

# A Life Lived Twice

Owen Fiss

Retirement celebrations are odd events. They are a mixture of joy and sadness, and that is emphatically true of those in honor of Justice Brennan.

Not since the retirement of Justice Holmes in the early 1930's has the nation been more generous in its tributes to a retiring justice. Justice Brennan served the Court for nearly thirty-four years and now, at a mere 84 (Holmes was 90), retires with a grandeur that is indeed stunning. In this, there is reason for joy because the Justice fully deserves all the accolades and honors that have been bestowed upon him. I rejoice in Brennan's glory and feel the pleasures of the moment, but I would be less than honest if I did not also acknowledge my sadness on this occasion, not just for the Justice who so loved his work, but even more for the law. His retirement imperils the achievements of the Warren Court in new and profound ways.

The Warren Court refers to that extraordinary phase of Supreme Court history that began in the mid-1950's, with *Brown v. Board of Education* and the appointments of Earl Warren (1954) and William J. Brennan, Jr. (1956), and which reached its apogee in the early 1960's, when Justice Frankfurter retired and the liberal wing of the Court achieved a solid majority. Aside from Warren and Brennan, that majority included Hugo Black, William O. Douglas, and Frankfurter's replacement, Arthur J. Goldberg, who served from 1962 until 1965 and then was replaced by Abe Fortas. In 1967, the group of five was strengthened when Thurgood Marshall replaced Tom Clark. Now and then, they picked up the vote of Potter Stewart or Byron White or even that of their most forceful critic, John Harlan, a conservative who often found himself encumbered by his commitment to stare decisis. Earl Warren retired from the chief justiceship in 1969, but the phase of Supreme Court history that bears his name continued into the early 1970's, probably until 1974. I clerked for Justice Brennan during the term of Court that began in October 1965 and ended the next summer.

Like everything else, law always has an antecedent. The roots of the jurisprudence of the Warren Court can be found in earlier periods, most especially in those decisions of the Supreme Court in the 1930's, when the Court gave important life to the principle guaranteeing freedom of speech, elevating the dissents of Holmes and Brandeis to majority status, and also began to intervene in criminal proceedings to assure a modicum of procedural fairness.

But there was something distinctive and special about the Warren Court, almost a new beginning. *Brown* itself undertook the most challenging of all constitutional tasks, making good on the nation's promise of racial equality. Even more importantly, that case embodied both a conception of law and a set of commitments that evolved into a broad-based program of constitutional reform. The Court saw the Bill of Rights and the Civil War Amendments as the embodiment of our highest ideals and soon made them the standard for judging the established order.

In the 1950's, America was not a pretty sight. Jim Crow reigned supreme. Blacks were systematically disenfranchised and excluded from juries. State-fostered religious practices, like school prayers, were pervasive. Legislatures were grossly gerrymandered and malapportioned. McCarthyism stifled radical dissent, and the jurisdiction of the censor over matters considered obscene or libelous had no constitutional limits. The heavy hand of the law threatened those who publicly provided information and advice concerning contraceptives, thereby imperiling the most intimate of human relationships. The states virtually had a free hand in the administration of justice. Trials often proceeded without counsel or jury. Convictions were allowed to stand even though they turned on illegally seized evidence or on statements extracted from the accused under coercive circumstances. There were no rules limiting the imposition of the death penalty. These practices victimized the poor and disadvantaged, as did the welfare system, which was administered in an arbitrary and oppressive manner. The capacity of the poor to participate in civic activities was also limited by the imposition of poll taxes, court filing fees, and the like.

These were the challenges that the Warren Court took up and spoke to in a forceful manner. The result was a program of constitutional reform almost revolutionary in its aspiration and, now and then, in its achievements. Of course the Court did not act in a political or social vacuum. It drew on broad-based social formations like the civil rights and welfare rights movements. At critical junctures, the Court looked to the executive and legislative branches for support. The dual school system of Jim Crow could not have been dismantled without the troops in Little Rock, the Civil Rights Act of 1964, the interventions of the Department of Justice and HEW, the suits of the NAACP Legal Defense Fund, or the black citizens who dared to become plaintiffs or, even more, to break the color line or march on behalf of their rights. The sixties would not have been what they were without the involvement of all of these institutions and persons, and the world would have looked very different. Yet the truth of the matter is that it was the Warren Court that spurred the great changes to follow, and inspired and protected those who sought to implement them.

