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REMEMBERING A CONSTITUTIONAL HERO

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REMEMBERING A CONSTITUTIONAL HERO

E. JOSHUA ROSENKRANZ

Good morning. I want to start by thanking the *Harvard Civil Rights-Civil Liberties Law Review*, and particularly Amy McManus and Garry Jenkins, the Co-Editors-in-Chief. I have never seen a group as together as this group. They put enormous energy and attention to detail into putting together a program that befits a great man and a great jurist. You will see the fruits of their labors today. And we at the Brennan Center are pleased and honored to be their partners in this venture.

There is a certain perfect symmetry to Harvard's celebrating Justice Brennan, because this is really where it all began, in a manner of speaking. This is where Justice Brennan first forged his intellectual framework, at least his legal framework. It is certainly the place where Justice Brennan was first exposed to the power of the law to help people, as he did in the Harvard Legal Aid Society of which he spoke very fondly. As such, Justice Brennan was really a product of Harvard.

To be sure, as Judge Higginbotham reminded us yesterday, Harvard also produced Justice Brown, the author of the infamous *Plessy v. Ferguson*.[1] Which only goes to show that legal education alone cannot create great insight. Character, too, is a necessary ingredient. Law school may provide the reason, but it cannot supply the passion.

With an unprecedented combination of reason and passion, brilliant legal reasoning, and an abiding empathy for all people, Justice Brennan had a habit of revolutionizing every area of law that he touched. And he touched almost every area. So what you get in this conference is really not much more than a taste of the types of issues that Justice Brennan grappled with and a feeling of where his legacy will lead into the future.

We could not hope for a better start than the one that we have today with the distinguished panelists and the brilliant legal scholars, judges, and practicing lawyers whom will be addressing the legacy.

Let me just mention a caveat about the purpose of today's session. I have heard comments that this symposium is not an even-handed examination of the Brennan legacy. We will leave it to other forums to debate whether Justice Brennan's impact on the law should be celebrated or condemned. Rather, the goal, as the title suggests, is to bring mostly

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1. 163 U.S. 537 (1896).

like-minded scholars and practitioners together to "remember and advance" Justice Brennan's "constitutional vision."

Since this is an event about a very special person, I cannot resist thinking about what Justice Brennan's reaction would be to this symposium. I think he would be partially mortified that so much attention is being lavished on him.

Remember what he said when he was introduced by the President of the United States as the next appointee to the Supreme Court. With the cameras flashing, throngs of reporters closing in, a reporter asked him, "Mr. Justice, how do you think that history will evaluate your legacy on the Supreme Court? How do you think that history will evaluate it?" Justice Brennan responded, "I think I'll be like a mule in the Kentucky Derby. I don't expect to distinguish myself, but I do expect to benefit by the associations."[2] A man of unsurpassing modesty, he'd be part mortified that we are lavishing so much attention on him.

But he would also be part tickled about all the talk about our "advancing the constitutional vision" he articulated—in effect—receiving the baton from Justice Brennan. It was a baton he carried for what seemed like several marathons spanning thirty-four years. He would also be tickled with the adulation that some people might heap on him today.

In Justice Brennan's absence I hope it is not presumptuous for me to give the speech that I think Justice Brennan would have given. It was his favorite speech. When his health was failing and his doctors ordered him not to overexert himself in public, Justice Brennan had a stock speech. He would say, "I have a short speech and a long speech. The short speech is, 'Thank you.' But I'm going to give you the long speech. 'Thank you, thank you, thank you, very, very much.'"

In my capacity as moderator allow me to start the formal proceedings of the day. We are pleased to have with us a distinguished panel. We have Morton Horwitz of the Harvard Law School; Justice Daniel O'Hern of the New Jersey Supreme Court, a former Brennan clerk; Professor Roy Schotland of Georgetown University Law Center, also a former Brennan clerk; and Judge Patricia Wald of the D.C. Circuit.

The topic is a very broad one: "Remembering a Constitutional Hero." Over the past few weeks when I have been thinking about intro-

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2. David Halberstam, *The Common Man as Uncommon Man*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 22, 24 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

ducing the subject, I kept asking people if they had good anecdotes about Justice Brennan as a constitutional hero. All agreed he was a constitutional hero, but no one could come up with any anecdotes to prove it.

Why was Justice Brennan a constitutional hero. What makes a constitutional hero? What was it about Justice Brennan that made him heroic? What was it about his background that turned him into the type of person who would be a hero? What were some of his acts of constitutional heroism?

With that, I turn the discussion over to Morton Horwitz.

MORTON HORWITZ

As one of the first speakers, I thought it would be helpful briefly to recall the basic facts of Justice Brennan's biography.

Justice William J. Brennan was appointed to the Supreme Court in 1956 by President Eisenhower as part of an electoral strategy for recapturing the Catholic Democratic vote that had gone to Eisenhower in the first campaign. A relatively unknown New Jersey Supreme Court Justice, Brennan was the first Roman Catholic to be appointed since Justice Frank Murphy died seven years earlier.[3] He served for thirty-four years between 1956 and 1990, equaling the length of service attained by Chief Justice Marshall, Justice Black, Justice Field, and the first Justice, Harlan. Only Justice Douglas's thirty-six years on the Court was longer.

Brennan's career spanned the Chief Justiceships of Earl Warren, Warren Burger, and William Rehnquist. In the second half of the Warren Court, between 1962 when Justice Goldberg replaced Justice Frankfurter and 1969 when Warren and Fortas resigned, ending the Warren Court, Brennan was the dominant intellectual figure in the new liberal majority.

After the Warren Court ended, Brennan was famous for continuing to muster majority support despite the Court's move to the right. After 1976, Brennan found himself increasingly in dissent.

I would like to make two broad points about Justice Brennan. First, it is not easy, given what we know about Brennan's pre-Court career, to find clear biographical clues of his future greatness as a Justice. To an

3. *See generally* J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968) (President Franklin Delano Roosevelt appointed Justice Murphy to the Supreme Court of the United States in 1940 where Murphy served until his death in 1949.).

historian, this is a terribly troubling thing.

A high-ranking graduate of Harvard Law School, Brennan's long career in management-side private practice before his swift rise up the New Jersey judicial hierarchy gave little hint of the boldness of his intellect and the depth of his constitutional vision.

His father appears to have been the central figure in his early life. His father, an immigrant from Ireland, rose from coal shoveler in a local brewery to become a labor leader, and later, Newark's Public Safety Director. One of the Justice's most vivid childhood memories was seeing his father carried home by fellow union members after having been bloodied and beaten by police while on a picket line.

