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FOREWORD

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"Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr." What a daunting endeavor to undertake. Justice Brennan articulated his constitutional vision over the course of thirty-four years on the Supreme Court. His vision filled some 1,573 opinions in the *U.S. Reports*—533 opinions for the Court, 694 dissents, and 346 concurrences.[1] But the numbers do not even begin to tell the whole story, for Justice Brennan had a knack for revolutionizing entire areas of the law. Often he did it in one fell swoop, in an opinion—such as *New York Times v. Sullivan*,[2] *Baker v. Carr*,[3] or *Goldberg v. Kelly*[4]—that will go down in the pantheon of landmark opinions. Other Brennan revolutions were more incremental, such as his case-by-case shaping of the modern doctrines of free speech[5] and freedom of association,[6] his vision of gender equality[7] and racial equality,[8] and his insistence—captured in the so-called "doctrine of unconstitutional conditions"—that government

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1. *In Memoriam: Justice William J. Brennan Jr.*, 522 U.S. V-VI (1998) (preliminary printing).

2. 376 U.S. 254 (1964).

3. 369 U.S. 186 (1962).

4. 397 U.S. 254 (1970).

5. *See, e.g.*, Texas v. Johnson, 491 U.S..397 (1989); Brandenburg v. Ohio, 395 U.S. 444 (1969) (a *per curiam* decision attributed to Justice Brennan).

6. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984); Elrod v. Burns, 427 U.S. 347 (1976); NAACP v. Button, 371 U.S. 415 (1963).

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

8. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Green v. County Sch. Bd., 391 U.S. 430 (1968); Cooper v. Aaron, 358 U.S. 1 (1958) (an opinion reputedly drafted by Justice Brennan and signed by all nine justices).

may not condition benefits on the recipient's willingness to relinquish constitutional rights,[9] to name a handful of areas.

In short, Justice Brennan—perhaps more than any other justice in history—propounded a ground-breaking and intricate constitutional vision that influenced virtually every area of constitutional law. If you open up any constitutional law textbook, you will find more opinions by Justice Brennan—more landmark opinions—than by any other justice in history. You would find, I would wager, more opinions by Brennan than by Marshall, Brandeis, and Holmes combined.

One could devote a lifetime—let alone a two-day conference or a single volume of the *New York Law School Law Review*—to remembering and advancing just a sliver of the vision animated in those opinions. Indeed, some of us do. So when the Brennan Center for Justice agreed to co-host with the *Harvard Civil Rights-Civil Liberties Law Review* the convening whose proceedings are published in this volume, we embarked on the endeavor of celebrating this extraordinary constitutional vision with the disheartening acknowledgment that we could not possibly do it justice.

The very thought of this undertaking took me back to an October day in 1987, when I first attempted to wrap my mind around the sheer breadth of that legacy. I was clerking at the time for Justice Brennan, and we were celebrating the thirtieth anniversary of his swearing in as a Supreme Court justice. It was a tradition in the Brennan chambers to celebrate the anniversary with great pomp and circumstance, with each class of Brennan clerks striving to outdo the antics of their predecessors. Since this particular anniversary was such a milestone, we decided that we had to do something especially bold and meaningful, something that would capture concretely Justice Brennan's remarkable legacy.

That morning the justices were behind closed doors in the Chief Justice's conference room, debating and voting on cases argued that week. My co-clerks and I, in turn, spent the entire morning making placards on sheets of white xerox paper. On each sheet we wrote the name of a single landmark opinion authored by Justice Brennan. We made scores of placards before we decided enough was enough. Quite frankly, we ran out of patience before we ran out of landmarks.

We then laid out the placards on the floor. We placed the first one at

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9. *See, e.g.*, FCC v. League of Women Voters, 468 U.S. 364 (1984); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

the door of the conference room. It read, "Brennan Landmarks: The First 30 Years." The rest we laid out, edge to edge, in a trail leading from the conference room all the way to Justice Brennan's chambers, located on the other side of the courthouse. The sight was awe-inspiring: landmark opinions for as far as the eye could see, each one more insightful, more passionate, more brilliantly reasoned than the next.

