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WILL THE BRENNAN LEGACY ENDURE?

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RICHARD FALLON

Our three panelists have insisted that they not be flattered in any way, but it will not be possible for me to honor their request completely.

Our first speaker is Akhil Reed Amar. After graduating from Yale University and Yale University Law School, Professor Amar went on to clerk for then-Judge Stephen Breyer. Amar was then hired back at Yale, where he is now the Southmayd Professor of Law. In a relatively brief career, he has made remarkable contributions to the fields of federal courts, constitutional theory, and criminal procedure.

Our second panelist is Professor Robert Nagel. Professor Nagel was educated at Swarthmore College and Yale University Law School. He served as the deputy attorney general for the Commonwealth of Pennsylvania before going into legal academics. Professor Nagel has been at the University of Colorado for a number of years and has produced a great deal of thoughtful, provocative, and influential commentary on constitutional law.

Our third panelist is Mark Tushnet. Professor Tushnet is a graduate of Harvard University and Yale University Law School. In addition to his Juris Doctor, Mr. Tushnet earned his Master of Arts degree from Yale University. He clerked for Justice Thurgood Marshall. Tushet has been in legal academics since 1973, and has produced an awe-inspiring number of books and articles that have changed the way we think about a variety of issues.

Each of the three speakers will make an opening statement of about fifteen minutes. Then the panelists will have a brief discussion, possibly prompted by a question from me. We will start with Akhil Amar.

AKHIL REED AMAR

It is a real privilege for me to be at Harvard and to be talking about one of my heroes, William Brennan, under the auspices of the *Harvard Civil Rights-Civil Liberties Law Review* and the Brennan Center.

My remarks focus on a non-trivial topic, but they do not touch on the entire Brennan legacy. I address that little thing that we call the Bill of Rights. I want to talk about the Bill of Rights as a whole, what it was like before the Brennan legacy, and what it is like as a result of Justice

Brennan. It will never be the same, and we all are the richer for that.

In identifying construction of the Bill of Rights as the keystone of the arch of Justice Brennan's contribution, I am adopting Justice Brennan's own self-assessment, reflected in two James Madison Lectures on the Bill of Rights delivered twenty-five years apart at New York University.[1] Justice Brennan ranked the Warren Court decisions that incorporated various clauses of the Bill of Rights against the states as "the most important [series of decisions] of the Warren era."[2] Brennan believed that these opinions were even more important than those that transformed political districting and race relations. That is Justice Brennan's assessment of the Warren Court, and I think he is the key architect of this central contribution, which is well known to you all as the idea of selective incorporation.

To appreciate that achievement, it is important to remember what the world used to look like. From the Founding to the Civil War, the Supreme Court of the United States never used the phrase "Bill of Rights" to describe the first ten amendments to the United States Constitution. Instead, they were described in opinions as "articles of amendment" to the United States Constitution.[3] That somewhat sterile description makes sense when you remember that the amendments were not, in every respect, a bill of rights. They applied only against the federal government. That is the rule of *Barron v. Mayor of Baltimore*.[4] But the federal government was not testing the limits of its powers to make and enforce social policy from the Founding era to the Civil War. Instead, it was trying to populate the continent by creating new territories and nurturing them into state governments. In that entire period, what is now called the Bill of Rights was rarely invoked. It was understood by many people as a set of structural limitations, especially on federal authority to infringe on states' rights. The Tenth Amendment was central.

The animating idea of liberty in this era is the idea of enumerated

1. *See* William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761 (1961); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

2. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, *supra* note 1, at 535-36. *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492-93 (1977).

3. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 285 (Yale Univ. Press 1998) (citing *Ex parte* Burford, 7 U.S. 13 (3 Cranch) 448, 451 (1807)).

