

# *Nova Law Review*

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*Volume 15, Issue 1*

1991

*Article 3*

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## An Appreciation of Justice William J. Brennan, Jr.

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## **Abstract**

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**KEYWORDS:** appreciation, justice, William

## An Appreciation of Justice William J. Brennan, Jr.

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Thirty-four years is a long time in the life of a man, and even of our nation. I wish it had been longer.

Justice William J. Brennan's years on the Supreme Court reach back to a Constitution that was shaped by a different vision than our Constitution today. When Justice Brennan was nominated by President Eisenhower in 1956, the first *Brown v. Board of Education*<sup>1</sup> had only been decided two years before. The "all deliberate speed" formulation of the second *Brown v. Board*<sup>2</sup> was a year old. States were constitutionally free to weight the votes of their citizens as unequally as they pleased,<sup>3</sup> so long as they did not engage in deliberate and grotesque racial gerrymanders.<sup>4</sup> The states were under very limited constitutional obligation to provide lawyers to those accused of crimes but unable to pay for representation.<sup>5</sup> The practices of the police in investigating criminal behavior were largely uncontrolled by the Constitution.<sup>6</sup> Evidence seized illegally by state police was admissible in criminal trials.<sup>7</sup> Federal habeas corpus had limited power to free state prisoners convicted and imprisoned after trials that violated federal constitutional standards.<sup>8</sup> State defamation laws provided little protection to untruthful but non-malicious statements about public figures.<sup>9</sup> States were free to prohibit the sale of contraceptives, and even to prohibit the giving of advice concerning their use.<sup>10</sup> States were free to criminalize a wo-

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1. 347 U.S. 483 (1954).

2. *Brown v. Board of Education II*, 349 U.S. 294, 301 (1955).

3. *Compare Baker v. Carr*, 369 U.S. 186 (1962).

4. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

5. *Compare Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Compare Miranda v. Arizona*, 384 U.S. 436 (1966).

7. *Compare Mapp v. Ohio*, 367 U.S. 643 (1961).

8. *Compare Fay v. Noia*, 372 U.S. 391 (1963), later effectively overruled by *Wainwright v. Sykes*, 433 U.S. 72 (1977).

9. *Compare New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

10. *Compare Griswold v. Connecticut*, 381 U.S. 479 (1965).

man's decision not to bear an unwanted child.<sup>11</sup> The federal and state governments were constitutionally free to discriminate against women in employment and other matters.<sup>12</sup>

During his thirty-four years on the Court, Justice Brennan helped to shape the Constitution under which we now live. This brief appreciation is far too short to analyze in detail his contribution, but I can sketch its outline.

Justice Brennan's approach to constitutional adjudication was a sort of eclectic intentionalism. He was faithful to the vision of the Constitution contained in the document itself, but the method by which he determined that vision was pragmatic, catholic (using the word in its non-sectarian sense), and aspirational. Justice Brennan did not pretend that the narrow and specific "original intent" of the framers could determine the course of constitutional adjudication. This, for him, was the "facile historicism" of "persons who have no familiarity with the historical record."<sup>13</sup> Nor was constitutional adjudication determined by a personal vision, but rather by a faithful "public reading"<sup>14</sup> of the text of the document, "public" both in the sense of a reading conducted in public view and in the sense of reading on behalf of the public. That reading was informed by the past but shaped by the present:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time? For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and

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11. *Compare* *Roe v. Wade*, 410 U.S. 113 (1973).

12. *Compare* *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

13. Brennan, *The Constitution of the United States: Contemporary Ratification*, 19 U.C.DAVIS L. REV. 2, 5 (1985) (speech given on October 12, 1985, at Georgetown University as part of its Text and Teaching Symposium). When Justice Brennan gave this speech, it was widely thought to be a direct response to Attorney General Edwin Meese, who had advocated a jurisprudence of original intent in a July 9, 1985 speech to the American Bar Association. *See, e.g.,* Taylor, *Brennan Opposes Legal View Urged by Administration*, N.Y. Times, Oct. 13, 1985, at 1, col. 2. It is obvious that Justice Brennan's remarks were relevant to the ongoing debate about the proper role of original intent in constitutional adjudication, but in fact his speech had been prepared before Attorney General Meese spoke to the bar association and his remarks were not directed specifically to the Attorney General.