The personal sources of Justice Brennan's constitutional thought remain unclear. I believe that one of the real clues to Justice Brennan's constitutional vision, as Dean Clark suggested, may be rooted in his Catholicism. The influence on Brennan of the Reformist atmosphere of Vatican II, which convened in Rome between 1962-1965, needs more study.

Second, the Brennan claim to constitutional greatness can be summarized in terms of his ability to see through the false dichotomies of existing constitutional thought. For example, his ideas about the First Amendment managed to transcend the stale debate between Justices Frankfurter and Black over whether the First Amendment occupied a preferred position in the constitutional scheme. Similarly, he avoided Black's dogmatic denunciation of balancing tests by refusing to follow Black's absolutist and literalist interpretations of the Amendment. He was also able to see through Black's dichotomy between speech and action.

Likewise, his early advocacy of selective incorporation of the Bill of Rights into the Fourteenth Amendment avoided the equally stale binary debate between Frankfurter and Black over incorporation. But the most fundamental false dichotomy that Brennan managed to puncture is that between democracy and judicial review. It was the Warren Court that placed an expansive idea of democracy into the foundational concept of constitutional interpretation.

Brennan realized that judicial review was not incompatible with democratic legitimacy. Judicial review could serve as a means of fulfilling democratic values through an expanded understanding of Justice

Stone's *Carolene Products* footnote.[4]

He thought of the enforcement of rights not as contradicting democracy but as a way of constituting it. Democracy was not simply majority rule or any exclusive procedural definition, but rather a system of participation and inclusion that sought to provide dignity to the outsider—the scorned, the weak, the marginal.

Indeed, during the last years of the Warren Court, with the support of a strong liberal majority, Brennan began to elaborate a conception of democracy not far from the European Social Democratic view that democracy is dependent on relative social and economic equality. In cases like *Shapiro v. Thompson*[5] and *Goldberg v. Kelly*,[6] Brennan understood that the right to welfare was part of an expanded conception of democratic participation.[7]

Brennan also took the lead in defining democracy in terms of a broader conception of democratic culture. His *Roth v. United States*[8] decision on obscenity, often criticized, can be seen as a rejection by

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4. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . Nor need we inquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

5. 394 U.S. 618 (1969).

6. 397 U.S. 254 (1970).

7. *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that statutes denying welfare assistance to persons who had not resided within the jurisdiction for a least one year were unconstitutional, *with* Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that procedural due process is applicable to termination of welfare benefits because welfare benefits are a matter of statutory entitlement for qualified persons).

8. *See* 354 U.S. 476 (1957) (holding that speech and press are protected to ensure the unfettered interchange of ideas. All ideas having even the slightest redeeming social importance have full protection under the First Amendment, unless they encroach upon a limited area of state interest).

Brennan of the view put forth prominently by the distinguished civil libertarian Alexander Meikeljohn that the First Amendment protected only political, not cultural speech.[9]

Brennan's belief in a democratic way of life allowed him to understand that democracy was part of a broader political culture.

In my view, Justice Brennan is entitled to be added to that select pantheon of the greatest Supreme Court Justices. I think there are three. Chief Justice Marshall, Justices Holmes, and Justice Brandeis. Into that exalted company we will come to see that William Brennan is the fourth really distinguished Justice of the Supreme Court. We will miss him greatly. Thank you.

E. JOSHUA ROSENKRANZ

Our next speaker is Justice O'Hern.

DANIEL O'HERN

There is a mystery about Justice Brennan. How did he come to be this incredible constitutional hero whom we honor today? I doubt very much that it was, as Professor Horwitz has suggested, Vatican II that inspired his idealism. I never heard that from him. He was a private person. He rarely, at least with me, discussed his inner thoughts or why he did what he did. It remains a mystery how he developed this burning zeal for human rights. I would simply like to speak today of Justice Brennan's influence on state courts. In the old days, we used to have classes on Saturday morning. So I will leave the podium for a few minutes to use the Socratic method and ask one of the students among you this question: If a police officer were to search the garbage outside of your home and find white plastic bags containing residues of marijuana and you were charged with an offense, do you believe that evidence should be admitted in a case against you? In *California v. Greenwood*,[10] the United States Supreme Court held that the Fourth Amendment does not prohibit unreasonable searches and seizures of garbage left for collection in an area accessible to the public.[11] In *State v. Hempele*,[12] the

9. *See generally* ZECHARIAH CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) (discussing free speech from a social and historical standpoint).

10. 486 U.S. 35 (1988).

11. *See id.*

12. 576 A.2d 793 (N.J. Sup. Ct. 1990).

New Jersey Supreme Court held that its citizens had an expectation of privacy in their garbage and that the evidence should be suppressed.[13] The question that I put to you is why should a state court feel free to disregard the decisions of the United States Supreme Court?

I use that word, disregard, because that is what the debate over state constitutional doctrine is about—whether state courts should rely instead on common law traditions or their own state constitutions when evaluating claims of entitlement to civil rights and civil liberties.

It is important to remember that state courts continue to be a tremendously important part of the system for the vindication of constitutional rights. The Brennan Center for Justice sponsors an annual lecture on state courts and social justice at New York University Law School. The inaugural lecture was delivered by Chief Judge Judith Kaye of New York. Judge Kaye pointed out how Justice Brennan is most often associated with his distinguished tenure on the Supreme Court of the United States but that he had previously served in the state courts, including four years on the New Jersey Supreme Court.

At the time of his confirmation, Brennan was only the third state judge appointed to the Supreme Court in this century. The previous two were Holmes and Cardozo. Since then, of course, Justice O'Connor and Justice Souter have joined the Court.

Chief Judge Kaye emphasized that our nation's legal disputes are centered overwhelmingly in the state courts. State courts handle over ninety-seven percent of the litigation, or tens of millions of new filings, each year.[14] The federal courts handle some two-hundred and fifty-thousand cases per year.[15]

It is in the state courts that the constitutional principles that Justice Brennan helped to shape are applied every single day. I did a brief computer search that disclosed over fifty recent references to *Goldberg v. Kelly*,[16] his opinion concerning due process and fair procedures in the administrative context. I am sure that if I had looked up *New York Times*

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13. *See id.* at 796.

14. *See, e.g.*, John Burrit McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 877 (1996).

15. *See* Judicial Business of the United States Courts 1997 (visited Mar. 11, 1999) <http://www.uscourts.gov/judicial_business/contents.html>.

16. 397 U.S. 254 (1970).

v. Sullivan,[17] there would be an equally great number of citations.[18] The principles of free speech set forth in that opinion will be used for years in state courts.