After surveying our work, we waited, and waited, until finally the justices emerged from the *sanctum sanctorum.* We knew the moment we were waiting for had come because we could hear Justice Brennan's bellowing laugh from the other side of the building. Justice Brennan followed that trail, stopping at each placard and belting out the name of the case as if he was greeting an old friend. *New York Times v. Sullivan! NAACP v. Button! Cooper v. Aaron! Jencks v. United States! Craig v. Boren! United Mineworkers v. Gibbs! Fay v. Noia! Bivens! Katzenbach v. Morgan! Keyishian v. Board of Regents!* As if he were on a receiving line, he would let out a little chuckle after each name, say a word or two ("Oh *Duberstein!* I haven't thought about that one in years. When is a gift really a gift?"), and then move onto the next. It took a while, but Justice Brennan made it to the end of the line to claim his cherished piece of the traditional celebratory chocolate cake.

What Justice Brennan did not realize was that about ten paces behind him, matching him pace for pace, was Justice Scalia. He, too, stopped at each placard. He looked down at each, scratched his head, and then looked up—expressionless. So from the time Justice Brennan entered his chambers, it took only a moment or two before Justice Scalia bounded in. With a big grin, he exclaimed, "My Lord, Bill, have you got a lot to answer for!"

And, indeed, he did. This conference is all about what Justice Brennan had to answer for. A Who's Who of the nation's leading scholars, practitioners, judges, and activists gathered at Harvard on March 13 and 14, 1998, under the auspices of the Brennan Center for Justice and the *Harvard Civil Rights-Civil Liberties Law Review,* to discuss just what Justice Brennan had to answer for. It was a riveting couple of days, full of insight, history, debate, emotion, hand-wringing, and hope. The *CR-CL* Editors-in-Chief Garry Jenkins and Amy McManus and their law review colleagues masterfully orchestrated the proceedings, which were then painstakingly transcribed, adapted, and edited by the staff of the *New York Law School Law Review.* This extraordinary group dissected the Brennan legacy from all angles. They discussed Justice Brennan's profound contributions to criminal justice, gender equality, privacy

rights, race relations, and the religion clauses and how his opinions might be adapted to new challenges. They discussed what it was that made Justice Brennan a constitutional hero. They debated whether he had the correct approach to reading and interpreting the Constitution.

The conference ended, as these published proceedings do, with a debate on the question "Will the Brennan Legacy Endure?" It seemed to me so obvious that the answer was a resounding yes, that I wondered why we bothered asking the question. Perhaps we can dismiss my reaction as the predictable reflex of anyone who would head an institution named after Justice Brennan and who would produce a book subtitled *Justice Brennan's Enduring Influence.*[10] Be that as it may, it was not as obvious to others.

To the question whether the Brennan legacy will endure, Robert Nagel, a prominent conservative scholar, answered no. Not only would it not endure, but also "many of Brennan's carefully crafted doctrinal edifices seem to be collapsing."[11] By way of example, Professor Nagel offered that "Brennan's position on affirmative action or discrimination in welfare policies, are currently in eclipse."[12] And, of course, he was right. For example, *Metro Broadcasting, Inc. v. FCC,*[13] an important case about affirmative action in government licensing—and, perhaps symbolically, Justice Brennan's last majority opinion—has already been overruled. And Exhibit A for Professor Nagel was the following observation: "For example, the three-part *Lemon* test that once controlled Establishment Clause jurisprudence has been discredited and is being gradually replaced by fact-intensive inquiries into endorsement and coercion."[14]

The next speaker, the final one in the proceedings, was Mark Tushnet, perhaps the most prominent of the left-wing scholars from the Critical Legal Studies school. And he agreed that the legacy was dead, but for different reasons. "[T]he Brennan vision," he offered, "was the product of specific historical circumstances that are extremely unlikely to return."[15] Justice Brennan's opinions were a product of the "New Deal order," and "the disappearance of that order would have to be fatal" to

10. REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

11. *Infra* p. 182

12. *Infra* p. 182.

13. 497 U.S. 547 (1990).

14. *Infra* p. 182 (referring to Lemon v. Kurtzman, 403 U.S. 602 (1971)).

15. *Infra* p. 186.

the Brennan legacy.[16]

Here were two scholars who approached the question from the opposite poles of the political spectrum. The two of them, who as far as I could tell would not agree on very much, seemed to agree that the Brennan legacy was really built on a foundation of quicksand, and was sinking under our very feet.

Admittedly, this gave me pause. But only for a moment. On reflection, I realized they simply had a different understanding of what was meant by the Brennan legacy. The Brennan legacy is obviously expressed in Justice Brennan's judicial opinions. But his legacy was not the individual rulings in each. True, the *Lemon* test that Justice Brennan championed has been modified, but that hardly means the Brennan legacy is on its last legs. When I first listened to the symptoms of this supposedly fatal illness, I was wracking my brain to try and remember what the third prong of the *Lemon* test was.