14. *See* Brennan, *supra* note 13.

gone, but in the adaptability of its great principles to cope with current problems and current needs.<sup>15</sup>

Justice Brennan's constitutional vision is necessarily complex, as complex as the government constituted by the document. We may discern two primary strands.

First, Justice Brennan had a deep concern for the proper structure and operation of government, which he combined with a sense that the Constitution has meaning beyond the bare words of the text. Many provisions — for example, that the President be a “natural born Citizen” and have “attained to the Age of thirty five Years”;<sup>16</sup> that members of the House of Representatives be “chosen every second Year”;<sup>17</sup> and so forth — have such obvious applications that judicial interpretation has been, and likely will always be, unnecessary. But other parts of the Constitution are much less determinate, almost constitutional truths in search of a text. As Chief Justice Hughes wrote in *Principality of Monaco v. Mississippi*:<sup>18</sup> “[b]ehind the words of the constitutional provisions are postulates which limit and control.”

Justice Brennan's opinion for the Court in *Baker v. Carr*<sup>19</sup> is at the heart of the constitutional vision of the Warren Court. Chief Justice Warren, in retirement, called it the most important decision of his time on the Court.<sup>20</sup> *Baker v. Carr*, of course, held the question of numerical malapportionment of state legislatures a justiciable question, and was soon extended to the national legislature as well.<sup>21</sup> Justice Frankfurter dissented vigorously.<sup>22</sup> Justice Brennan, a Harvard Law School graduate, takes great delight in telling the reaction of Justice Frankfurter, a former Harvard Law School professor, to his new colleague on the Court: “I always taught my students to think for themselves, but Brennan takes it too far.”

The vision of *Baker v. Carr* was that of an activist judiciary, but it was an activism based on a democratic vision of the equality of citizens and the primacy of popular power. The decision quite deliberately replaced the previous constitutional order, and it did so without the com-

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15. See Brennan, *supra* note 13.

16. U.S.CONST. art. II, § 1.

17. U.S.CONST. art. I, § 2.

18. 292 U.S. 313, 322 (1934).

19. 369 U.S. 186 (1962).

20. E. WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

21. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

22. *Baker*, 369 U.S. at 266 (Frankfurter, J., dissenting).

pulsion of a clear textual mandate. But for Justice Brennan, it was not the personal vision of the individual justices that produced *Baker v. Carr*, for “[w]hen Justices interpret the Constitution they speak for their community, not for themselves alone.”<sup>23</sup> And it was not a decision arrogating power to the judiciary. Rather, it was fundamentally a decision empowering and legitimating legislative power by requiring that legislative bodies be elected in a manner that accords with the deepest ideals of American democracy.<sup>24</sup>

Justice Brennan’s constitutional vision of the relation between the state and federal governments cannot be captured in a single formula. He read the Constitution to prefer national solutions to national economic problems, at least where the national political process had indicated its solution.<sup>25</sup> But where the state and federal government each had plausible claims to regulate private economic behavior, he was reluctant to impose a national solution as a stand-in for the national political solution that Congress could have, but had not, supplied.<sup>26</sup> He read the Constitution to require national solutions to the problem of protecting individual rights against government, siding consistently with those who found key provisions of the Bill of Rights incorporated into the fourteenth amendment and applicable against the states.<sup>27</sup> But where the national Constitution did not provide a protection of individual rights, Justice Brennan actively encouraged the state judiciaries to

23. Brennan, *supra* note 13, at 4.

24. See Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L. J. 227, 232 (1972) (“[T]he premise of equality of citizenship [is] a *constitutive principle* in American politics for its own sake, as a means to no ‘realistic’ end other than a renewed sense of the principled legitimacy of the whole political enterprise.”) (emphasis in original).