We are especially proud that it was in New Jersey that Justice Brennan first addressed this movement on the part of state courts to interpret their state constitutions to provide greater protection to citizens than the United States Supreme Court may have found in the counterpart federal constitutional provisions. In a speech to the New Jersey State Bar Association in May 1976, Justice Brennan said that more and more state courts are interpreting counterpart constitutional provisions of the Bill of Rights as guaranteeing citizens of their states more protection than the federal provisions. [19]

As an example, Justice Brennan cited *State v. Johnson,*[20] a case authored by Justice Sullivan. The issue in *Johnson* was whether a person had validly consented to the search of his car when the police pulled the car over. The New Jersey Court said that for the consent to be valid, the person would have to know that he or she had the right to refuse. According to Justice Sullivan, "where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent."[21]

In Justice Brennan's 1977 *Harvard Law Review* article, he encouraged state courts to take advantage of the system of federalism created by the United States Constitution.[22] When originally enacted, the Constitution had no Bill of Rights. Instead, most believed the protection would come from the states.

Justice Brennan believed that as state courts began to play a more prominent role in developing constitutional protection, state decisions could create additional rights that would warrant protection in federal

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17. 376 U.S. 254 (1964).

18. A Westlaw search disclosed more than 1,800 references.

19. *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (discussing that "numerous state courts . . . have already extended to their citizens, via state constitutions, greater protections than the Supreme Court has held are applicable under the federal Bill of Rights).

20. 346 A.2d 66 (N.J. Sup. Ct. 1975).

21. *Id.* at 68.

22. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights, supra* note 19.

court.

Professor Bob Williams has traced the growth and development of state constitutional law over the twenty or more years since Justice Brennan encouraged it. New Jersey and Washington State favor what is called the criteria approach. Under that approach, courts should not first look to their state constitutions but rather only do so when certain criteria are met.

I have not been a fan of uncritical reliance on state constitutional doctrine probably because I love the Supreme Court too much. I was a clerk for Justice Brennan. There is an institutional reverence that comes from working so closely with the Court. I fear that if state courts simply choose to ignore what the Court is doing, there will be a subtle undermining of the moral authority of the United States Supreme Court. This undermining is problematic, because the Court ultimately has to resolve many, if not most, of the profound social issues of our society.

Thus, in *State v. Hemple*,[23] I did not see why a citizen in Pennsylvania, just across the river from New Jersey, should enjoy a different national identity from a New Jersey citizen, or have a different expectation of privacy in garbage.

I did join a case called *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty*.[24] The issue was whether protesters could enter a mall to distribute pamphlets in that private place. The United States Supreme Court ruled the other way. Because we had in New Jersey a stronger tradition of free speech in private places than had been found elsewhere, I felt comfortable with joining an opinion that allowed the protesters greater protection to distribute pamphlets in a mall.

The great moral disasters of the twentieth century all occurred in societies in which there was no ultimate arbiter of human rights. As strange as it seems, even the Supreme Court of South Africa maintained some degree of the rule of law. That respect for law helped the transition to a true democracy.

We enjoy here an incredible respect for the United States Supreme Court and the rule of law. My fear is that this respect will be undermined

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23. 576 A.2d 793 (N.J. Sup. Ct. 1990).

24. 628 A.2d 1094 (N.J. Super. Ct. App. Div. 1991) (holding that owners had no constitutional obligation to provide forum for expressive activity), *aff'd*, 628 A.2d 1075 (N.J. Super. Ct. App. Div. 1993), *rev'd*, 650 A.2d 757 (N.J. Sup. Ct. 1994), *cert. denied*, 516 U.S. 812 (1995) (holding that regional shopping centers were required to permit distribution of leaflets on societal issues, provided reasonable conditions were met).

by too great a reliance on state constitutional doctrines.

On a more pragmatic level, I have seen how easy it is to change a state constitution. I served as counsel to the New Jersey governor. One of the members of the legislature became angered once by what is referred to as a pocket veto. He introduced a resolution to amend the state's constitution to outlaw the pocket veto. By a simple majority vote over two sessions, the legislature was able to have the question placed on the ballot. Once on the ballot, the amendment can pass by a simple majority of voters, exemplifying how easy it is to amend a state constitution. It is easier to amend a constitution than to pass a law. A governor may be bypassed.

Justice Brennan has nonetheless given this challenge to the state courts. State courts must enforce constitutional rights ninety-seven percent of the time. For everyday state judges, Brennan is a constitutional hero. Even while he was on the New Jersey Supreme Court, Brennan dissented from holdings of that court concerning the right of the defendant to have access to a confession. That decision in *State v. Tune*[25] foreshadowed one of his very controversial early cases called *United States v. Jencks*.[26] Justice Brennan's legacy expressed in his countless decisions will endure in the state courts for many years to come. Thank you.

E. JOSHUA ROSENKRANZ

Thank you, Justice O'Hern. I will introduce Roy Schotland now, from Georgetown.

ROY SCHOTLAND

Whenever the Justice spoke to law students, as many people here today remember, he would ask, "What's the most important point to know about the Supreme Court?" After a pause, he would hold up five fingers.

What made Brennan a historic figure was his own five strengths that were, as Morton Horwitz said, an "almost magical combination." Each

25. 98 A.2d 881 (N.J. Sup. Ct. 1954) (holding that a criminal defendant is not entitled to inspect his own confession since the law does not protect an accused against his own voluntary acts).

26. 353 U.S. 657 (1957) (finding that the defendant was entitled to an order directing government to produce for inspection all reports concerning events and activities that were presented as evidence at trial and was entitled to inspect such reports and to determine whether they should be used in his defense).

strength was more than impressive, but the combination was unique. At least unique among mortals—for if we focus on what our Justices have built high on Olympus—is John Marshall, who in Lawrence Tribe's words was the "chief architect of [our] national government," and Brennan, who was the "principal architect of [our] system for protecting individual rights."[27]

Let me list Brennan's strengths in random order.

One was his vision for our nation. Brennan's classmate, Paul Freund wrote that the law, like art, "seek[s] to accommodate change within the framework of continuity, to bring heresy and heritage into fruitful tension."[28] Brennan was the acrobat walking that high wire-like tension, always seeing what could be but never sliding into what Winston Churchill called the "cloudland of aspiration"—always finding steps to keep the society open and to assure that continuity would work not only for those who already had, but also for those who had not.

Another strength was his vision of his own role. I once asked Paul Freund what was the difference between the two Justices he had worked for, Brandeis and Frankfurter. He responded that Brandeis had more patience, and Frankfurter, as an academic, had less experience with bitter battles over public policy. Brandeis was confident that given time, his view of cases would prevail. Brennan, too, never lost sight of the cases yet to come, as I will exemplify in a moment.