A constitutional program so daring and so bold was, of course, the work of many minds. As is customary, we use the name of the chief justice to refer to this period of Supreme Court history, and in Warren's case that practice

seems especially appropriate. Earl Warren was a man of great dignity and vision, in every respect a leader, who discharged his duties (even the most trivial, such as admitting new members to the bar) with a grace and cheerfulness that were remarkable. He presided in a way that filled the courtroom with a glow. Yet the substance of the Court's work, the revolution that it effectuated in our understanding of the Constitution, drew on the talents and ideas of all those who found themselves entrusted with the judicial power at that unusual moment of history.

Justice Brennan's contribution to the ensemble known as the Warren Court had many dimensions. He was devoted to the values we identify with the Warren Court—equality, procedural fairness, freedom of speech, and religious liberty—and he was prepared to act on them. More importantly, he was the justice primarily assigned the task of speaking for the Court. The overall design of the Court's position may have been the work of several minds, fully reflecting the contributions of such historic figures as Black, Douglas, and Warren, but it was Brennan who by and large formulated the principle, analyzed the precedents, and chose the words that transformed the ideal into law. Like any master craftsman, he left his distinctive imprint on the finished product.

Warren and Brennan were invariably on the same side in the great constitutional cases of the day. They served together for thirteen terms and agreed in 89% of the more than 1400 cases they decided. Indeed, it is hard to think of a case of any import where they differed. As chief justice, Warren had the responsibility of assigning the task of speaking for the Court when his side prevailed. Sometimes, as in *Reynolds v. Sims* and *Miranda v. Arizona*, where he felt the need for the imprimatur of his office, or where the issue was especially close to his heart, Warren wrote the opinion. But generally he turned to Justice Brennan.

In part, this reflected the unusual personal tie that developed between the two. The Chief—as Justice Brennan always called him—visited Brennan's chambers frequently, and each visit was an important occasion for the chambers as a whole and for Justice Brennan in particular. One could see at a glance the admiration and affection that each felt for the other. The relationship between Earl Warren and William Brennan was one of the most extraordinary relationships between two colleagues that I have ever known; surely, it must be one of the most famous in the law.

But more than personal sentiment was involved. In turning to Brennan, Warren could be certain that the task of writing the opinion for the Court was in the hands of someone as thoroughly devoted as he was to the Court as an institution. An assignment is always an expression of trust, and Warren could depend on Brennan to formulate and express the Court's position—to declare the principle and attend to the details that constitute the law—in a way that would strengthen the Court in the eyes of both the public and the profession, and thus enhance its capacity to do its great work. Brennan was, in the highest

and best sense of the word, a statesman: not a person who tempers principle with prudence, but rather someone who is capable of grasping a multiplicity of conflicting principles, some of which relate to the well-being of the institution and remind the judge that his duty is not just to speak the law, but also to see to it that it becomes an actuality—in the words of *Cooper v. Aaron*, to make sure that the law becomes “a living truth.”

Brennan could be trusted to choose his words in a way that would minimize the disagreement among the justices, not only to avoid those silly squabbles that might interfere with the smooth functioning of a collegial institution, as the Court most certainly is, but also to produce a majority opinion and strengthen the force of what the Court had to say. Only five votes are needed for a decision to become law, but the stronger the majority and broader the consensus, the more plausible is its claim for authority. Brennan could also be trusted to respect the traditions of the bar and to pay homage to the principle of stare decisis. He always tried to build from within. Sometimes that was not possible, for the break with the past was just too great. Yet, even then, Brennan's inclination, once again rooted in a concern for the Court's authority, was to minimize the disruption, and to find, if at all possible, a narrow path through the precedents. Brennan also understood that reform as bold as the Court tried to effectuate required a coordination, not a separation, of powers, and that gratuitous confrontations with the other branches were to be avoided. In fact, as evident from Justice Brennan's opinion in *Katzenbach v. Morgan*, affirming a broad conception of congressional power under section 5 of the Fourteenth Amendment, every effort was made to invite the other branches of government to participate and collaborate in the program of constitutional reform inspired by the Court.

