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William J. Brennan, Jr., American – In Memoriam

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IN MEMORIAM

WILLIAM J. BRENNAN, JR., AMERICAN

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At Justice Brennan's funeral, President Clinton spoke of the Justice's enormous impact on our country's law—thirty-four years on the Supreme Court, over 1300 opinions authored, many of them landmarks: *Baker v. Carr*,[1] opening the way to one person, one vote; *Craig v. Boren*,[2] wielding the Equal Protection Clause to strike down discrimination on the basis of sex; *Goldberg v. Kelly*,[3] insisting on the right of the poorest citizens of the administrative state to be heard in the face of an arbitrary bureaucracy; *New York Times Co. v. Sullivan*,[4] articulating the modern rationale for a free press; and so many more.

It was all true, but to those of us who were privileged to know and work for the man, it seemed somehow beside the point—and even, in one way, a little too much like what the Justice's detractors would have said. The powerful force in American law perhaps resembled too closely the man who "imposed his values on the Constitution," the legal colossus who remade the Constitution in his own image. Of course, we understood Justice Brennan's great influence on the law; some of us had even worked on some of those opinions. But what did all that have to do with the modest little man with the big grin and the bigger heart, that wonderfully warm gentleman who seemed to remember the name of everyone he'd ever met (and their spouses and children), who bestowed his love and interest as freely on the security guards at the Court as on the senators and foreigu dignitaries he met? Was this towering figure the same humble fellow who said upon being sworn in that he felt like a "mule in the Kentucky Derby"?[5] The Justice we knew, despite close involvement in the most divisive and difficult legal issues of our time, and despite taking an enormous amount of public, editorial, and scholarly praise and abuse, never played the great man and never had an ungenerous word to say even about his most committed intellectual adversaries. It was always

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1. 369 U.S. 186 (1962).

2. 429 U.S. 190 (1976).

3. 397 U.S. 254 (1970).

4. 376 U.S. 254 (1964).

5. Kim I. Eisler, A Justice for All: William J. Brennan, Jr. and the Decisions That Transformed America 99 (1993).

hard, in the Justice's presence, to put this incredibly decent and unassuming man together with his public role as perhaps the most influential associate justice of all time.

Justice Souter, the next eulogist, came a lot closer to capturing the person we knew. "'Get in here, pal,' he'd say to me."[6] Oh yes, we'd all heard that, and we all remembered what followed, just as Justice Souter described it: the two-handed handclasp, the hug, the pulling you over by the elbow for a confidential conference, and—if you perhaps had some good news about yourself—"well, isn't that just lovely." There was the man himself, and now came the tears of remembrance.

But even this view of Justice Brennan is susceptible to a misleading spin. All that personal charm and warmth, snarls the critic, was the very vehicle by which the behind-the-scenes operator, the master manipulator of majorities, the crafty coalition builder, somehow managed to work his will on his colleagues, despite the weakness of his arguments and the wrongheadedness of his philosophy. And even if the friendliness was sincere (because no one who came remotely within the orbit of the Brennan warmth could fail to admit the total genuineness of the man), wasn't all that personal warmth, that compassion, quite literally the heart of the problem? It was his heart, his sense of justice, his love for humanity that led him away from the plain meaning and original intent of the Constitution. To speak of the greatness of the man, and the love we bore him, in the chilly context of academic debate, invites professorial condescension: "A wonderful man, I'm sure, but not much of a theorist, eh? Not really an intellectual of the law?" (The Justice was never that popular with law professors, even in his heyday. One early clerk recalled that he had been primed by his professors not to expect much from his clerkship: "You see, I went to Harvard, as did the Justice. And the Justice was not on the *Law Review*.")

So for all the eulogies, for all the praise, for all the recognition that this was a person both of great influence and of great humanity, there is, for me, an important question that is not really being addressed by the Justice's many admirers. The notion that Justice Brennan's judicial philosophy was one that illegitimately imposed his own values on the country is very widespread, in this more conservative age, among legal scholars as well as among politicians and the public. And that notion is not often contested by his defenders. Lawyers, judges, and legal scholars who may admire Justice Brennan's conclusions nevertheless feel a certain insecurity about his methods—or, perhaps, with an eye on possible future confirmation hearings or election campaigns, find it more prudent to avoid association with anything that could be called "liberalism" or "judicial activism."

