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Memorial Dedication to Justice William J. Brennan, Jr.

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We are gathered here today to pay tribute to one of the giants of American law, Justice William J. Brennan, Jr. It is now commonly recognized that Brennan was the driving force behind many of the most important intellectual and doctrinal innovations we have come to associate with the Warren Court.[1] In his last years, of course, Brennan was often in dissent, as the Court moved to the right. A question has been raised, therefore, about the endurance of the Brennan legacy.

Brennan has bequeathed to us an astonishingly large number of opinions. It is true that some of the specific holdings of these opinions have since been overruled, particularly in areas like the death penalty or federal jurisdiction. Yet the substance of the Brennan legacy does not reside in the particular holdings of specific opinions. What Brennan created during his time on the Court was no less than an overarching intellectual framework for the ascertainment of constitutional rights.

To appreciate the significance of this contribution, one must understand that in the 1950s, when Brennan was appointed to the Court, American constitutional law was inclined to test assertions of individual rights against the countervailing values of federalism. These values are complex and hard to specify, but in general they required courts to attach great importance to protecting decentralized centers of community self-definition that were associated with the States.

Brennan proposed a wholly different picture of the American polity.[2] Instead of citizens constituting themselves through local states, he saw individuals in constant struggle with governments, local and national. The consequences of this vision were profound. It cut

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1. *See* Robert C. Post, *Justice William J. Brennan and the Warren Court*, 8 CONST. COMMENTARY 11 (1991).

2. *See* Robert C. Post, *Justice Brennan and Federalism*, 7 CONST. COMMENTARY 227 (1990).

the ground out from the traditional communitarian values of federalism and instead made the individual the unit of constitutional analysis. This methodological individualism eventually found its supreme expression in Brennan's innovative and influential First Amendment jurisprudence, a jurisprudence which continues to structure First Amendment decision making to this very day. Brennan's vision also entailed strong egalitarian commitments, for it regarded all individuals as equal before the state. This vision of equality is perhaps best displayed in Brennan's enduring opinion in *Baker v. Carr*,[3] with its strong predicate of egalitarian individualism. Finally, Brennan's vision suggested that an important function of constitutional rights was to safeguard a sphere of liberty within which individuals could act in a manner that was free from state interference—a function exemplified in Brennan's several "right to privacy" decisions which, miraculously, have managed to survive largely undamaged.

Brennan's true legacy inheres in this framework of constitutional decision making, a framework that remains dominant and effective, although applied in recent years with considerably less generosity and humanity than Brennan was accustomed to display.[4] It is a framework that is clearly visible in the Commencement Address which we have gathered to discuss.[5] In that Address Brennan offered what was for him a characteristic tribute to the law and to lawyers as agents of social progress and amelioration. When, in the second half of his speech, he turned to articulating the nature of the progress for which he yearned, Brennan stressed the three complementary themes of egalitarianism, individualism, and freedom.

He urged Loyola's graduates to find ways to assure "equal rights and opportunities to all"[6] because, he said, "[s]ociety's overriding concern today is with providing freedom and equality of rights and opportunities in a realistic and not merely formal sense, to all the

3. 369 U.S. 186 (1962).

4. The one structural aspect of Brennan's legacy that has been fundamentally truncated does not concern the ascertainment of constitutional rights, but rather the regulation of access to courts. Brennan believed that access to the courts for the evaluation of constitutional claims should be facilitated, and he authored many important opinions making this possible. *See, e.g.*, Bivens v. Federal Bureau of Narcotics, 403 U.S. 388 (1971); Dombrowski v. Pfister, 380 U.S. 479 (1965); Fay v. Noia, 372 U.S. 391 (1963). But much of Brennan's work in this area has subsequently been undone.

5. *See* Justice William J. Brennan, Jr., *Commencement Address Delivered to Loyola Law School Class of 1986*, 31 LOY. L.A. L. REV. 725 (1998).

6. *Id.* at 4.

people of this Nation."[7] He inspired Loyola's graduates with the "sacred aspects"[8] of the profession, which he defined as those in which they could assume their "rightful place in the matter of service to the individual" in the protection of her "life, liberty, rights, estate and beneficiaries."[9] And, in ringing tones, he declared that "the retention and development of our freedom continues to be the supreme problem of our times. That is why the primary mission of the profession must be to preserve individual freedom—freedom of thought and action—to the fullest extent possible."[10]

Brennan's 1986 Commencement Address was thus a full-throated expression of the concerns that Brennan had brought so forcefully to bear in his re-articulation of American constitutional law. These concerns generated what is now the preeminent framework of constitutional decision making. It is a framework that aspires indivisibly to unite freedom, individualism, and equality.

The dangers that assail this framework do not so much arise from the holdings of particular cases, but rather from the fact that in recent years the internal connections between freedom, individualism, and equality have begun to unravel. Fissures now separate these three values, and, as a result, internal tensions have become visible that were not at all apparent in the years of the Warren Court.

In his last years as a Justice, Brennan became acutely aware of these tensions. For example, in cases like *Austin v. Michigan State Chamber of Commerce*[11] and *FEC v. Massachusetts Citizens for Life, Inc.*,[12] which involved limiting freedom of speech in order to promote equality in the arena of campaign finance, Brennan struggled hard to transcend an increasingly manifest strain between the values of freedom and of equality. He faced a similar issue in his notable opinion in *Roberts v. United States Jaycees*,[13] in which an antidiscrimination statute was pitted against freedom of association. Brennan also came to appreciate an important tension between the values of equality and individualism. In *Regents of the University of California v. Bakke*,[14] he addressed in his joint opinion the question of whether group benefits could constitutionally be used to remedy the effects of

7. *Id.* at 3.
8. *Id.* at 7.
9. *Id.*
10. *Id.* at 6.
11. 494 U.S. 652 (1990).
12. 479 U.S. 238 (1986).
13. 468 U.S. 609 (1984).
14. 438 U.S. 265 (1978).

past discrimination against persons, while in *Metro Broadcasting, Inc. v. FCC*,[15] his last opinion for the Court, he queried the more fundamental issue of whether equality could constitutionally attach to groups instead of only to individuals.

In the years since Brennan's departure, even the values of freedom and individualism have begun to fly apart. In recent controversies over the regulation of hate speech and pornography, for example, claims have been made that meaningful freedom can be protected only through the safeguarding of group identity and reputation.[16]

These are issues that have been made visible by the very success of the constitutional perspective that Brennan forged in the days of the Warren Court. They have no ready solutions within that perspective. One can discern them lying just beneath the surface of Brennan's Commencement Address at Loyola. If one asks, for example, how exactly the "ugly inequities"[17] Brennan abhorred can be remedied in ways that square with individual rights, the tensions become immediately manifest. This is well illustrated by the ugly controversy about affirmative action that has swirled through this State.

These are tensions that we receive as heirs of the Brennan legacy. They define the cutting frontier of *our* constitutional law. And it is our deep misfortune that we must explore and civilize that frontier without the guidance of a master-jurist like Justice William J. Brennan, Jr.

15. 497 U.S. 547 (1990).

16. *See, e.g.*, R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

17. Brennan, *supra* note 5, at 4.