Aside from a proper regard for institutional needs, a successful opinion requires a mastery of legal craft, which Warren also found in Brennan. Justice Brennan was as much the lawyer as the statesman. Law is a blend of the theoretical and the technical, and though there were others as gifted as Brennan in the formulation of a theoretical principle, there was no one in the ruling coalition—certainly not before Fortas's appointment—who had either the patience or the ability to master the technical detail that is also the law. Everyone on the Court, law clerk and justice alike, admired Brennan's command of vast bodies of learning, ancient and modern. He knew the cases and the statutes, and how they interacted, and understood how the legal system worked and how it might be made to work better. Among the majority, he was the lawyer's judge.

Even Brennan's most theoretically ambitious opinions, like *New York Times v. Sullivan*, bear the lawyer's mark. In that case Justice Brennan spoke of the national commitment to a debate on public issues that is “uninhibited, robust, and wide-open,” and he has been justly celebrated many times for reformulating the theory of freedom of speech associated with the work of Alexander

Meiklejohn in a fresh and original way. Meiklejohn, then in his nineties, saw Brennan's opinion in *New York Times v. Sullivan* "as an occasion for dancing in the streets." Of even greater importance to the lawyers and judges among us (Meiklejohn was a political theorist) was Brennan's analysis of the common law of libel and his deft reformulation of doctrine—the announcement of the "actual malice" requirement—in order to create a rule that, one, would be operational and, two, would effectuate a just accommodation of reputational interests and democratic values. *New York Times v. Sullivan* is a great decision, a fountainhead of freedom in our day, only because it is an exercise in political philosophy made law.

In 1968, Richard Nixon ran against the Warren Court, and in so doing, attacked Justice Brennan as much as anyone, perhaps more so, given the commanding role that Brennan played on that Court. But history soon took an odd turn: the Warren Court collapsed, but Brennan remained. Prior to the election of 1968, but clearly with a view as to its likely outcome, Earl Warren tendered his resignation to President Johnson in an effort to turn the leadership of the Court over to Johnson's confidant, Abe Fortas. The Senate, however, balked on the elevation of Fortas, and his nomination for the chief justiceship was soon withdrawn. Yet following the 1968 election, Nixon made good on Earl Warren's resignation and began his presidency with the appointment of Warren Burger as chief justice. In addition, Fortas was forced to resign from the Court, due to the disclosure of financial improprieties; and with the resignations of John Harlan and Hugo Black, President Nixon found himself able to make three other appointments during his first term in office. Over time, one of those appointments—Harry A. Blackmun—evolved into a justice whose view of the Constitution turned out to be similar to those who sat on the Warren Court. But the two other appointments—Lewis Powell and William Rehnquist—were of a different character. There were differences between the views of Powell and Rehnquist, but the views of both were at odds with the jurisprudence that reigned supreme during the sixties.

The final dissolution of the Warren Court occurred with the resignation of Douglas in 1975 and his replacement by John Paul Stevens. The balance of power had decisively shifted, and was then locked in place by two accidents of history: Jimmy Carter had no appointments to make, a distinction he shared with no other President in our history who completed a full term, while Ronald Reagan had three—Antonin Scalia (to fill the vacancy created by Burger's resignation), Sandra Day O'Connor (to replace Stewart), and Anthony Kennedy (to replace Powell). In 1986, at the same time he appointed Scalia, President Reagan elevated Rehnquist to the chief justiceship, but that change only conformed outward appearances to the inner reality. For much of the seventies and eighties it was Rehnquist who led the Court, building the necessary coalitions, setting the agenda, and formulating the methods of revision. Even during Burger's years, it was the Rehnquist Court.

These changes ushered in a new phase of Supreme Court history, and Justice Brennan found himself working in a wholly new environment. He could turn to Marshall and, to a considerable extent, Blackmun, for support, but from there on in the going was rough. No longer a dominant figure in the ruling coalition, Brennan became part of the opposition, pitted against a majority driven by a contrary vision of American law and life. The new majority believed that the doctrine of the Warren Court was mistaken and had to be limited, corrected, and perhaps even eradicated.