And it is true that some other important Brennan opinions have been chipped away or outright overruled. But Justice Brennan reversed *himself* more frequently than the Supreme Court has reversed him. He considered it a natural part of the judicial process to rethink old pronouncements and examine whether they still made sense in changing times. As he so eloquently put it, the law "may be compared to a tapestry, the weaving of which is never done."[17] Justice Brennan believed this so strongly that when he gave his blessing to the creation of the Brennan Center, an institution that was to be devoted to advancing his legacy, he imposed a lone condition: He made us promise that we would never pledge allegiance to any particular Brennan opinion. The worst thing we could do to honor his legacy, he told us, was to create the "Brennan defense fund"—a group of lawyers and scholars engaged in some form of "perverse originalism," poring over Brennan opinions to discover the dogmatic expression of a Brennan legacy that was fixed for all time. He insisted instead that the Brennan Center, and all who would honor him by advancing his "constitutional vision," should be moved instead by the fundamental spirit that moved him.

What was that spirit? One thing that I can say without any doubt is that it was a spirit whose relevance was not limited to a single moment in

16. *Infra* p. 188.

17. William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 10 (1965) (quoting O'Meara, *The Notre Dame Program: Training Skilled Craftsmen and Leaders*, 43 A.B.A. J. 614, 670 (1957)).

history and then relegated to the dustbin. It was, and remains, a permanent and vital fixture in our constitutional jurisprudence. It is an understanding that the Constitution is not a "stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[18] Rather, it is an ageless document, a "living charter,"[19] whose framers fully expected us to breathe new life into it with each passing generation. It is a vision of a Constitution that requires the government—whose very legitimacy derives from "We the People"—to act with fundamental fairness when it takes steps that might hurt any one person. It is a vision of the Constitution—and particularly the Bill of Rights—as a protector of what Justice Brennan called "common human dignity."

That is a vision that will never die. It will never die because it is deeply rooted in reason. It will never die because it is connected to a history and to values that the founding fathers incorporated into our Constitution. It will never die because it is woven inalterably into the fabric of our constitutional jurisprudence. Most importantly, it will never die, because it appeals to a side of us that we cannot afford to let die. It appeals to the aspirational side of us, the side of us that aspires to create a society that is better, fairer, and more just than the one in which we live.

This aspirational side is best captured in the title of this conference—"Reason, Passion, and 'the Progress of the Law'"— which is, in turn, drawn from the title of a speech Justice Brennan delivered more than a decade ago.[20] The theme of the speech was that judges could not decide cases by reason alone. "We cannot delude ourselves," he insisted, "that the Constitution takes the form of a theorem whose axioms need mere logical deduction."[21] Rather, they needed passion: "Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is . . . not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."[22] Put another way, "Only by remaining open to the entreaties of reason and passion, of logic and experience, can a judge come to understand the complex human meaning of a rich term such as 'liberty,' and only with such under-

18. Michael H. v. Gerald D., 491 U.S. 110, 141 (1981) (Brennan, J., dissenting).

19. *Id.*

20. *See* 10 CARDOZO L. REV. 3 (1988) (42nd Annual Benjamin N. Cardozo Lecture, delivered at the Association of the Bar of the City of New York (Sept. 17, 1987)).

21. *Id.* at 16.

22. *Id.* at 10.

standing can courts fulfill their constitutional responsibility to protect that value."[23]

In Justice Brennan's constitutional vision, a judge could not apply abstract logic to decide a case like *Goldberg v. Kelly,* assessing the fairness of the procedures New York followed for cutting off a welfare lifeline. New York's procedures, Justice Brennan observed, were "a model of rationality."[24] But he understood that the inquiry did not end there, for "the state's procedures lacked one vital element: appreciation of the drastic consequence of terminating a recipient's only means of subsistence."[25] It was the judge's job, Justice Brennan insisted, to hear "the human stories that the state's administrative regimes seemed unable to hear."[26] Any judge "who operates on the basis of reason alone . . . is cut off from a vital wellspring from which concepts such as dignity, decency, and fairness flow."[27]

Reason and passion. That's what I mean about the aspirational side of us all. That is what Justice Brennan had to answer for. And if we ever let go of it, that is what we will all have to answer for.

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23. *Id.* at 11.
24. *Id.* at 20.
25. *Id.*
26. *Id.* at 21.
27. *Id.* at 22.