4. 32 U.S. (7 Pet.) 243, 247 (1833).

federal power. Another basic motif of Supreme Court doctrine is property protection. That is what the world looked like before, when William Brennan came to Harvard Law School, and that is why he did not take courses on the Constitution.[5]

There was not much case law. In 1928 when he arrived here, there was not a single Supreme Court case that forcefully defended free speech or press or expression against governmental action, either state or federal. Not until 1931 in *Near v. Minnesota*[6] and *Stromberg v. California*,[7] did the Court begin to invalidate government action in the name of free speech principles. Those principles began to be applied against state infringement through a process that Justice Brennan later christened "selective incorporation." Religion clause principles began to receive similar attention in the 1940s in such cases as *Cantwell v. Connecticut*[8] and *Everson v. Board of Education of Ewing*.[9]

Thanks to Brennan, we can consider the Bill of Rights our palladium of liberty, our Parthenon. Through selective incorporation of the Bill of Rights—making many of its other provisions applicable against states—Brennan's opinions have increased protections for criminal defendants: protections against double jeopardy[10] and compelled self-incrimination,[11] protections of the right to counsel,[12] to confrontation,[13] compulsory proc-

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5. People like Justice Brandeis want to change the vocabulary from property to privacy. Privacy is more equally distributed than property: property conduces to inequality, but we all—rich and poor—have privacy in our persons and our personal affairs and our family lives and the like. This is one of the differences between the old substantive due process and the new substantive due process. We see this shift in Warren Court cases like *United States v. Katz*, 389 U.S. 347 (1967), a Fourth Amendment case moving from property to privacy as the motif.

6. 283 U.S. 697 (1931).

7. 283 U.S. 359 (1931).

8. 310 U.S. 296 (1940).

9. 330 U.S. 1 (1947).

10. *See* Benton v. Maryland 395 U.S. 784 (1969). Brennan joined the majority in finding the Fifth Amendment bar against double jeopardy applicable to the states. *See id.*

11. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

12. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). Justice Brennan joined Justice Black's opinion of the Court. *See also* United States v. Wade, 388 U.S. 218 (1967).

13. *See* Pointer v. Texas, 380 U.S. 400 (1965). Although *Pointer* was written by Justice Black, Justices Brennan and Black worked on the opinion together. *See* KIM ISAAC EISLER, A JUSTICE FOR ALL 180 (1993).

ess and jury trial.[14]

In the realm of free speech and press, the world has also been transformed. By turning the Bill of Rights into a bulwark against abuse of state power, the Supreme Court developed a great body of doctrine that could then be aimed at Congress and the federal government. Historically, the Supreme Court has been far more likely to address state abuses than to take on its fellow federal branches. Incorporation has enabled the Court to assemble an arsenal at the state and local level.

New York Times Co. v. Sullivan[15] marks the opening of an era of Court-imposed restrictions on Congress. As Larry Tribe points out in his treatise, before *Sullivan*, speech and press protections were never invoked successfully against an act of Congress by the United States Supreme Court.[16] The first time a Congressional statute was struck down on free expression grounds was the year *after* Sullivan—in the 1965 case, *Lamont v. Postmaster General of the United States.*[17]

Since Burt Neuborne mentioned *Sullivan* at the beginning and *Texas v. Johnson*[18] at the end of Justice Brennan's great career, I should point out that *Johnson*, a state case, set the stage for the following year's flag burning case, *United States v. Eichman*,[19] which reaffirmed *Johnson*'s basic free speech principles to strike down an act of Congress.[20] The religion clauses tell a similar story.

Before I conclude, I will briefly discuss criminal procedure. Case books in the early 1960s included a minor chapter on criminal procedure, and it was taught as a subset of constitutional law. In contrast, today's constitutional criminal procedure has its own course.

Some of the features of this portion of the Brennan legacy are particularly interesting. Justice Brennan emerges as an early moderate. He believed in selective incorporation, not in Hugo Black's total incorpora-

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14. *See* Duncan v. Louisiana, 447 U.S. 323 (1980). Brennan joined the majority in finding the Sixth Amendment right to a jury trial applicable to the states. *See id.*

15. 376 U.S. 254 (1964).

16. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 4 n.8 (1978).

17. 381 U.S. 301 (1965).

18. 491 U.S. 397 (1989).

19. 496 U.S. 310 (1990).