*Brown*, of course, was not overruled, but it has been drained of much of its generative power. Arresting the trajectory that was implicit in cases like *Green v. School Board of New Kent County*, *Swann v. Charlotte-Mecklenburg Board of Education*, and *Keyes v. School Dist. No. 1, Denver*, all ultimately rooted in *Brown*, the Court ruled that school systems that contain a large number of all-black and all-white schools are constitutionally acceptable. According to the new majority, *Brown* condemned not the inequality resulting from the actual separation of the races, but only the use of racial criteria as a method of assignment. As a result, the Court has allowed school boards to assign students to schools on the basis of neighborhoods, even where there is residential segregation; it also effectively insulated suburban communities—invariably white—from the reach of court orders trying to desegregate the inner-city schools. School boards remain obliged to correct for vestiges of past practices, such as racial gerrymandering, but the Rehnquist Court has shifted the emphasis and underscored the limited nature of the remedial obligation, both geographically and temporally.

Even outside of the school desegregation context, which might have been thought to be a category unto itself, the egalitarianism of the Warren Court has been curbed by new renderings of the provision that constituted that Court's nerve center—the equal protection clause. In cases like *Moose Lodge No. 107 v. Irvis*, which upheld the award of a state liquor license to a club that openly discriminated on the basis of race, a sharp distinction was drawn between state and society, confining the ban on discrimination to state action narrowly understood. In addition, the Court ruled that in order to establish a denial of equal protection it is not enough to show that the state action especially disadvantages minorities; it must be shown that such an effect is intended by the state. In the mid-1970's, the Court also effectively removed the poor from the scope of the equal protection clause, leaving the war on poverty more vulnerable than ever to the vicissitudes of politics. In the same case, the Court declared that education was not a fundamental right, thereby bringing to a halt the process of enumerating rights that would warrant special solicitude under the equal protection clause. Even the commitment to strict numerical equality in the apportionment context has been diluted, as the Court became more and more tolerant of departures from the "one person, one vote" standard.

The Rehnquist Court also created new cracks in the wall between church and state by allowing the state to engage in practices, such as the maintenance of a creche, that earlier would have been unthinkable. In addition, the Court's commitment to maintaining public debate that is "uninhibited, robust, and wide-open" has been compromised during this period. Lacking the steely tolerance for political protest that characterized the Warren Court at its most determined moment, the Court under Rehnquist upheld laws that denied political activists the opportunity to reach the public at shopping centers or in front of certain government buildings, or through posting posters on utility poles, demonstrating in public parks, and picketing in residential neighborhoods. It also refused to create access to the networks for editorial advertisements sponsored by a group of businessmen criticizing the Vietnam War. On the other hand, a number of laws trying to limit political expenditures were struck down as violative of the First Amendment, even though these measures were conceived as means of preserving the vitality of democratic politics by preventing the wealthy from drowning out the voices of the less affluent in society. In these cases, and others, the new majority seemed to be confounding the protection of speech with the protection of property.

In the criminal context, the new majority lifted the ban on the application of the death penalty that had its roots in the sixties and that formally took effect in the early seventies. Since 1976 more than 140 persons convicted of crimes have been put to death, and Rehnquist, both as a judge and in discharge of his administrative responsibilities as head of the Judicial Conference of the United States, seems determined to institute a series of procedural reforms that would expedite and facilitate that process. Similarly, the Court has sought to shift the balance of advantage in the criminal process, relaxing some of the restrictions on the investigatory techniques of the police, most notably the rule excluding illegally seized evidence.

During the 1960's the Court had opened the doors of the federal trial courts for writs of habeas corpus and injunctions against state criminal proceedings. This was done to ensure that state criminal proceedings adhered to minimum standards of fairness and to make certain that these proceedings were not used for improper purposes, such as the harassment of political activists. During the 1970's and 1980's those doors were closed. *Fay v. Noia* and *Dombrowski v. Pfister*, opinions by Brennan that gave substance to the view that federal courts are the primary forum for the protection of federal rights, were emptied of all operative significance. A similar fate befell *Goldberg v. Kelly*, also written by Justice Brennan, which had extended the due process revolution of the sixties from the criminal to the civil domain. Today, government is allowed to act to the detriment of individuals, to inflict grievous suffering on them, for example, by denying disability benefits or terminating parental rights, without providing some of the most elementary forms of due process.