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6. Justice David Souter, Remarks at the Funeral Mass for Justice Brennan (July 29, 1997) (transcript on file with the Columbia Law Review).

The charge that Justice Brennan confused his own values with those of the Constitution does capture one piece of the truth. As far as I could see, the Justice was totally, absolutely, fervently devoted to the ideals that America and the Constitution, as he understood them, represented. He did not have the slightest doubt that America is the greatest country in the world, and that its greatness resided in institutions that were committed to freedom and equality, to human dignity, and to openness to all who chose to commit themselves to those ideals. He believed that his ideals *were* the ideals of the American polity, not because he thought that his beliefs ought to be imposed on the nation, but because he had been taught from an early age, in the best American immigrant tradition, to commit himself to the values that the nation professed.

Of course, one might say, we all do believe in the same values at some level of generality—but that's not what the debate over the role of the Supreme Court is about. Fair enough, but let me linger a moment before descending from the heights of patriotic abstraction. For not everybody does believe, even at this level of generality, in the American values that Justice Brennan accepted so fervently. Since many of those who do not are on the left, and many of those who criticize the Brennan legacy associate him with a certain kind of leftism, it is important to take the time to understand Justice Brennan's patriotism.

One of the uglier consequences of the Vietnam War was the blow it dealt to simple patriotism. Too many of the generation that came of age during the civil rights struggle and the movement to protest what they saw as an unjust imperial war came to identify their country with oppression, unfairness, and destruction, rather than with the defense of freedom and equality. Perceiving the failure of the United States to live up to its most profound aspirations, they associated their country with the failures, and located the aspirations against which they measured the nation somewhere outside of, rather than at the heart of, American institutions. Some of those people went so far as to burn their country's flag, in protest of those failures. A majority of Americans, particularly those of an older generation, saw such protests, not always inaccurately, as a failure of patriotism. Many of them supported laws to prohibit such conduct.

In *Texas v. Johnson*,[7] Justice Brennan wrote an opinion for the Court holding such laws unconstitutional. Those—both among the flag burners and among their would-be prosecutors—who would associate Justice Brennan with the protesters whose rights he defended would no doubt be surprised at the love of the flag and the nation it stands for that he expressed in that opinion:

> [T]here is a special place reserved for the flag in this Nation
> . . . .
> . . . .

7. 491 U.S. 397 (1989).

> . . . Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag . . . .
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> . . . We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns . . . .[8]

Justice Brennan believed that. He served that flag in war; he was buried under it. Justice Brennan's "own values" had little enough to do with those of the flag burners, but he did not seek to impose his values on them by law. Instead, he put his faith in the values of tolerance. He thought these values were not only his, but America's.

But yes, believing in free speech and individual liberty in general does not automatically dictate toleration of flag burning. The problem, and here is the heart of the argument against Brennanism, is that there will always be different interpretations of what those core shared values mean in particular situations. We all agree, and the text of the Constitution proclaims, that all of us are entitled to be equally protected by the laws. Does that equality imply a principle of government color-blindness with respect to elementary school assignment? If it does, does that principle extend so far as to prohibit "remedial" or "diversity-seeking" race consciousness in graduate school admissions? Doesn't a judge impose his own interpretation of our collective values when he answers these questions differently than a political majority?

At this more specific level, too, however, it is an oversimplification to speak of a judge's imposing her "own" values. Justice Brennan would have said that he was put on the bench, through a politically responsible process, precisely for the purpose of deciding, in the light of the nation's traditions and values, how the generalities of the constitutional language should best be applied to the contemporary problems that come before the Court. This is surely not a simple process of deciding that "school desegregation [or affirmative action, or whatever] is, in my opinion, a good policy, so it ought to be found to be constitutionally compelled." A complex calculus of text, historical evidence of framers' intent, history, precedent, institutional competence, and philosophy may lead to the conclusion that the Constitution does not adopt the solution the judge would prefer. Most of the time, the usual techniques of legal analysis lead to answers most lawyers will agree with, regardless of their own policy preferences or governmental philosophies. But those are the cases that usually get resolved without a close vote on the Supreme Court. When the going gets tough—precisely because textual or precedential analysis

8. Id. at 418–20.

doesn't yield clear signals—the judge is left, I'm afraid, with his own ability to articulate, as persuasively as possible, his best understanding of the true meaning of the broad value to which the Constitution requires adherence.