What a strength was Brennan's charm! Another Justice's clerk once commented to the Brennan clerks: "There's only one thing you guys lose by clerking for Brennan. All the rest of us have two Justices, our own and yours."

What sheer power of legal intellect—Justice Souter called it "the Brennan charm." Just look at all those landmark cases! Constitutional law casebooks have more opinions for the Court by Brennan than any other Justice in U.S. history. That is even more remarkable if you remember that the same man also wrote more dissents than any Justice in history. Why did he have so many major opinions for the Court? It was more than long tenure.

Which sets up the last strength: luck. Maybe Brennan deserves credit even for luck by being smart enough to be born Irish. Brennan and

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27. Laurence H. Tribe, *Lion of Liberalism*, TIME, Aug. 4, 1997, at 19.

28. Paul A. Freund, *Constitutional Dilemmas*, 45 B.U. L. REV. 13, 13 (1965), *reprinted in* PAUL A. FREUND, ON LAW AND JUSTICE 23, 23 (1968).

Earl Warren, Brennan's second mentor after Arthur T. Vanderbilt, his Chief Justice on the New Jersey Court, participated together in 1,406 cases over all their years together. They voted together in eighty-nine percent of those cases.[29] Warren valued Brennan's vision to see what position could command a majority, which is why Brennan so often was assigned to write that position.

A perfect example of Brennan's vision was *Baker v. Carr*,[30] 1962's opening of the reapportionment revolution. Brennan had five votes because Potter Stewart was willing to come along on a very narrow opinion. After several months, Brennan's work persuaded one of the dissenters, Tom Clark, to switch and join Brennan, which opened the possibility for a broader opinion. But Stewart had been there when needed, and Brennan was both loyal and mindful about cases yet to come. *Baker* also gives us a perfect example of Brennan's charm. Soon after *Baker* was decided, the Brennans hosted a party for a visiting delegation of British judges. The bitterest dissenter in *Baker* had been John Harlan, who was so upset about how he thought "the political thicket" would damage the courts, that on the day the opinions were read, he literally wore a black tie. Harlan came to the party for the British judges, and when he came into the Brennan home, there was the ebullient leprechaun, Brennan, doing one of his immortal bear hugs on the startled Harlan, who just loved it.

Baker v. Carr ended an era in which the States had been so unresponsive to so many of their people that federalism was not working—because only Washington was responsive.[31] For the vigor of our states today, and therefore of our federal system, thank Brennan. Earl Warren said that *Baker* was the Warren Court's most important case, and that if it had come earlier, *Brown v. Board of Education* would not have been necessary.

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29. Contrast the current togetherness of Justices Scalia and Thomas: in only a single term, they have voted together more than 89% of the time.

30. 369 U.S. 186 (1962) (holding that voting schemes should adhere to "one person-one vote" apportionment).

31. How much today's vigor of state governments owes to the reapportionment revolution is clear only when one recalls how limp those governments had been. The scene, even in as major a state as Illinois, was memorably captured by Judge Abner Mikva, describing his time as a legislator. He used to say that the hardest decisions he had to make as a state legislator came every Sunday night, when he had to decide what to pack to take to Springfield. Since he had no office at the state capitol, not even a desk with a lock, he'd have to carry there and back everything he expected to be working on.

Brennan's last major reapportionment case, a 5-4 decision in 1983 about New Jersey's congressional districting, showed the Justice's concern for future cases. He insisted that "one person-one vote" left no room for deviations that would inevitably involve judges in deciding how much deviation was too much. He sought clarity to avoid entanglement. After all, redistricting has been called politics as blood sport, and after the next census, redistricting battles will be unprecedentedly lively.[32] Of course the academic reaction was slower, especially at Harvard, where Frankfurter's approach was gospel. But in 1966, when Harvard feted Brennan's tenth anniversary on the Court, Dean Griswold gave special emphasis to *Baker*, saying he did not think it could work, but it seemed as though Brennan had made it work.

In 1982, twenty years after *Baker*, Congress amended the Voting Rights Act, calling upon the courts to implement a truly tricky task: to assure that minorities have the effective opportunity to elect candidates of their choice. The watershed case was *Thornburg v. Gingles*[33] in 1986, with Brennan again driving for clarity, not a pedantic preference for

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32. The justification for Brennan's jurisprudence must be sought in its results—in whether it has made, or is likely to make, the country better off in either a material or a spiritual sense.

"Thirty-five years after *Baker v. Carr*, no one is sure what the effect of constitutional review of legislative apportionment has been on public policy." Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9, 12-13 (1997).

Posner is rarely this wrong. One might first agree that thirty-five years may not be long enough, but as a greater economist than Posner put it, "in the long run we're all dead."

No passage of time will suffice to reach agreement on what public policy is good. The literature on the results of reapportionment is inconclusive. Even if we agreed that whatever policy the suburbs want is good policy, still there would be disagreement on how much the adoption of policy was attributable to the suburbs' political strength. But Brennan's "result" was not to advance a particular policy, nor to advance urban or other political strength. Rather, it was to end the oligopolistic "lock-up" of political power by those who enjoyed it only because their seats reflected some earlier distribution of population. Restoring rational allocation of representation, and thus restoring an open, competitive political process, was the "result" sought. It was clear with startling speed that *Baker* secured that result: "While there was some footdragging, and judicial proceedings were often necessary, the astonishing fact is that by the spring of 1968, four years after the key decisions, the task of revision was essentially complete." Robert McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 229 (1968). Dean McKay presented the data on the remarkable sweep of compliance in both congressional and state legislative districting.

33. 478 U.S. 30 (1986) (discussing voter dilution in racial gerrymandering cases).

rules, but rather a concern to keep judicial intervention effective without risking avoidable entanglement with raw politics. Once again, Brennan found a workable balance between aspiration and the attainable. Thanks in large part to the 1982 amendments and the *Thornburg* opinion, today there are twenty-one black southern U.S. Representatives, and nationally over 8,000 black-elected officials and about 6,000 Hispanic officials. Sadly, Justice Souter, carrying the Brennan flag so splendidly in the Voting Rights Act cases, must now carry it in dissent, for the Court has turned.

