Closing Remarks for Symposium on Justice Brennan and the Living Constitution

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Burt Neuborne is the very best of lawyers and law teachers. I appreciate his spirit-lifting introduction, also the Brennan clerks’ invitation, conveyed by Geoff Stone, to take part in this symposium.

We are gathered here to celebrate the work and spirit of William J. Brennan, Jr., a jurist Barbara Jordan rightly called “the lightning rod for individual rights and individual freedom” in our time.¹ You have had a stimulating morning, with an engaging roster of speakers addressing topics of special concern to Justice Brennan. My remarks, in contrast, will spark no controversy. I simply seek to convey our shared admiration and affection for a Justice who contributed monumentally to the advancement of liberty and justice, equal and accessible, for all.

In 1956, when Justice Sherman Minton retired from the U.S. Supreme Court, President Eisenhower nominated then New Jersey Supreme Court Justice Brennan to fill the vacancy. Brennan’s Chief Justice on the New Jersey court, Arthur Vanderbilt, gave his junior colleague a ringing endorsement. Vanderbilt wrote of striking things about Bill Brennan—“his [genuine] fondness for people,” his “industry[,] knowledge and wisdom,” his capacity constantly to grow, “his crowning trait[s]” —“courage and forthrightness.”²

Those traits were evident when Justice Brennan, while still a member of the New Jersey Supreme Court, spoke out against Senator Joseph McCarthy. If we violate individual rights out of fear, Brennan warned, we come “perilously

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¹ Anna Quindlen, Justice and Mercy, N.Y. Times, July 29, 1990, § 4, at 19 (quoting Barbara Jordan) (internal quotation marks omitted).
close to destroying liberty in liberty’s name.”

Chief Justice Vanderbilt thought, given Justice Brennan’s relative youth at the time of his nomination—he was then age 50—he might serve some 20 years. To our everlasting benefit, that predicted 20 years became 34, a time spanning eight Presidencies, seventeen Congresses, and 146 volumes of the United States Reports (the volumes collecting the opinions of the Supreme Court). When failing health required him to retire in 1990, he had served with twenty-two Supreme Court colleagues—one-fifth of the 110 Justices ever to have served on the Court.

It is not possible today to engage in the business of judging without reckoning with what Justice Brennan’s successor and devoted friend, Justice David Souter, called “the gravitational pull of the Brennan total”: 533 majority opinions, 694 dissents, and 346 concurring opinions, in all, 1,573 opinions. A theme characteristic of that huge output: his appreciation of the innate dignity of all humankind.

Justice Brennan’s opinions remain path-marking. Among his many enduring contributions to our constitutional landscape: Baker v. Carr, the 1962 decision that led to reapportionment in every state of the nation; NAACP v. Button, decided the next year, recognizing that public interest litigation is political advocacy sheltered by the First Amendment; New York Times v. Sullivan, in 1964, protecting the press against ruinous libel actions, thereby securing “breathing space” for freedom of expression to thrive; Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, in 1971, establishing the right of an individual to sue a federal agent for unconstitutionally intruding on one’s peace and security; Penn Central Transportation Co. v. New York City, in 1978, allowing room for accommodation of historical preservation laws within the Constitution’s restrictions on deprivations of property; Texas v. Johnson, in 1989, and United States v. Eichman, in 1990, on the tolerance the First Amendment demands even for those who demonstrate their disdain for U.S. policies by burning our flag.

My first encounter with Justice Brennan left an indelible impression. It was in the spring of 1966. The Justice visited Rutgers Law School in Newark.

4. Wermiel, supra note 2, at 531.
(the faculty on which I then served) to dedicate the School’s new building. He persuaded his Chief, Earl Warren, and his newest colleague, Abe Fortas, to join him. Demonstrators circled the block expressing in words and costumes their strong disapproval of several Warren Court decisions. "Should we call for heightened police surveillance," a worried Dean asked. "Let them demonstrate undisturbed," Justice Brennan instructed with the concurrence of his colleagues, "They are just exercising their First Amendment rights."

I thought back to that episode when I stood on the steps of St. Matthew’s Cathedral on July 29, 1997, watching as members of Justice Brennan’s law clerk family carried his coffin into the church. A voice blared over a loudspeaker protesting the church service because of Justice Brennan’s votes on women’s access to abortion. Let him speak, Bill Brennan would have said, as the voice blared on.

Justice Brennan was also instrumental in the 1970s, I should not fail to note, in moving the Court in a new direction regarding women’s rights. The very first case I argued before the Court, *Frontiero v. Richardson,* 13 yielded, in 1973, the first in a line of Brennan opinions holding that our living Constitution obligates government to respect women and men as persons of equal stature and dignity. In leading the Court as he did, Brennan perhaps recalled his World War II service, when he supervised the massive influx of women into civilian defense jobs, and organized day care and other support systems to facilitate women’s participation in the wartime labor force.

Until the Library of Congress opened Justice Marshall’s papers to the public, I did not know how close the Court had come to backsliding in a 1977 case on gender stereotyping, *Califano v. Goldfarb,* 14 or how Justice Brennan strived mightily and successfully to turn a starting four into a finishing five for the judgment in my client’s favor. “Inherent differences between men and women,” Justice Brennan well understood, “remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” 15

Justice Brennan’s legacy includes not only gems in the United States Reports. He also produced a rich seam of commentary. Among the best of his writings were two Madison lectures, both delivered here at New York University’s School of Law, one in February 1961, 16 the second, a generation later in November 1986. 17 In between these two, he composed his 1977 Meiklejohn lecture, delivered at Harvard Law School. 18

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18. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90
In his first Madison lecture, Justice Brennan described a vision he sought to make a reality: He believed the provisions of the Bill of Rights themselves, not vaguer notions of "fundamental liberty and fairness," governed the conduct of all officialdom—not just federal officers, but state actors as well. He cautioned against "judicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting[—the stomach pump—]cases." By 1969, the absorption process he championed was largely accomplished. Under the banner of the Fourteenth Amendment, most of the rights stated in the first ten amendments had become checks on state government.

In that year, however, a personnel change at the Court began, resulting in a less capacious federal court definition of Bill of Rights guarantees. Responding to that change, Justice Brennan realized that his dream of the 1960s had been incomplete. Rights declared only at the federal level would not do. The states, as participants in our federalism, had a vital role to play.

In 1977, in the Harvard Law Review, Justice Brennan described part two of his dream. He urged elaboration and development of state constitutions to safeguard and advance individual rights. Then, integrating the two parts into a grand whole, he restated in his 1986 Madison lecture that the strength of the federal system is its double source of protection for human rights. Both the state half and the federal half, he wrote, must nourish the hopes and possibilities of this nation to achieve "justice, equal and practical . . . for all."

Today's event is a fitting tribute to a man whose greatness (as Justice Souter said) lay in the perfect match of his mind and heart. In common with members of this audience, I count it my great good fortune to be in the large company of people whose lives have been touched and affected by this prince of a man.

To sum up what I have tried to convey, I will quote the words of a former dean of the New York University School of Law, Robert McKay—words spoken in 1987, when Justice Brennan delivered the Cardozo lecture at the Association of the Bar of the City of New York: "He is a hero, he is our hero of the Constitution of the United States."

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20. Brennan, supra note 17, at 553 (internal citation omitted).