20. *See Johnson*, 491 U.S. at 406-22.

tion. Hugo Black considered freedom of speech an absolute.[21] In his view, there should never have been a libel action against the *New York Times* in *Sullivan*.[22] When Justice Brennan wrote for the Court in *Sullivan*, he did not take an absolutist position.[23] In the early criminal procedure cases, Justice Brennan, again, was a voice of restraint and caution. He urged the view that Congress and the states could craft alternatives to the Miranda warnings. Brennan was the fifth vote in *Schmerber v. California*,[24] writing that the government has to be able to take blood samples and fingerprints, despite Fourth and Fifth Amendment objections.[25] Brennan was the author of *Warden v. Hayden*,[26] which authorized governmental searching and seizing for so-called mere evidence.[27] Nor was he a death penalty absolutist in the early phase of his tenure.

Later in life, as the Warren Court became the Burger Court, Justice Brennan the play-making guard became Justice Brennan the great dissenter. In criminal procedure cases, he staked out intellectually pure but more extreme positions that are probably too exuberant to endure.

His most enduring legacy is a legacy of moderation and the elevation of the Bill of Rights as the centerpiece of our liberty–a bill protecting Americans from unconstitutional interference by government at all levels.

ROBERT NAGEL

I am afraid that what I have to say will strike you as excessively pessimistic, even grim. So at least I shall try to be brief.

Justice Brennan, of course, has left many specific doctrinal legacies. Some of them, like the intermediate standard of review in sex discrimi-

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21. *See* Konigsberg v. State Bar of Cal., 366 U.S. 36, 61-62 (1961) (Black, J., dissenting) (advocating absolute protection of free speech); *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

22. *See* New York Times v. Sullivan, 376 U.S. at 293 (Black, J., concurring) ("I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials.").

23. *See id.* at 265-92.

24. 384 U.S. 757 (1966).

25. *See id.* at 760-61, 772.

26. 387 U.S. 294 (1967).

27. *See id.* at 310.

nation cases,[28] remain solidly entrenched. Some, like the root and branch remedy in school desegregation cases, are formally established,[29] but time and events seem to have passed them by. Others, such as Brennan's position on affirmative action or discrimination in welfare policies, are currently in eclipse.[30]

Behind these specific legacies, there is a more general intellectual legacy inherent in the doctrines themselves. By doctrine, I mean the formulas, the prongs, the tests, the standards to which we lawyers are all so accustomed.

I do not claim that Brennan originated this form of analysis and explanation. But I do think he was its most accomplished practitioner, at least in modern times. He wrote with more energy and conviction than anyone else about how constitutional formulas should be worded and applied. He was a virtuoso of doctrine. He not only utilized the conventions of doctrinal argument with skill and relish, but he also pushed and redefined the limits of those conventions.

Brennan did much more than win discrete constitutional arguments. He dominated legal thought and commentary on the Constitution. But this overarching legacy, like some of his more specific doctrinal ones, appears to be in jeopardy today. While the formulas remain important interpretive and explanatory devices, many of Brennan's carefully crafted doctrinal edifices seem to be collapsing.

For example, the three-part *Lemon* test[31] that once controlled Establishment Clause jurisprudence has been discredited and is being gradually replaced by fact-intensive inquiries into endorsement and coercion.[32] Free exercise law rather forcefully rejects the old compelling interest test and substitutes contextual analysis of reasonableness and motivation.

Even in areas like sex discrimination and free speech, where Bren-

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28. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

29. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995); Green v. County Sch. Bd., 391 U.S. 430 (1968).

30. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Brennan, J., concurring in part and dissenting in part) (advocating an intermediate level of scrutiny for affirmative action-type programs).

31. The *Lemon* test is a three part test announced by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), used to determine whether governmental action violates the Establishment Clause.

32. *See, e.g.*, Texas Monthly v. Bullock, 489 U.S. 1 (1988).

nan-style formulas are still influential, the doctrines seem less and less essential, a superstructure rather than a foundation. In such important cases as *Romer v. Evans*,[33] doctrinal explanations have receded so far as to have virtually disappeared.