I close with *Buckley v. Valeo*,[34] a 1976 case that many well-meaning souls want to overrule. In 1997, Josh Rosenkranz co-edited a wonderful book about Brennan titled *Reason and Passion*.[35] In that book, Brennan is credited with several per curiams, and even with a major role in decisions authored by others, like *Griswold*[36] and *Bakke*.[37] But *Buckley* is not mentioned anywhere in the book. May I fantasize? Josh's co-editor, the recently deceased Bernard Schwartz, would not let Josh mention *Buckley*. Josh argued that it would be a Stalin-like rewriting of history to just ignore the Justice's role in this much-controverted case. In fact, as biographer Steve Wermiel has found, Brennan not only pressed for the *Buckley* majority, he deemed the result so important he hoped to have it signed, as his *Cooper v. Aaron* effort had been, by all nine Justices.

Why did Brennan agree with striking down so much of the 1974 campaign finance statute? Two reasons. One was, as *Buckley* quoted from *New York Times v. Sullivan*, "our profound national commitment ... that debate on public issues should be uninhibited, robust, and wide-open."[38] Indeed, that part of *Buckley* was written by Potter Stewart, and Brennan was unhappy with it, wanting it even clearer that speech was being injured—being the only question that justified the injury. The second reason was that Brennan knew that however noble may be the cloak of reform, since statutes are bound to be written by incumbents,

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34. 424 U.S. 1 (1976) (holding that despite First Amendment objections, statutory provisions limiting individual contributions to campaigns were constitutional).

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

36. Griswold v. Connecticut, 381 U.S. 479 (1965).

37. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

38. 376 U.S. 254, 270 (1964) (holding that "debate on public issues should be uninhibited, robust, and wide-open," even though it may contain attacks on the public and the government).

and incumbents are bound to have a unique stake in campaign finance, it follows that the closest judicial review is essential if we are to preserve open elections. There's the Brennan "vision" again—not law serving those who write the laws, but rather law preserving the open society.

Judge Wald closed an opinion with the phrase, "we have taken a long while to come to a short conclusion: the rule is reasonable."[39] Today, our short conclusion is that the man is immortal.

E. JOSHUA ROSENKRANZ

Thank you, Roy. Just a brief answer. It had nothing to do with Stalinism—or anything nearly as conspiratorial as you imagine—and it wasn't Bernie Schwartz's fault. The Justice is reputed to have written the unsigned *per curiam* opinion *Buckley v. Valeo*.[40] And it certainly was a landmark case, for better or for worse. But we could not find a single author to go on record and credit—or blame—Justice Brennan for *Buckley*.

Let me now introduce Judge Wald.

PATRICIA WALD

How do judges get to be heroes? Should they even try? David Luban—the legal ethicist—recently wrote an article titled *Heroic Judging in an Antiheroic Age*,[41] in which he posed the troubling question: when is it appropriate for unelected, life-tenured judges to exercise fearlessly the kind of raw power that is usually thought to be the essence of heroism. Reluctantly, he concluded: when other institutions fail, a judge may have no alternative but to use power expansively, even heroically.

But he added: Not all judges have what it takes to be a hero.

A judicial hero is different from a military hero whose heroics usually involve acts of physical courage, or a political hero whose heroism may involve daring leadership or a charismatic ability to attract the devotion of crowds of followers. The judicial hero walks a high wire between his natural terrain of declaring and interpreting laws made by others and the jungle of constitutional crises where decisive action may be required to preserve the nation, some group of citizens within it, or the

39. Sierra Club v. Costle, 657 F.2d 298, 410 (D.C. Cir. 1981).

40. 424 U.S. 1 (1976).

41. David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064 (1997).

constitutional pact itself. The judicial hero needs caution and humility on the one hand and boldness on the other and the judgment to recognize when to use either.

There is another difference too. Our traditional heroes earn their spurs in a defining battle or decisive oratory. Many are sprinters who fade over long distance, but William Brennan was the ultimate marathoner. He served thirty-four years on his nation's highest tribunal and wrote 1,573 opinions that fill 146 volumes of the U.S. Reports. His opinions deal with the full spectrum of society's problems: voting rights, equal protection of the laws, school prayer, free press, gender discrimination, the rights of the accused, desegregation, and capital punishment *inter alia*. His time on the Court spanned the anti-Communist frenzies of the 1950s, the turbulent civil rights revolution of the 1960s, the Vietnam War, the women's movement, the birth of environmentalism, Watergate, the Reagan-Bush administrations, and three Chief Justices. A generation of Americans was born, grew up, and became parents themselves on his judicial watch.

From this great body of work are some decisions more heroic than others? There are the decisions cited in the constitutional treatises: *Goldberg v. Kelly*,[42] the twentieth-century adaptation of due process to the "new property" entitlements of the welfare state; *Plyler v. Doe*,[43] the right to an education for illegal alien children; *Baker v. Carr*,[44] the one man-one vote case; *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[45] the creation of a remedy for the victims of constitutional torts; *New York Times v. Sullivan*,[46] the trumping of freedom of the press over libel laws; and *Texas v. Johnson*,[47] the striking down of a flag-burning law? In all of them, Brennan did not hesitate to follow the course described by one of his law clerks, Gerard Lynch:

> When the going gets tough—precisely because textual or precedential analyses does not yield clear signals—the judge is left, I'm afraid, with his own ability to articulate, as per-

42. 397 U.S. 254 (1970).

43. 457 U.S. 202 (1982).

44. 369 U.S. 186 (1962).

45. 403 U.S. 388 (1971).

46. 376 U.S. 254 (1964).

47. 491 U.S. 397 (1989) (holding that burning an American flag during a protest rally was expressive conduct under the protection of the First Amendment).

> suasively as possible, his best understanding of the true meaning of the broad values to which the Constitution requires adherence.

Many of the decisions that made him a hero, in the view of many, made him a villain to others. History alone will be the ultimate arbiter, but William Brennan's place, I believe, is secure. Constitutional heroes are not made by solitary acts of heroism. Instead, whole careers must be examined, and even then, judgments must be tested. As Lynch said, "the aspirations to justice and liberty in which Justice Brennan so fervently believed must surely transcend his time, but his particular application of those principles grew out of his own time."

Originalists aside, most agree that we are continually revising our constitutional understandings and accommodating them. Realistically, the heroic stature of most jurists is transitory. How often are decisions of nineteenth-century judges cited today?

Justice Brennan was never afraid to confront a real constitutional crisis or to break new legal ground. Yet, remarkably, in historic hindsight, it is hard to find any decision he wrote that could be called extremist or uninformed. He chose his targets well. I want to stress in these brief remarks his judicial craft and strategic wizardry in advocating and achieving the result he had decided was right for the country and for the Constitution. If you are an appellate judge, however heroic, you do not rule alone. The decisions you render must carry a majority of your court if they are to take effect. Pragmatically, you may indeed be as much a constitutional hero when you cast the swing vote that makes a 5-4 decision as when you author timeless prose that explains why the case is coming out one way rather than another. My first boss, Jerome Frank on the Second Circuit, once said of a finely crafted legal text: "Patient genius made this work." William Brennan had patient genius.