25. *National League of Cities v. Usery*, 426 U.S. 833, 856 (1976) (Brennan, J., dissenting) overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

26. See, e.g., *Kassell v. Consolidated Freightways Corp.*, 450 U.S. 662, 679 (1981).

27. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Pointer v. Texas*, 380 U.S. 400 (1965); *Klopfert v. North Carolina*, 386 U.S. 363 (1966); *Parker v. Gladden*, 385 U.S. 213 (1967); *Washington v. Texas*, 388 U.S. 14 (1967); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Benton v. Maryland*, 395 U.S. 784 (1969); Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (“As is well known, . . . I believe that the [f]ourteenth [a]mendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and that the Constitution and the [f]ourteenth [a]mendment allow diversity only *above and beyond* this federal constitutional floor.”) (emphasis in original).

find that protection in their own state constitutions.<sup>28</sup>

Our federalism is uniquely American. It is not a system for its own sake, but rather a system whose genius is that it can always be used for substantive aims beyond itself. Justice Brennan had a more direct understanding of this than most. He started his judicial career as a state court judge in New Jersey for six years, the last two of them on the New Jersey Supreme Court. I worked for Justice Brennan during October Term 1976. I remember the pride with which he recalled his opinion for the New Jersey Supreme Court in *State v. Fary*<sup>29</sup> twenty-one years earlier, stating that a criminal defendant was privileged from having self-incriminating grand jury testimony used against him if he had been a target of investigation, even if he had failed to make an affirmative claim of that privilege while he was being questioned. Justice Brennan carefully inserted a citation to *State v. Fary* in his dissent to *United States v. Washington*,<sup>30</sup> in which the Court allowed such self-incriminating testimony to be used. He did not indicate in his dissent the author of *State v. Fary*. One would have had to have been an unusually thorough student of the Court to know that the state "laboratory" in which the case was decided was the Justice's own.<sup>31</sup>

Second, Justice Brennan was deeply concerned about the relation between the government and private individuals. The relationship goes both ways. Private citizens affect and control the government. And the government, for its part, acts directly on private individuals, both conferring benefits and inflicting pain. As much as any person who has ever sat on the Court, Justice Brennan has sought to provide the tools by which we may both control our government and protect ourselves from it. In *New York Times Co. v. Sullivan*,<sup>32</sup> Justice Brennan wrote for the Court, holding that damages cannot be recovered by a public figure for false and defamatory speech unless uttered with "malice." And in *Dombrowski v. Pfister*<sup>33</sup> he provided the phrase "chilling effect" by which we now describe and assess constraints on the exercise of free speech. In both cases, we see Justice Brennan equipping the citizenry

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28. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

29. 19 N.J. 431, 117 A.2d 499 (N.J. 1955).

30. 431 U.S. 181, 194 (1977) (Brennan, J., dissenting) (citing *Fary*, 19 N.J. at 437-38, 117 A.2d at 503).

31. See also *New Jersey v. Portash*, 440 U.S. 450, 460-62 (1979) (Brennan, J., concurring) (discussing *Fary*).

32. 376 U.S. 254 (1964).

33. 380 U.S. 479 (1965).

for self-government and for the control of their governmental institutions.