One might conclude that I am only describing the predictable consequence of a conservative Court's lack of enthusiasm for progressive doctrines. But even where the current Court shows commitment and creativity, the form of its explanations seems to be moving away from the formulaic. In *United States v. Lopez*,[34] the majority explicitly rejected all available conceptual rationales and announced a legal standard that requires investigation into the extent to which a law affects commerce.[35] The Tenth Amendment cases, like *New York v. United States*[36] and *Printz v. United States*,[37] categorically ban federal commandeering rather than test its extent and impact.

While the Court's most ambitious project, the growing line of cases that cast doubt on affirmative action programs, does employ the familiar strict scrutiny formula, the Justices deny seeing any overriding significance in this test even as they announce its applicability.

If we are witnessing the beginning of the collapse of the formulaic style that Justice Brennan did so much to propagate and to legitimize, what might that mean? I only have time to suggest one of the possible answers.

Brennan's urgent doctrinal argumentation was more than legal analysis at a high level. It was the rhetorical expression of extreme intellectual confidence. Most of us are so used to constitutional formulas that we do not appreciate how optimistic and ambitious an impulse they represent. Brennan's opinions embodied the conviction that even for morally profound and difficult social issues, the mind can identify a manageable subset of problems and construct a constraining, yet flexible, set of tests that will yield appropriate solutions. Brennan's opinions embody the conviction that a mental contrivance, a calibrated set of quasi-rules, can resolve complex social questions.

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33. 517 U.S. 620 (1996).

34. 514 U.S. 549 (1995).

35. Under *Lopez*, Congress may regulate under its commerce power activity where it "substantially affects" interstate commerce. *See id.* at 559.

36. 505 U.S. 144 (1992).

37. 521 U.S. 98 (1997).

In Brennan's era, this conviction made it seem feasible for the federal judiciary to pursue programmatic social reforms—racial justice, gender equality, wide open public expression, minimal welfare entitlements, and so on. Because the formulas combined attributes of rules with instrumental calculations, they also embodied the belief that the courts could pursue social justice without either abandoning their essentially legalistic nature or succumbing to naive versions of formalism.

With the current Court, I suspect we are seeing the dissolution of each of these elements of confident intellectualism. For example, the Rehnquist Court is against affirmative action,[38] but so far it lacks sufficient confidence to try to eliminate it. Similarly, the current Rehnquist Court wants to limit the commerce power but is not sure it can construct doctrines that are both prudent and effective.[39] The Court favors abortion rights but wants to evaluate state regulations *ad hoc*.[40] It thinks that nude dancing is free speech but not worth systematic protection.[41] The Court wants to limit school desegregation decrees, but it will not reexamine the fundamental goal of racial balance in a way that might precipitate large-scale judicial withdrawal.[42]

The Court appears, then, to lack the courage of its convictions. It does not have the intellectual self-assurance necessary for programmatic reform. And even if it had this confidence, there appears little commitment to the idea that those convictions could be synthesized in formulas that would both work and have law-like qualities. Even the centrist on the court, Justice O'Connor, whose version of common law adjudication is to a degree both pragmatic and formalistic, seems inhibited by caution and self-doubt.

In short, while bits of the formulaic style linger on, the underlying legacy of intellectual optimism that it represented is essentially gone from the present Supreme Court. The question is not whether this aspect of the Brennan legacy will endure but whether it might some day reap-

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38. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications, even for benign purposes, are to be reviewed under strict judicial scrutiny).

39. *See, e.g.*, *Lopez*, 514 U.S. at 549.

40. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 874-77 (1992) (holding that state regulations that impose an undue burden on a woman's ability to obtain an abortion violate due process of law).

41. *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560 (1991).

42. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467 (1992).

pear. The answer depends in part on the reasons for the abandonment of the formulaic style. To some extent, judicial retrenchment probably reflects a broader loss of confidence in government-sponsored social reform. This is almost certainly a consequence of specific political experience and therefore is probably temporary. The Court could regain confidence in the possibility of judicially imposed programmatic reform, just as other branches of the federal government could become expansive about their capacities again.