Standing out as a hero on a court of nine strong, canny, frequently idiosyncratic personalities, all imbued with at least some degree of fervor, and often driven by a sure sense of righteousness, is not easy. Among others, Brennan sat with Hugo Black, Felix Frankfurter, Bill Douglas, Tom Clark, John Harlan, Potter Stewart, Thurgood Marshall, Byron White, Arthur Goldberg, Abe Fortas, Earl Warren, Lewis Powell, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, and Nino Scalia. Need I say more?

When Brennan joined the Court in 1956, he gravitated naturally toward the liberal alliance of Chief Justice Earl Warren and Justices Hugo

Black and William Douglas. But in these early years, he mastered the art of building coalitions across ideological divides. One of his former law clerks of that era wrote, "Time and again, Mr. Justice Brennan wrote opinions relying upon relatively narrow, sometimes technical grounds, gathering a majority for the disposition of cases when . . . '[t]he Court seemed hopelessly split into minor fragments.'"[48] Yet he strongly rejected any characterization of his role as a "playmaker" and insisted that he never cajoled or importuned his colleagues to win their votes.[49] Brennan built consensus by persuasively communicating to his colleagues his sense of what was important to them and by crafting those often inconsistent viewpoints into a harmonious whole. "When I have been able to draw a consensus," he explained, "I have done it by the drafts I circulated among my colleagues."[50] What he meant is that he patiently revisited and revised to absorb the varied comments of his colleagues as they flooded in. We know that in *New York Times v. Sullivan*, he circulated eight separate drafts before achieving his consensus.

In the 1960s, as Earl Warren's most trusted ally, Brennan took on a pronounced leadership role. During this time, Justice Brennan demonstrated that he was not just a master builder of consensus but a master builder of constitutional doctrine. He crafted opinions that not only drew along his colleagues but also planted the seeds of future opinions. This was an acquired talent. He did not arrive at the Court as a full-blown constitutional scholar. Indeed, I am told he never even studied Constitutional Law here at Harvard and, for shame, was not even on the *Law Review*. In the beginning of his tenure, many sophisticated legal commentators found his opinions "boring," "clunky," and not especially well-reasoned. Yet with practice and patience he developed, as Larry Tribe has said, an "unparalleled ability to detect related themes in starkly different cases, and to see the constitutional structure as a whole."[51] This ability to plot the path he felt the law must take and to follow through with a series of opinions that served as stepping stones toward his ultimate destination gave his judicial handiwork an enduring force that made

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48. W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 4 (1991).

49. *See* Nat Hentoff, *The Constitutionalist*, THE NEW YORKER, Mar. 12, 1990, at 59.

50. *See* HOPKINS, *supra* note 48, at 4.

51. Laurence H. Tribe, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 41, 45 (1997).

it less vulnerable to later ideological shifts on the Court. Ironically, to some, it is Justice Scalia who has paid him the supreme compliment of being "probably the most influential justice of the century."[52]

Here is an example from internal Court records: Although Brennan did not write *Griswold v. Connecticut*,[53] which declared unconstitutional a state law prohibiting the sale of contraceptives, even to married couples, he was instrumental in constructing the Court's approach to the case.[54] Responding to Justice Douglas's first draft of the opinion, Brennan suggested that he replace reliance on the First Amendment's "Freedom of Association,"[55] as the source of constitutional protection of the marital relationship, with a focus on a broader right to privacy based on several clauses in the Bill of Rights. Brennan suggested to Douglas:

> Instead of expanding the First Amendment right of association to include marriage, why not say that what has been done for the First Amendment can also be done for some of the other fundamental guarantees of the Bill of Rights? In other words, where fundamentals are concerned, the Bill of Rights' guarantees are but expressions or examples of those rights and do not preclude applications or extensions of those rights to situations unanticipated by the Framers.[56]

Articulated this way, Brennan explained, "All that is necessary for the decision of this case, is the recognition that, whatever the contours of a constitutional right to privacy, it would preclude application of the statute before us to married couples."[57] Douglas adopted and incorporated Brennan's suggestions in a revised draft, which convinced a majority of the Justices.

In *Eisenstadt v. Baird*,[58] Brennan expanded the embryonic right to privacy established in *Griswold*, holding that because there was no "ra-

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52. Anthony Lewis, *Reason and Passion*, N.Y. TIMES, July 28, 1997, at A17 (quoting remarks of Justice Antonin Scalia).

53. 381 U.S. 479 (1965).

54. *See id.*

55. *See* U.S. CONST. amend. I.

56. David J. Garrow, *Reproductive Rights and Liberties: The Long Road to Roe*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE, *supra* note 2, at 110.

57. *Id.*

58. 405 U.S. 438 (1972).

tional basis" for distinguishing between married and unmarried individuals in the right to access contraceptives, the rights of single persons to obtain contraceptives were protected by the Equal Protection Clause of the Fourteenth Amendment.[59] As Brennan explained:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible . . . . If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[60]

Brennan's opinion in *Eisenstadt* had a more far-reaching effect. Released while the abortion cases were pending before the Court, it provided the basic framework for Justice Blackmun's opinion in *Roe v. Wade*.[61] The right to privacy announced in *Griswold v. Connecticut*,[62] thus became the constitutional underpinning for the right of a woman to obtain an abortion.

During the period of the Warren Court, Justice Brennan drafted a major segment of the Court's most important and controversial opinions, including *NAACP v. Button*,[63] which recognized public interest litigation as a valid form of political advocacy; *Green v. County School Board*,[64] which required the states to work quickly to implement realistic desegregation plans; *Fay v. Noia*,[65] which dramatically expanded the scope of habeas corpus review of state criminal convictions; and, of course, *New York Times v. Sullivan*,[66] which protected citizen-critics of public offi-

59. *See id.* at 468.

60. *Id.* at 453.

61. 410 U.S. 113 (1973).

62. 381 U.S. 479, 484-86 (1965).

63. 371 U.S. 415 (1963) (holding that NAACP activities are modes of expression and association that are protected by the First and Fourteenth Amendments).

64. 391 U.S. 430 (1968) (holding that the "freedom of choice" plan, which did not promote racial integration, was not in compliance with the Court's order to desegregate in *Brown v. Board of Education*, 349 U.S. 294 (1954)).

65. 372 U.S. 391 (1963) (holding that a state prisoner's failure to appeal from criminal conviction did not justify withholding federal habeas corpus relief).

66. 376 U.S. 254 (1964).

cials from punitive defamation suits and in the process set First Amendment doctrine on a surer and safer course through the turbulent seas of political controversy.