This is not, simplistic political arguments to the contrary notwithstanding, a question of degrees of judicial "activism." The late twentieth-century "liberal" position favors school integration (an "activist" position that struck down policies adopted by the political branches of southern state governments) but would permit affirmative action (a more "deferential" posture that declines to upset programs put in place by Congress or state legislatures). "Conservatives" in 1954 argued for judicial restraint, while today many of their ideological successors seem prepared to strike down race-conscious programs adopted by the more politically responsive organs of government. The argument is about what our commitment to equality should be held to entail, and judges in our system, liberal or conservative, "activist" or "restrained," must examine our texts and traditions for answers.

Nor is it a matter of respect for "original meaning." The framers and ratifiers of the Fourteenth Amendment probably did not believe that the principle they were enshrining in the Constitution required integrated public schools, nor that it would prohibit race-conscious remedial actions. There is little reason, in any case, to assume that those who drafted and adopted broad and general principles to govern our polity believed or intended that those principles should always and forever be interpreted as they might have expected, even when the social conditions that shaped their own understandings had long since passed from the scene. Justice Brennan's belief that the Constitution must be given meaning for the present seems to me a simple necessity; his long and untiring labor to articulate the principles of fairness, liberty, and equality found in the Constitution in the way that he believed made most sense today seems far more honest and honorable than the pretense that the meaning of those principles can be found in eighteenth- or nineteenth-century dictionaries.

But just as passionately as Justice Brennan interpreted those principles to make sense for his generation, his successors must do so in light of their own wisdom and experience, and in light of the conditions of American society today. The aspirations to justice and liberty in which Justice Brennan so fervently believed must surely transcend his time, but his particular applications of those principles grew out of his own time. Justice Brennan's version of American values grew from the experience of an immigrant generation's love for the America they taught their children to revere, from a depression generation's experience of poverty and of an activist government's attempt to ameliorate it, from a warrior generation's commitment not to let bigotry at home lead to the horrors they had fought to defeat abroad, from a Red-scared generation's understanding that suppressing freedom to save it from its enemies is a dangerous

game. Succeeding generations have had different formative experiences, and face different problems, which will inevitably put a different spin on the norms of human dignity about which our constitutional law is a continuing dialogue. While many of the specific commitments and interpretations supported by Justice Brennan will surely survive and influence legal dispositions for generations, others will just as surely be overruled, or simply become irrelevant. None of this should surprise anyone. Nor will the continuing revision of constitutional understandings—whether or not disguised as a restoration of original meanings—mean that Justice Brennan's conclusions were wrong for his time, or that the provisional understandings arrived at in the 1990s will be any more enduring than those of the 1960s, as yet other generations take up the dialogue.

We can hope, however, that those who are called to that task today and tomorrow, and whose values will inevitably inform (not be "imposed on") our constitutional arrangements, will possess Justice Brennan's humanity, and his deep love of the law, the Constitution, and the country.

I suppose there are some who were surprised that Justice Brennan—vilified by many on account of his support for *Roe v. Wade*[9]—went to his burial from a Roman Catholic funeral mass (and a rather traditional liturgy at that, including, at his express request, some hymns in Latin), and that the last song played at his graveside, by a military band, was *America the Beautiful.* But they should not be. The values for which Justice Brennan stood are not, I suppose, the only values that can be found within the American tradition, but it is precisely from that tradition that he derived them. His interpretations of those values were the unique product of his own experience, his own intellect, and his own generous spirit, but the values themselves came from, and I hope will continue to animate, the country he loved.

We'll miss you, boss.

9. 410 U.S. 113 (1973).