To some extent, however, judicial retrenchment also seems rooted in a more fundamental depletion of language and culture. The Court's formulaic explanations now seem contrived and forced and empty in much the same way that most public efforts at moral and political discourse seem futile. So even if confidence in programmatic reform returns, it could come without any renewal of confidence in the Court's capacity to articulate its principles in legal terms. The Court might then be forced back on whatever rhetorical resources are available in the wider political culture.

For example, the therapeutic terminology that increasingly dominates our political discourse might be imported into constitutional opinions. *Lee v. Weisman*[43] may be one model for the future. Another possibility is that the Court may, like so many political interest groups in today's culture wars, impugn the motives of those with whom it disagrees. Cases like *Church of the Lukumi Babalu Aye v. City of Hialeah*,[44] *Romer v. Evans*,[45] and *City of Boerne v. Flores*[46] may be indicative of future trends. Or we may see a reformist Court that is impatient with the very idea of verbal explanation. *Romer*, again, could be a harbinger.

If what we are now seeing is the beginning of a sustained effort to adapt from the surrounding culture new modes of judicial discourse, Brennan's earnest, dogged, elaborate arguments about how legal formulas should be phrased and applied may come to have for future lawyers the same unreal and detached quality that old religious disputations have to modern secularists. Moreover, the language that emerges to take its place may be starkly unattractive. If the power of the formulaic style does collapse while there is a resurgence of confidence in the possibility

43. 505 U.S. 577 (1992).
44. 508 U.S. 520 (1993).
45. 517 U.S. 620 (1996).
46. 521 U.S. 507 (1997).

of programmatic reform, even Brennan's critics, myself among them, may look back at his time with nostalgia.

MARK TUSHNET

We have already thanked the *Harvard Civil Rights-Civil Liberties Law Review* and the Brennan Center for sponsoring this event. I also want to congratulate all of you for hanging in to the very end.

As the last scheduled speaker, I feared that my comments would be preempted, so I prepared two introductions. One has indeed been preempted. The second came to me when Professor Rosen earlier today described the range of views from the left to the right. I looked to my right and saw everybody he described over there. That seemed to me to be symptomatic of something in the current situation that bears on the legacy of Justice Brennan. My argument begins with the observation that in the past decade there has been a dramatic shift to the right.

The text I want to use is evoked, perhaps deliberately, by a phrase Professor Amar used. Its author was another child of New Jersey, Bruce Springsteen. In *My Home Town*, Springsteen writes, "[T]hese jobs are going boys and they ain't coming back . . . ."[47] Analogously, the Brennan vision was the product of specific historical circumstances that are extremely unlikely to return.

Historians who teach the survey course in American history now structure the second semester around the rise and fall of the New Deal political order, from 1877 to the present. Brennan and his vision were part of that order. Operating within a political framework of pluralism, his vision was nationalist and universalist.

Pluralism meant the accommodation of all the claimants' interests that appeared within the pluralist bargaining frame—the New Deal growth coalition. The word *growth* is important, because that sort of accommodation was possible only so long as buoyant economic growth was sustained. Steady growth meant political leaders did not have to make hard choices among competing interests.

The New Deal political coalition collapsed when growth slowed and its leaders had to choose which elements of the coalition they were going to satisfy at the expense of the others. They may have chosen correctly, but the effect was the disintegration of the very coalition that had won them the power to choose.

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47. BRUCE SPRINGSTEEN, *My Hometown*, *on* BORN IN THE U.S.A. (Columbia 1984).

But one of those choices turned out not to require serious choosing—the choice of the institution to accommodate these pluralist interests.

The Brennan vision, which could also be called the New Deal vision, simply assumed that each branch of government would do its share—each building structures of policy around the initiatives of whichever branch got around to doing something first.

The nationalist, universalist vision within a framework of pluralism made sense in an expansive economy, but there are some implications that I want to describe briefly with a reference to the Holmes lectures that Alexander Bickel gave, published under the title, *The Supreme Court and the Idea of Progress*.[48] One chapter was titled *Remembering the Future*. Sometimes when I teach about this lecture, I assert that a better title would be, *Predicting the Future*. *Romer v. Evans*,[49] for example, is a case in which the Court predicted the future by making a guess about where social change was likely to go and by getting ahead of the tide. Remembering the future is different. To remember the future, you have to project yourself two generations into the future and then look back one generation to assess what happened.

