nor did state police at any time "ring" the campus, although they had been deployed nearby in large numbers. *Id.* at 259. In addition, Dr. King had not been arrested seven times, but only four. *Id.*

81. *Id.* at 271-72.

82. *Id.* at 279.

83. *Id.* at 270.

84. *Id.* at 268.

85. *Id.* at 298 (Goldberg, J., concurring).

86. *Id.* at 293 (Black, J., concurring).

bench during an oral argument during the term in which the *Times* case was considered. Written in the Alabaman's bold scrawl, it read as follows: "Bill, You know of course that despite my position [and] what I wrote I think you are doing a wonderful job in the Times case and however it finally comes out it is bound to be a very long step towards preserving the right to communicate ideas."[87]

For his part, Arthur Ochs Sulzberger, president and publisher of *The New York Times*, was understandably ecstatic. A few hours after the Court's ruling, he issued an official statement which read: "We are, of course, delighted with the decision of the Supreme Court. It clearly illuminates several basic issues regarding freedom of the press and therefore is of fundamental importance not only for newspapers, but other news media as well."[88]

Sulzberger concluded, "The opinion of the Court makes freedom of the press more secure than ever before."[89]

As one legal scholar has described it, the actual malice test enunciated in *New York Times*,

> makes no pretense of distinguishing constitutionally valuable from constitutionally valueless speech. It is instead "designed solely as an instrument of policy, to attain the specific end of minimizing the chill on legitimate speech." As such, the standard epitomizes the pragmatic conception of constitutional law, a conception whose articulation and development can authoritatively be traced to Brennan.[90]

Because of Brennan's *New York Times* ruling, the national media were able to inform the American public at large about Martin Luther King, Jr., the struggle for civil rights, and the often violent and abusive nature of southern white resistance. Perhaps more than anything else, access to this information motivated the sympathy and popular support for civil rights that ensured King's success. Within four months of the Court's ruling in the *Times* case, on July 2, 1964, the Civil Rights Act of 1964 was signed into law. Subsequently, President Lyndon Johnson was able to push through Congress the landmark Voting Rights Act of 1965, which finally made good the promise

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87. Note from Justice Black to Justice Brennan (date unknown) (on file with author). According to Chief Judge Richard A. Posner, modern history has proven that Justice Black's reservations regarding the actual malice standard were well founded. As Posner recently observed, "Punitive damages in libel suits against the media are actually more frequent now than in the old days because the 'actual malice' rule of *New York Times Co. v. Sullivan* fixes on the defendant who is found to have libeled a public figure the label of a wrongdoer." Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 1, 13 (1997).

88. NY. TIMES, March 10, 1964, at 23.

89. *Id.*

90. Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 CONST. COMMENTARY 11, 23 (1991) (quoting Robert C. Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539, 553).

held out by the Fifteenth Amendment to the Constitution, ratified after the Civil War to guarantee former slaves and their descendants the right to vote.

A quarter-century later, however, Brennan was forced to concede that the fight for racial equality still had not been won. In 1989, he told an interviewer, "Anybody who thinks that our problems of racial injustice are behind us is fooling himself. But the struggle must go on and will go on."[91]

He carried on that struggle for dignity and equality on behalf of *all* Americans throughout his tenure on the Court. Other landmark rulings by Brennan established that people are entitled to strict procedural safeguards whenever their rights or interests are threatened by the government;[92] that communities have the right to enforce historic preservation;[93] that the guilt of criminal defendants must be established beyond a reasonable doubt;[94] and that statutory classifications based on gender should be subjected to heightened judicial scrutiny.[95]

As an advocate of race and gender equality, he supported affirmative action.[96] And he fought tirelessly, if in vain, to abolish the death penalty, which he regarded as cruel and unusual punishment, and an affront to human dignity.[97]

By the end of his life, he had earned a well-deserved reputation as a champion of the poor and the down-trodden. In 1986, he told the American Bar Association's Section on Individual Rights and Responsibilities the following:

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91. Haupt, *supra* note 19, at 57.

92. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

93. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

94. *See In re* Winship, 397 U.S. 358 (1970).

95. *See* Craig v. Boren, 429 U.S. 190 (1976); *see also* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (Brennan, J., plurality opinion) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

96. *See, e.g.*, Metro Broad. Inc. v. FCC, 497 U.S. 547 (1990) (upholding FCC policies designed to increase minority ownership of broadcast licenses in order to promote program diversity).

97. *See, e.g.*, William J. Brennan, Jr., *Foreword to Symposium on Capital Punishment*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 7 (1994).

> A punishment must not be so severe as to be utterly and irreversibly degrading to the very essence of human dignity . . . . 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. Yet an executed person has lost the very right to have rights, now or ever. For me, then, the fatal constitutional infirmity of capital punishment is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded.

Id.

> We do not yet have justice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the technological revolution, for alienated youth, for the urban masses, for the unrepresented consumer—for all, in short, who do not partake of the abundance of American life . . . . The goal of universal equality, freedom and prosperity is far from won and . . . ugly inequities continue to mar the face of our nation. We are surely nearer the beginning than the end of the struggle.[98]

Some who knew or worked with him say his compassion was a reaction to the oppressive era in which he came of age as the son of Irish immigrants. Journalist Nina Totenberg has written:

> He grew to maturity at a time when there was incredible poverty and repression, a time when children worked as laborers twelve and fourteen hours a day, a time when attempts at unionizing workers were put down with ruthless force, and [he] witnessed some of those struggles firsthand.[99]

Brennan himself once reflected:

> What got me interested in people's rights and liberties was the kind of family and 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.[100]

The 1950s in which he came to power on the Court were especially virulent. As Yale law professor Owen Fiss, who clerked for Brennan during the Court's 1965-1966 term, has observed:

> In the 1950's, America was not a pretty sight. Jim Crow reigned supreme. [African Americans] were systematically disenfranchised and excluded from juries. State-fostered religious practices, like school prayers, were pervasive. Legislatures were grossly gerrymandered and malapportioned. . . . The heavy hand of the law threatened those who publicly provided information and advice concerning contraceptives, thereby imperiling the most intimate of human relationships. The states virtually had a free hand in the administration of justice. Trials often proceeded without

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98. Nat Hentoff, *The Justice Breaks His Silence*, PLAYBOY, July 1991, at 156, 158 (quoting Justice Brennan) (internal quotations omitted).

99. Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 35 (1990). A defining moment in Brennan's life occurred in 1916 when, at the age of ten, he saw his father brought into the house by union organizers after the elder Brennan had been bloodied and beaten by police during a labor protest. *See* EISLER, *supra* note 8, at 19.

100. Nat Hentoff, *Profiles: The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 45, 46 (quoting Justice Brennan) (internal quotations omitted).

> counsel or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or on statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like.[101]

In addition, the nation was in the grips of an anti-Communist frenzy, a "Red Scare" attributable in large part to the military challenge posed by the Soviet Union and the fear that communists had somehow infiltrated the United States government. Beginning in the late 1940s and continuing on throughout the decade of the 1950s, communists, alleged communists, and their suspected sympathizers were, as former University of Texas law professor Michael E. Tigar, has observed, "remorselessly driven from the trade union movement, the civil service, the professions, the sciences and every influential area of American life. Their rights to hold jobs, to engage in professions, or to hold positions of trust in trade unions were systematically abridged and denied."[102]

Justice Souter, for his part, offered a rudimentary explanation for Justice Brennan's social conscience. Souter described him, quite simply, as "a man who loves."[103] Thurgood Marshall, Jr., son of the late Supreme Court justice, called him "not just my father's closest and dearest partner but his hero in the pursuit of equality and justice."[104] He added that Justice Brennan had "the biggest heart" in the Supreme Court building.[105]

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101. Fiss, *supra* note 13, at 1118.

102. Michael F. Tigar, *The McCarthy Era: History as Snapshot*, 15 HARV. C.R.-C.L. L. REV. 507, 511-12 (1980) (reviewing DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1979)).

103. David Souter, Remarks at the Harvard Club of Washington, D.C., Reception in Honor of Justice William J. Brennan, Jr. (Sept. 30, 1992) (on file with author).

104. Denniston et al., *supra* note 11, at 1A. As Brennan found himself inclined to dissent more throughout the decades of the 1970s and 1980s, often he was joined only by Justice Marshall, the Warren Court's other liberal holdover. As University of Virginia law professor John C. Jeffries, Jr. has observed:

> In most terms they [Brennan and Marshall] voted with each other more regularly than did any other two Justices. Sometimes, their percentage of agreement reached astonishing heights. "Brennan and Marshall" became almost a hyphenated entity, predictably aligned in the general run of cases and almost certain to vote together on the really important ones.

JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 260 (1994). For a discussion and comparison of Brennan's and Marshall's jurisprudence, see Donna F. Colthrap, *Writing in the Margins: Brennan, Marshall, and the Inherent Weaknesses of Liberal Judicial Decision-Making*, 29 ST. MARY'S L.J. 1 (1997).

105. Denniston et al., *supra* note 11, at 1A.

Nevertheless, he had his detractors. During the 1950s, critics called him soft on communism because he opposed what he called Senator Joseph McCarthy's "witch-hunt" tactics.

In addition, his liberalism, and that of Chief Justice Warren, another Eisenhower appointee, irked Ike who, in 1961, told former CBS News president Fred Friendly, "I made two mistakes as President and they are both sitting on the Supreme Court."[106]

Others blamed Brennan's decision in *Roth* for the sexual revolution of the 1960s and 1970s, and the proliferation of pornography, because of the way it expanded First Amendment freedoms. Moreover, at least one leading jurist has recently posited that the "unprecedented unpopularity of federal judges" may be attributable to Brennan's liberal brand of judicial activism.[107]

Catholics opposed to abortion reviled him as an apostate for his pro-choice stance. In fact, noisy Catholic abortion protestors outside St. Matthew's Cathedral could be heard by mourners during his funeral services.[108] According to a newspaper report, "They [the protestors] complained about Brennan's being allowed a Catholic funeral Mass, despite the church's opposition to legalized abortion."[109]

Justice Brennan would have blessed them. After all, they were only doing their duty as citizens.[110]

The *Drake Law Review* honors Justice Brennan's respect for the rights and privileges that he protected for all Americans. The following articles reflect his jurisprudence and the importance the justice placed on free expression. As future lawyers, the members of the *Drake Law Review* admire Justice Brennan's dedication to individual rights and attempt to live up to his model of public service. In conclusion, it is with great pride that they dedicate this issue of the *Drake Law Review* to the memory of this great American, Justice William J. Brennan, Jr. (1906-1997).

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106. Tony Mauro, *Courtside*, LEGAL TIMES, Sept. 10, 1990, at 11, 11; *see also* Hentoff, *supra* note 100, at 45.

107. Posner, *supra* note 87, at 13.

108. *See* Tony Mauro, *Brennan and the Church*, LEGAL TIMES, Sept. 1, 1997, at 10, 10.

109. Joan Biskupic & Saundra Torry, *Rites Celebrate Justice Brennan's Enduring Legacy*, WASH. POST, July 30, 1997, at A1, *available in* 1997 WL 11976508.

110. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 268 (1964).