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Volume 31
Number 3 *Symposium on Mental Disability Law*

Article 4

4-1-1998

Memorial Dedication to Justice William J. Brennan, Jr.

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Recommended Citation

Stephen Reinhardt, *Memorial Dedication to Justice William J. Brennan, Jr.*, 31 Loy. L.A. L. Rev. 735 (1998).
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*Stephen Reinhardt**

Justice Brennan was a giant—a giant who changed this nation for the better—a giant who turned the law and the Constitution into magnificent instruments of justice. Traditionally, our legal institutions had served as pandering protectors of corporate interests, zealous guardians of the privileges of the wealthy. Under the gentle but firm guidance of Justice Brennan, we entered a far different world.

Justice Brennan represented the conscience of America. He inspired us to be better. He showed us that law and justice would indeed be one and the same. He had vision; he had compassion; he had a heart and a soul—and to him, and to those of us who truly care about law and justice, that is essential to being a good jurist. Justice Brennan, more than any Justice in history, understood the magnificence of our profession—and how one man could change our legal and judicial institutions, as well as our fundamental thinking.

Today we live, temporarily I hope, in an era of bureaucratic thinkers—an era dominated by men and women of small vision who permeate our governmental institutions. Mediocrity reigns. Today's arguments are not over how we can expand the rights of all, how we can bring greater equality, fairer treatment, more opportunities to those less fortunate. Today's skirmishes in Washington and elsewhere are over how much we can limit individual rights; how much we can reduce our obligations to each other; to what extent we can get away with cutting capital gains and estate taxes; how many ways we can find to limit the right of habeas corpus, the rights of minorities, of immigrants, of those on welfare, of prisoners; how we can bring to the courts more and more bureaucratic techniques for taking individual values out of the justice system—out of the sentencing process. More and more we seek ways to better protect the economic interests of those who already have the most, ways to increase the profits of the few while holding down the wages of the many. We seek out ways to shrink the Constitution; and, to top it off, our judiciary zealously looks for opportunities to establish additional procedural obstacles to doing justice, for more and more reasons to shut the doors of the courthouse to those who most need our services. We

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do this in the name of doctrines such as standing, mootness, ripeness, and yes, even more so these days, in the name of federalism. And our courts do this enthusiastically, and with the eager cooperation of the Congress and the President.

What would Justice Brennan say and do in these circumstances? He would look to our youth, to the lawyers of the future, to the judges of the future, to the Justices of the future. He would tell all of you about your obligations and the exciting opportunities that are there for you to seize. It's all there for you, he would say. Don't sell yourself short. You are sorely needed, every one of you. This country is a great nation, Justice Brennan would remind us. It has great people. It has a magnificent Constitution. We can overcome the short-term setbacks, he would assure us cheerfully. Tides may ebb and flow, but in the long run this country can and will move forward again, if we have the will. Some day, once again, we will have a Supreme Court and a justice system populated by men and women with a vision like Justice Brennan's.

When I get discouraged, I think of Justice Brennan and I take heart. None of us will ever measure up to him—*Baker v. Carr*,¹ *New York Times Co. v. Sullivan*,² *Shapiro v. Thompson*,³ *Goldberg v. Kelly*,⁴ *Bivens*,⁵ *Monell*,⁶ and *United Steelworkers v. Weber*,⁷ his constant fight to preserve affirmative action; his opinion in *Furman*⁸ and his unyielding battle against the death penalty; his fight for equality for all; and his leadership in *Griswold v. Connecticut*⁹ and in establishing the right to privacy and all that flows from it. Some of what flows has already come, like *Roe v. Wade*,¹⁰ and some is yet to come like the overruling of *Bowers v. Hardwick*¹¹ and the vindication of our right to control our own lives and deaths.¹² No, none of us can ever measure up to Justice Brennan, but we can all keep trying.

What we can do to best honor Justice Brennan is to bring back the Constitution he loved. In response to a majority opinion by Justice

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

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

3. 394 U.S. 618 (1969).

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

5. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

6. *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

7. 443 U.S. 193 (1979).

8. *Furman v. Georgia*, 408 U.S. 238 (1972).

9. 381 U.S. 479 (1965).

10. 410 U.S. 113 (1973).

11. 478 U.S. 186 (1986).

12. *See Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

Scalia, Justice Brennan wrote:

The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past. *This* Constitution does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations. I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.¹³

We should not accept a Constitution that is so unlike the document Justice Brennan envisioned for America. We should not accept a squalid constitutional doctrine that excludes Justice Brennan's magnificent vision of this great nation and its destiny. And I hope you won't. Collectively, you have the power to make Justice Brennan's constitutional vision—and his Constitution—a reality once again. You can help restore it for yourselves, and for all of us. A lawyer could ask for no greater or more rewarding challenge.

13. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