Bickel argued that the Warren Court's greatest strength was its ability to remember the future. He was impressed and puzzled by the fact that although the Warren Court was doing things that should have gotten it into enormous political trouble, the Justices were not getting into serious trouble at all. He concluded that they did not because of their skill at remembering the future.

In contrast, my formulation entails projecting yourself two generations into the future and then looking back. Two generations is not three generations, and the Warren Court's vision, broad though it was, was not broad enough to see the decline of the New Deal order.

There was a provocative question at the end of this morning's debate. Someone asked whether Justice Brennan's very success made it impossible for his legacy to endure. The questioner's argument was that in the political atmosphere that followed the decay of the New Deal coalition, someone like Brennan could not be appointed to the Court again.

There are various wrinkles that would need to be worked out to make this case. But there is some truth in the argument that the success of the

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48. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (Yale Univ. Press, 2d ed. 1978) (1970).

49. 517 U.S. 620 (1996).

Warren Court, its vision two generations into the future, contributed to its failure in the third generation.

To the extent that the Brennan vision's coherence depended on the New Deal order, the disappearance of that order would have to be fatal. In a much more narrow sense, the ability to project yourself into the future is an extraordinary talent that is very hard to reproduce.

There might be some people who could remember the future today. The difficulty with that premise is that no reconstituted political order has yet emerged. We are in a period of political disarray, out of which some new order is likely to be constructed over the next decade. The contours of that order, however, would take an extraordinary talent to discern.

My guess is that it will be some version of what Vice President Gore describes as reinventing government and what the sociologists Niklas Luhman and Gunther Teubner describe as reconstitutive law.[50] But the constitutional form of that new order is extremely hard to figure out. It will have something to do with devolution and voucher programs with extensive regulation, but figuring out what constitutional reconstruction will occur to accommodate those developments is beyond me.

At the same time, we can see Brennan's vision and, indeed, the whole New Deal order as one side of a continuing dialogue in U.S. history between universalist nationalists on one side and parochial particularists on the other. On the universalist nationalist side, Justice Brennan's vision stands. On the other side stand versions, not all of them without some appeal, of state's rights policies or identity politics, multiculturalism, or other variants, all of them deeply rooted in the nation's history.

There is no reason to think that the dialogue between universalist nationalism and parochial particularism has ended simply because the particular framework within which it was conducted and within which the universalist nationalist prevailed in the New Deal order, has collapsed. Brennan's articulations will be a resource for the future, as are all the other prior articulations.

Future generations may find Justice Brennan's articulations attractive. It could be, as Professor Nagel suggested, that succeeding genera-

50. The confusion surrounding the shape of the new order relates to the ambiguous nature of the legal system as one which is normatively closed and cognitively open. *See* NIKLAS LUHMAN, A SOCIOLOGICAL THEORY OF LAW (1985).

tions will find them as strange as an earlier rhetoric of religious identity. After all, the legal academy in the past fifteen years experienced a republican revival two centuries late. It seems possible that we could have a Brennan revival in a couple of decades.

Finally, it seems worth pointing out that Bruce Springsteen actually was wrong. The jobs do appear to be coming back, although in a different form. Justice Brennan's legacy may also return, but it is impossible to predict what shape his New Deal universalist nationalism will take in a multicultural, global economy. Thank you.

RICHARD FALLON

We have just heard some extremely interesting and provocative comments.

Before we go to the audience, I would like to pose a question: Has the panel so far collectively done justice to the Brennan legacy? Everybody has identified at least one element of the Brennan legacy, and there seem to be some common themes. But is the picture that emerges a complete one?

Justice Brennan was very much part of the New Deal coalition, happy to go along with those trends in national politics that saw a huge shift of power from the states to the federal government. As power gathered at the center, Justice Brennan wanted to make sure that individuals' rights were protected. I believe that is what Mark Tushnet meant when he talked about universalism. We get the same protections for everybody—a universal scheme of rights. In addition, Akhil Amar emphasized that constitutional rights were broadly extended against the states. The Bill of Rights is much more a part of the national political consciousness than it used to be. Professor Nagel explained that there was great confidence on the part of Justice Brennan and the Court in articulating this nationalist and universalist vision.