One case in particular illustrates Brennan's role as an architect of constitutional jurisprudence and his uncanny ability to tie together a fractured Court. *Baker v. Carr*[67] established the principle of "one man-one vote" and dramatically expanded the power of the Court vis-a-vis states and the legislative branch in the area of equal political representation. On the surface, the case raised the question of whether the federal courts could mandate that state legislative districts be apportioned to approximate populations. On a deeper level, the case posed fundamental questions about the role, scope, and power of the Court in democratic majoritarian politics, questions that had been brooding in the jurisprudence of federalism and separation of powers for decades.

The Court granted certiorari in the 1960 term, with just four votes. Brennan, one of the four, realized instinctively that *Baker* afforded a vehicle to overrule *Colegrove v. Green*,[68] a 1946 opinion written by his law school professor and frequent opponent on the Court, Felix Frankfurter, which held that the federal courts had no power to interfere with the apportionment of state legislatures.[69] A vital fifth vote was needed to accomplish any change.

At the conference following the first oral argument in the case, the Court was evenly split, four for and four against reversing *Colegrove*, with Justice Stewart swinging undecidedly in the middle. The case was reargued in the 1961 term. Justice Frankfurter circulated a sixty-page memorandum arguing vigorously to affirm *Colgrove*'s hands-off policy. Justice Brennan picked up the gauntlet. With Justice Stewart in the forefront of his mind, he wrote an especially long memo replying to Frankfurter and outlining the arguments against permitting malapportionment in legislative districting to continue. The memorandum, diligently researched and impeccably reasoned, persuaded Justice Stewart.

The Court's majority, however, was razor-thin. As was common in such cases, Justice Brennan was assigned the task of writing an opinion that would bind this tenuous majority. He understood well that Stewart, who had been so long hesitant on the outcome, would not likely join the

67. 369 U.S. 186 (1962).

68. 328 U.S. 549 (1946).

69. *See id.* at 554.

kind of broad and freewheeling opinion that Douglas and Black supported; yet the opinion would do little to achieve the goal of equal representation if it did not lay a solid foundation on which that principle could be implemented in a multitude of political contexts. Meanwhile, Justice Thomas Clark, who had stood solidly with Frankfurter, was dismayed to discover in his own research that Tennessee's Constitution provided no means for the public to directly remedy a severe malapportionment problem. After examining a chart that Brennan circulated showing the huge disparities in Tennessee's legislative districts and meeting with Brennan, Clark surprised his colleagues by joining Brennan's opinion. Although Justices Douglas, Stewart, and Clark ultimately wrote separate concurring opinions, Brennan worked assiduously to minimize the degree of their divergence from his majority opinion. A defining case that had begun inauspiciously with a minority of four votes to overrule *Colegrove*, thus, concluded with a commanding majority of six.[70]

Baker v. Carr is emblematic of Brennan's unique judicial style to build a majority on the Court using a combination of legal acumen and individual attention. He understood that *Baker* offered an important opportunity for broadening rights of participation that were fundamental to his constitutional vision. Yet he also well understood the "rule of five." His command of the law, analytical ability, and insights into his colleagues' personal dynamics allowed him to write an opinion that pushed the envelope just to the point of what his fellow Justices could accept. His true collegiality came to the forefront as well when, following Justice Clark's switch assuring his majority, he nonetheless crafted the decision to hold Justice Stewart's vote, which achieved a broader majority than he could have gotten with his own preferred formulation. I regard this tedious, patient, calm, selfless adaptation of principles to personalities in the cause of great constitutional issues to be at the core of judicial heroism.

Justice Brennan played this crucial role on the Warren Court throughout the 1960s, during which time the Court fundamentally altered the course of constitutional law in many areas. As Brennan himself observed, "It was in the years from 1962 to 1969 that the face of the law changed." He could take credit and responsibility for much of those jurisprudential shifts.

But times change, too, even for heroes, and by 1972 Brennan's liberal colleagues, Justices Fortas, Warren, Harlan, and Black, had been

70. *See* Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29 (1997); *see also* KIM ISAAC EISLER, A JUSTICE FOR ALL 168-77 (1993).

replaced by Justices Rehnquist, Burger, Powell, and Blackmun. The Court turned to the right, and, as it did, Justice Brennan's role was dramatically altered. He now was writing in dissent more often than in the majority.

Can one remain a constitutional hero when he is no longer leading the troops, but rather challenging those that do? The role of a dissenter is a problematical role and legal scholars and judges differ sharply as to the intrinsic value of that role. Many judges think that institutional integrity requires that dissent be kept to a minimum and, while a court may argue among its members behind closed doors, it should speak with one voice to the world. Following this view, many countries do not acknowledge the right of individual dissent. Furthermore, some of our own premier appellate judges dissent little or almost never. Frank Coffin, the distinguished former Chief Judge of the First Circuit, dissented only twenty-three times in 2,300 cases. Carl McGowan—perhaps the most admirable judge I have ever served with and quite a substantial hero in his own right—rarely if ever dissented.

Some say that dissents taint the Court's pronouncements with uncertainty. But, as Justice Brennan knew, they can also persuade future courts, influence state courts operating under their own constitutions, and provoke Congress. Supreme Court dissents also serve the important function of validating a lower court's attempt to get it right even when that court is ultimately overruled, giving succor to the losing parties (not to be dismissed lightly in close cases). Perhaps most importantly, dissents often temper the breadth and assuredness with which the majority lays down its pronouncements. They are surely therapeutic for the writer. They are a critical part of the judge's legacy, leaving a public record of his total philosophy. The Brennan-Marshall dissents on capital punishment, for instance, acted as a continuing reminder to colleagues never to forget the implications of the ultimate power they wield in death penalty cases. These dissents, in the end, won over a third convert, Justice Blackmun. They remain a powerful reminder to future courts.

At the start of his thirtieth year on the Court, Brennan said:

> I have always felt that a member of this Court is duty-bound to continue stating the constitutional principles that have governed his decisions, even if they are in dissent, against the day when they may no longer be in dissent. It has happened so often in the history of the Court, and must continue to happen, that views that represent the minority position

> come to be understood as correct. That is why I continue to dissent on the death penalty and in other areas, and I am going to continue to do so because I am duty-bound.[71]

Brennan practiced his preachings. Of the 1,573 opinions he wrote, almost 700 were dissents. During his time as a ranking minority member of the Court, Brennan considered dissents critically important to the development and evolution of the law. He established the practice, now routine, of assigning dissents.[72] This institutionalizing of the dissent function gave the minority view greater coherence and unity and reduced the writing burden on those individual Justices who regularly found themselves in dissent. Although his dissent assignments were always framed as respectful requests, virtually no Justice turned one down. A memo found in his papers makes it clear that the Justice assigned to a dissent was expected to write on behalf of all of the dissenters. After Brennan assigned Stevens to write the dissent in one case, Stevens replied, "Although my views may differ slightly from yours and Thurgood's, I will be happy to try to write a dissent that we can all join."[73] By urging the dissenting Justices to speak with a single voice, he amplified the force of their constitutional disagreements with the majority.