In a separate line of cases, Justice Brennan tried, usually successfully, to protect individual rights by controlling government through direct judicial order and holding it accountable for harm it has caused. In *Green v. New Kent County School Board*<sup>34</sup> he spoke for the Court in saying, “[t]he burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.” Justice Powell, who at the time of *Green* was active in school board affairs in Richmond, Virginia, later told Justice Brennan that it was this opinion, more than any other, that signalled to those resisting desegregation in the south that the Supreme Court really meant business. *Monell v. Department of Social Services*,<sup>35</sup> in which he persuaded his colleagues that 42 U.S.C. § 1983 provided for damage recoveries against subdivisions of the state, was a notable triumph. It encapsulated the idea that government should compensate for harm it has caused, and that government should be deterred from wrongdoing to the extent that damage awards can do so. Justice Brennan would go farther still, and effectively do away with the sovereign immunity of the states themselves in cases where the states have violated protected federal rights. In *Atascadero State Hospital v. Scanlon*,<sup>36</sup> Justice Brennan laid out in eloquent detail the historical case for reading the Eleventh Amendment not to bar suit in federal court, but his more conservative colleagues, who are ordinarily vigorous in insisting that the the Court be governed by the intent of the framers, declined to follow Justice Brennan’s lead.<sup>37</sup>

In a wide range of cases, Justice Brennan has protected individuals from the coercive power of government. The most numerous are criminal procedure cases protecting the rights of the accused. Out of the many cases, I choose *Fay v. Noia*<sup>38</sup> which was effectively overruled by the Court in 1976. Justice Brennan wrote for the Court in *Fay*, establishing the principle that a state prisoner could not be foreclosed by a state procedural rule from raising a federal constitutional objection on

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34. 391 U.S. 430, 439 (1968).

35. 436 U.S. 658 (1978).

36. 473 U.S. 234, 247 (1985) (Brennan, J. dissenting).

37. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Chief Justice Burger, Justices Powell, White, Rehnquist, and O’Connor); *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273 (1989) (at 2289, Justice Kennedy; at 2295, Justice Scalia).

38. 372 U.S. 391 (1963).



federal habeas corpus unless he had “deliberately bypassed” the opportunity to raise the question in state court. This was classic Brennan. At one level is theory: Constitutional rights are too important to be lost in a web of procedure and technicality. At another level is practice: In the real world, defense lawyers do make procedural mistakes to the detriment of their clients. And at the heart is a concern for fundamental justice: Such mistakes should not be held against a client in a criminal case unless their cure poses a serious threat to the state’s ability to administer its criminal justice system.

The most controversial are the cases in which the Court has protected private decisions of individuals in domestic and reproductive matters against interference by the government. Of these, the most notable is *Roe v. Wade*,<sup>39</sup> in which the Court struck down a Texas statute criminalizing the decision of a woman to terminate an unwanted pregnancy. The case is, of course, about freedom from state compulsion. But there is more to it than that. With the freedom from government control comes the responsibility of individuals for their own decisions. The constitutional faith of the Court, and of Justice Brennan, is that the Constitution preserved for individuals the freedom to make these profoundly important choices, informed by their own moral and religious views. This respect for the dignity, integrity, and deep seriousness of the private decisions of our citizenry lies at the heart of the privacy cases.

Two years ago, Justice Brennan and his wife, Mary, came to Boalt Hall for the Justice to judge a moot court. My wife, Linda, and I drove the Justice and Mary back and forth between Berkeley and their hotel in San Francisco. Linda said at the time that she was nervous about driving through the city and crossing the Bay Bridge because we were carrying a “national treasure” in our car. (As it turned out, the bridge didn’t go down until a year later.) We do not have a formal system in this country, as they do in Japan, for formally designating individuals as national treasures. But if we did, Linda (and I) would be first in line to nominate Justice Brennan.

The Justice had slightly over one hundred law clerks during his thirty four years on the Court, the earliest of whom are now older than the Justice when he first took his seat. All of us will tell variations of the same story. The Justice is a warm and affectionate man. He was quick to listen to us and slow to tell us we were wrong. He has an

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39. 410 U.S. 113 (1973).

amazingly retentive memory and a lightning fast analytical capacity, yet at the same time was patient with clerks, who were, on many days and on many topics, little more than law students. He helped and advised virtually all of us in the years following our year clerking for him. He instructed us by his example how a genuinely good person conducts himself in both his professional and personal life. And he inspired us all by the strength and wisdom of his “public reading” of the Constitution, faithful not to his personal vision and personal predeliction but to his understanding of the meaning of that document in our government and our history.