I am struck, however, that nobody has referred specifically to equality, though that may be what is meant by universalism, and that no one has referred to democracy, in talking about the Brennan legacy. I would have thought that equality, in particular, would be a term that would come immediately to mind.

So before we go to the audience, have we collectively done justice to the Brennan legacy? What have we left out?

AKHIL REED AMAR

It is impossible to do justice to so vast and rich a legacy in just a few minutes.

Since you mentioned two ideas, democracy and equality, let me give you two examples of Brennan opinions that have had a profoundly enduring effect that are not purely formulaic. These opinions won the day even among conservatives.

Freedom of speech, central to democracy, is at the heart of *New York Times Co. v. Sullivan.*[51] You cannot have a democratic polity and a national debate about race when Alabama can shut down the *New York Times*'s or the national media's coverage of the issue. One of the most powerful ideas in this opinion is that the government cannot make it a crime to oppose government policy.

Harry Kalven says the same thing in his note on *Sullivan* in *The Supreme Court Review.*[52] The government cannot make its symbols immune from criticism. That is the central idea of the flag burning case.[53] A flag can be burned respectfully. That is what you are taught to do in the Boy Scouts and in the military. What offended some was that the flag was burned disrespectfully, to the chant "America, the red, white and blue, we spit on you."[54]

In *Texas v. Johnson*, a five-to-four case, Justices Scalia and Kennedy joined Brennan in the majority.[55] There are many more friends of the First Amendment today than when Brennan came on the Court. These new friends are trying to load the First Amendment with freight that it was never meant to carry, like property and protection of inequality. Perhaps Brennan was too successful.

The second example is gender equality. In *Frontiero v. Richardson,*[56] there is a paragraph that compares sex with race.[57] Sex and race have been used to justify social disadvantage, and both have caste-like features. They involve inherited characteristics fixed at birth.

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51. 376 U.S. 254 (1964).

52. *See* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

53. *See* Texas v. Johnson, 491 U.S. 397 (1989).

54. *Id.* at 399.

55. *See id.* at 398.

56. 411 U.S. 677 (1973).

57. *See id.* at 685.

There are important historical connections between treatment of racial minorities and of women. Women's equality, which Brennan was among the first to articulate, is now embraced even by conservative justices.

ROBERT NAGEL

I agree with much of those comments. It is true that there is a consensus, at least among members of the Court, on sex discrimination. I do not know if Brennan is entirely responsible for forging that consensus, but it does not really matter. There is a tendency to state certain values at a high level of generality and then say we all agree and that the Court's adoption of these values therefore is an attractive legacy. When the values are examined piece by piece, however, it becomes more questionable whether they will endure.

I have no better predictions than anybody else. But on the point about democracy and Akhil's reference to *New York Times v. Sullivan*,[58] I am not at all sure that case demonstrates any stable consensus. In fact, what one sees in *Sullivan* and all the subsequent cases is a very ambitious effort by the Court to regulate or optimize speech with a set of specific rules. Today, both on and off the Court, there is much skepticism about whether those defamation rules are useful. So it is possible to say very generally that Justice Brennan's legacy is a belief in democracy and free speech, but if you look more specifically, you see ideas that have become highly contested as too ambitious. These ideas may be in the process of receiving significant revision.

Similarly, to do justice to Brennan's legacy, you have to speak more specifically about equality. Do we mean equality of income or of poverty or of welfare entitlements? It seems to me that there is no particular legacy here.

On gender equality, there seems to be an enduring legacy—although, again, I do not know how much of it is Justice Brennan's and whether it might be in the process of receiving significant revision too. His concept of racial equality certainly is under serious review.

It is difficult to do justice to such a broad array of programs and ideals. But it is also important not to romanticize Brennan's legacy in glittering generalities. Much of what he stands for, if scrutinized, is highly contested and problematic, and may be in the process of being substan-

58. 376 U.S. 254 (1964).

tially revised or rejected.