Right to the end, Brennan continued writing dissents of his own. He utterly rejected the playwright Ionesco's caution that: "To think contrary to one's era is heroic, but to speak against it is madness." Perhaps his best known dissent was in *McCleskey v. Kemp*,[74] where he was joined by Justices Marshall, Blackmun, and Stevens. This dissenting opinion reiterated his deeply held view that the death penalty is in *all* circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. Furthermore, the death penalty is, as implemented, racially discriminatory. He explained in a lecture why he continued to dissent in every capital punishment case afterward:

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71. Jeffrey T. Leeds, *A Life on the Court*, N.Y. TIMES, Oct. 5 1996, § 6, at 25.

72. *See* Beverly Blair Cook, *Justice Brennan and the Institutionalization of Dissent Assignment*, 79 JUDICATURE 17 (1995); Sandra L. Wood & Gary M. Gansle, *Seeking a Strategy: William J. Brennan's Dissent Assignments*, 81 JUDICATURE 73 (1997).

73. Wood & Gansle, *supra* note 72, at 74.

74. 481 U.S. 279 (1987) (holding that a study indicating inconsistency in death penalty application was not a constitutionally significant risk of racial bias affecting Georgia's capital-sentencing process, and was thus not a violation of the Eighth Amendment).

> 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 humanity . . . . This is an interpretation to which a majority of my fellow justices—not to mention, it would seem, a majority of my fellow countrymen—do not subscribe. Perhaps you find my adherence to it, and my recurrent publication of it, simply contrary, tiresome, or quixotic. Or perhaps you see in it a refusal to abide by the judicial principle of *stare decisis*, obedience to precedent . . . . Yet, in my judgment, when a justice perceives an interpretation of the text to have departed so far from its essential meaning, that justice is bound, by a larger constitutional duty to the community, to expose the departure and point toward a different path.[75]

So, perhaps in the case of a dissenting Justice, hero is a title that can be conferred only posthumously, when history's accounts are rectified. In the short term, many of Justice Brennan's decisions, if not overruled, may fall into disuse, but, as Justice Souter said at Brennan's funeral, "the Court must still grapple with those 1,350 decisions, dissents and all, when it revisits old dilemmas or contemplates changing course." In the end, heroism in a dissenter's lexicon may be, as someone once defined it, "endurance for one moment more."

As I conclude, I want to mention one quality about Justice Brennan that endeared him to me and to countless other lower court judges. While I was not an intimate of his, we were close enough for him to include me in noontime trips with his judicial cronies to a lunchroom in a warehouse in the far northeast corner of Washington. Everybody let their hair down. William Brennan reminded me of the Irish pols that I grew up with; lots of hugs, kisses, and outrageous compliments, but underneath steely straight. I saw him, too, a number of times after he left the Court. Those were hard times for him; suffering the indignities of old age and illness, he missed the vortex, and he lamented that he had left too soon. Even heroes are human.

Justice Brennan had what Joseph Campbell, the chronicler of the

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75. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. J. 433, 444 (1986).

hero myth in his classic *The Hero With a Thousand Faces* calls a "gentle heart."[76] Lawyers revered him because, in Peter Strauss's words, he was "not one to show off or to play at ducks and drakes with attorneys; he earnestly sought (from them as from his colleagues) the understanding that would foster the best lines of resolution." He talked little at oral argument and avoided publicity. He treated his colleagues on the state, district, and circuit courts with the same warm spirit as he did his fellow members of the Supreme Court. As a former State Supreme Court judge himself, he had great respect for the work of state and lower federal court judges. In New York Chief Justice Judith Kaye's words, "He saw us as full partners in shaping the legal landscape of the nation."

Brennan's opinions evidenced civility, kindness, humility, and respect for the opinions of others. He never engaged in the practice, all too common today among appellate judges, of harshly critiquing lower court decisions and the motivation of the lower court judges who wrote them. Even when a lower court made a clear error of judgment or fact, he would very often note it only in a footnote. He left the impression that he respected and valued the work of the judges whose decisions he was reviewing, even if he disagreed with the outcome. He was happily not given to lecturing the lower courts on their deficiencies.

Justice Brennan was keenly aware of the greater practical insight that lower courts showed in resolving matters that involved local customs, conditions, or law. Indeed, in one of his last dissents, he chastised his own Court for ruling that a federal district court judge in New York had abused his discretion by holding city council members in contempt for failing to pass a public housing ordinance required by a consent decree in a civil rights suit. "The Court's . . . judgment," he wrote, "rests on its refusal to take the fierceness of the councilmembers' defiance seriously, a refusal blind to the scourge of racial politics in Yonkers and dismissive of [that trial judge's] wisdom borne of his superior vantage point."[77] He deplored the prospect, in his words, that "even the most delicate remedial choices by the most conscientious and deliberate judges are subject to being second-guessed by this Court."[78]

Joseph Campbell describes a mythical hero's first step as the realization that "the familiar life horizon has been outgrown; the old concepts,

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76. *See* JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 349-53 (1949) (psychoanalyzing the archetypal hero in mythology).

77. Spallone v. United States, 493 U.S. 265, 305-06 (1990).

78. *Id.* at 306.

ideals and emotional patterns no longer fit; the time for the passing of a threshold is at hand."[79] William Brennan understood this. He was a real-life hero who worked quietly, competently, serenely—in the majority or in the minority—to advance a constitutional vision that broadened rights and opportunities for every citizen.

E. JOSHUA ROSENKRANZ

Thank you. We have time for one question. Did everyone hear the question? The question is has Justice Brennan's heroism, the manner in which he occupied the field with what was characterized as sort of a progressive agenda, precluded the emergence of future heroes? Is that fair?

ROY SCHOTLAND

There is an easy answer. I think Eisenhower said it. He made two big mistakes. Warren and Brennan. We might be lucky and have other Presidents make such mistakes.

E. JOSHUA ROSENKRANZ

I want to thank the panelists very much for their opening statements, which really set a wonderful tone for the rest of the discussion today. Again, thank you all for being here.

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79. CAMPBELL, *supra* note 76, at 51.