The law does not move slowly, but it does move unevenly, and during the last twenty years all has not been bleak, even for someone with Brennan's outlook. There have been a few bright moments. The most significant are *Roe v. Wade*, a 1973 decision creating a right to abortion, and *Regents of the University of California v. Bakke*, which, in effect, indicated that certain preferential treatment programs for minorities were permissible, a ruling later to be extended to women in *Johnson v. Transportation Agency*. No one should belittle those achievements, or any of the others that might come to mind, but they should not be taken as representative of the judicial era of which they are a part. *Roe v. Wade* and *Bakke* did not insert new premises into the law, but built on understandings of an earlier time. These cases were hard-fought victories that sharply divided the Court, and to this day survive by the narrowest of margins. At present, they define the outer limits of the law, barely tolerated, without any generative power of their own.

The danger to these decisions would have significantly increased if the campaign to place Robert Bork on the Court had been successful. As a law professor, as Solicitor General during the Nixon and Ford administrations, and as a federal appellate judge, Bork was a principal figure in the attack on the Warren Court and a relentless critic of *Roe v. Wade* and *Bakke* and the precedents upon which they were based. President Reagan's decision in 1987 to nominate him to the Supreme Court forced the Senate to consider carefully the jurisprudence of both Bork and the traditions which he so criticized, and the result was a series of hearings that offered the country an extraordinary seminar on constitutional law. The importance of those hearings and the decision of the Senate to reject the nomination cannot be denied. It should be understood, however, that contrary to what some have maintained, Bork would not have been a transformative appointment; that transformation had already occurred a decade earlier and continues to this day.

Living through this period was not easy for Justice Brennan. It proved to be a test of sorts, and as such brought to the fore many of his strengths. Value commitments that were shared in the sixties became distinguishing features of the Justice in the seventies and eighties and, as a result, are now recognized as a source of his identity and also his greatness. In some instances, his understanding of the Constitution evolved over time. A striking example is the change in his position on obscenity. In 1973 he rejected the strategy that he had created in 1957 in *Roth v. United States* and refined throughout the sixties—of keeping censorship to a minimum by providing a narrow definition of that genre of speech that falls outside the ambit of First Amendment protection—and took up a position close to the absolutism of Black and Douglas. Brennan indicated that characterizing sexually explicit material as obscene was not a sufficient justification for restricting its availability to consenting adults.

For the most part, however, the seventies and eighties were for Brennan a period devoted primarily to defending the achievements of the Warren Court.



At times that consisted of demanding that the Court take the inevitable next step, say, of extending the egalitarianism of *Brown* to issues of gender; most of the time, however, he had to confront the most blatant retrenchment. In this context the nation learned what his clerks knew first hand—namely, that the Justice is extraordinarily strong-minded—and when the day was done, he emerged as a national hero, a freedom fighter of sorts. On issues of detail Brennan is conciliatory, but when it comes to what he regards as matters of principle he is adamant and, in the best sense of the word, stubborn.

This stubbornness expressed itself in many ways, not the least of which was the profusion of dissents. One enterprising law clerk, more familiar with Lexis than I, calculated that over his career Justice Brennan wrote dissenting opinions in 2,347 cases, mostly during the 1970's and 1980's. Of those, 1,517 were in death penalty cases, and a great number of them were formulaic dissents from the denial of certiorari, jointly issued with Marshall. But even subtracting these, the number of dissenting opinions remains impressive—830. During the last term alone, the Justice wrote dissenting opinions in 23 cases. During the term I clerked, one of the halcyon days of the Warren Court, Brennan wrote a dissenting opinion in only one case, *United States v. Guest*, and it is not even clear whether that opinion should be regarded as a dissent. As commentators soon realized, though his opinion in that case was labeled a “dissent,” it actually set forth a view of congressional authority which, when read in conjunction with Justice Clark's separate concurrence, had the support of a majority of five justices and which, along with *Katzenbach v. Morgan*, later was used to provide the constitutional foundation for the Civil Rights Act of 1968.