MARK TUSHNET

I have one further point. Although there were a number of visions of democracy in Justice Brennan's work, the most robust is the pluralist vision. While the pluralist vision is an attractive vision of democracy, it is not the only one. It is now highly contested. Indeed, I think that the tension between *Buckley v. Valeo*[59] and the positions taken by the Brennan Center are symptomatic of the tension between a pluralistic vision of democracy and an alternative vision of democracy.

RICHARD FALLON

Questions or comments from the audience?

AUDIENCE MEMBER ONE

The conversation today has focused on Justice Brennan's intellectual contributions, but shouldn't we also discuss his character–his qualities of empathy, his depth of soul?

AKHIL REED AMAR

Yes—a great point.

On empathy, let us move beyond the current Court and think more about Justice Brennan's broad legacy. I used to think that I taught law, but now I think I teach lawyers. They are men and women, who are going to go out and do things with their lives. I need to talk to them about the lives they are going to live, and talk to their souls and hearts, not just their heads.

This year I discussed the death of William Brennan in my class. I used Justice Souter's marvelously empathetic eulogy, and I think Justice Souter has these qualities of soul that you mentioned.

The true legacy is teaching our students to act as good human beings as well as good lawyers.

ROBERT NAGEL

I understand what you mean by empathy, but how do we conclude that empathy characterizes Brennan's opinions? When you have two

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59. 424 U.S. 1 (1976).

parties in a case, one is going to win and one is going to lose that empathy. It seems doubtful that Brennan could be much more empathetic than anybody else. It seems to me that when we say Brennan was empathetic, we mean he was empathetic to certain groups for which we feel empathy. The other justices may also be empathetic, but to groups that we do not readily notice or do not sympathize with.

Accordingly, I am not sure empathy is the right idea. For example, where does empathy analysis get us in a case like *Texas v. Johnson*? Was Brennan empathetic to the outside dissenter? I guess he was. Was he empathetic to the values of the American patriotic middle class? I have read accounts of that opinion by people who were not originally hostile to Brennan, but later were downright condescending. So empathy is relative.

AUDIENCE MEMBER TWO

Is it appropriate for a Justice to write a decision that caters to both parties?

MARK TUSHNET

Texas v. Johnson is a case in which Justice Brennan was most visibly attempting to empathize with both sides. As I read Justice Brennan's statement that the way to honor the flag as it is burned is to salute,[60] I am embarrassed. This does not capture what really bothers people who care about flag burning.

I think of Robert Burt's arguments about trying to give things to both sides in decisions. In *Brown v. Board of Education*,[61] for example, you have a ruling in one way and then in the remedy decision you try to make it easier for people to work things out on their own.

That may be a better example of how a universally empathetic judge would approach things, but it is not entirely clear that it describes Brennan.

AKHIL REED AMAR

I, too, have been critical of Justice Brennan's tone in that opinion. Justice Kennedy writes a concurrence that tries to speak to people who are going to be hurt—ordinary citizens who are going to feel a visceral

60. *See* Texas v. Johnson, 491 U.S. 420 (1989).

61. 347 U.S. 483 (1954).

pain at the outcome of that case.

But let me mention another case in which you do see Justice Brennan's empathetic qualities. *Frisby v. Schultz*[62] is an opinion that discusses residential picketing and holds that there can be restrictions on it.[63] Brennan dissents.

Ask yourself whether Justice Brennan, as a human being, would have been more likely to be the picket or the picketed. He was much more likely to have been the latter. And yet he, because of a profound commitment to robust, wide-open freedom of expression, apparently understood the feeling of someone who opposed abortion as immoral. He understood that the best way to communicate that understanding was to try to address the doctor as a member of the moral community and confront him with the moral claim.

That is pretty remarkable for someone who believed in a right to abortion and for someone who was more likely to be picketed than to be the solitary picket.

RICHARD FALLON

I thank all of our panelists.

62. 487 U.S. 474 (1988).

63. *See id.* at 488.