The escalation in the number of Justice Brennan's dissents during the Rehnquist years is indeed striking, all the more so because it is so much greater than the number of dissenting opinions written by the first Justice Harlan or Justice Holmes, both of whom are often referred to as the great dissenters. Over their careers, Harlan wrote 134 dissents and Holmes 81, but these numbers seem trivial when compared to the number of Brennan's dissents. It would be a mistake, however, to view Justice Brennan, even during this second phase of his career on the Court, as we view Holmes or the first Harlan, as another great dissenter or, as the enterprising clerk declared, the greatest dissenter.

As a matter of collegial style, both Harlan and Holmes were loners, and in addition, Holmes's philosophic outlook supremely suited him to the role of dissenter. Holmes viewed history, or even the action of his brethren, much as a spectator might. At times he was prepared to raise his voice in protest, as he did in *Lochner v. New York* and *Abrams v. United States*, but he did so with an indifference as to whether he persuaded his colleagues or managed to obtain their votes. Holmes spoke to the future, and as it turned out he was prophetic, but his basic intent was to speak his mind and let the chips fall wherever they might. Justice Brennan, on the other hand, never, but never, was a loner nor a spectator, but always was thoroughly engaged with his colleagues, passionate-

ly working to build a majority; in the 1950's and 1960's he did so to implement the revolution, in the 1970's and 1980's to stop the counterrevolution. The Brennan dissents of the 1970's and 1980's spoke not to the future, but to his colleagues. More often than not they read like majority opinions that just fell short of one or two votes. In one notable instance involving congressional power under the commerce clause, he soon managed to sway one of the previous majority to switch, thereby transforming the position he originally articulated in dissent into the law of the land.

Moreover, while the second phase of Brennan's career is marked by an extraordinary number of dissents, one should not be misled by the numbers. The dissents were not at the core of his mission. At the occasional law clerk dinners held during the 1970's and 1980's, he would wryly announce the tallies to the assembled. We would cheer the resistance offered by his dissents. But it was obvious that the Justice's true source of pleasure came in the cases in which he somehow—miraculously, I think—formed a majority that held the line. Rehnquist was usually on the other side, and because of his seniority, Brennan acted as a shadow chief justice and often assigned himself the task of speaking for the odd coalition that he pulled together. Justice Brennan's last term on the Court was marked by a large number of dissents, but of equal, even greater, significance is the fact that in two important cases—one involving flagburning, the other patronage—he was able to speak for the majority in support of freedom of speech. It was entirely fitting that on the last day of his last term on the Court, after almost thirty-four years of service, he announced an opinion for a majority of the Court upholding an FCC policy—born of another era—that favored minority interests in awarding broadcasting licenses. Later that afternoon, Justice Brennan received the prognosis from his doctor that led to his decision to retire.

Justice Brennan is a proud man, not in the least bit arrogant—indeed he is one of the most modest men I have ever known—but he is someone who takes a very special pride in his work. He is a fighter who likes to win, and as such, would be pained to see an earlier victory reversed, especially when, as in the line of cases that undid *Dombrowski*, the new majority, also trying to build from within, turned Brennan's doctrinal creations to another purpose. The fight in Brennan no doubt accounted for the sense of engagement that carried him through the seventies and eighties, and helps explain the unusual role he created for himself during that period. It was, however, dwarfed by an even more significant factor: his devotion to the institution.

In the Warren Court era, this devotion accounted for Brennan's role as Court spokesman and for the distinctive nature of his opinions. He took no pleasure in speaking alone, but always tried to speak through the Court and to mold judicial doctrine in a way that was fully sensitive to the needs of that institution. His first priority was to have the Court speak authoritatively and his second was to produce an opinion that would strengthen the effectiveness

of the Court. He strove to avoid any gestures that would either dissolve or splinter the majority, infuriate those on the other side of the bench, or set into motion a political dynamic that would undermine the ability of the Court to achieve all that it might. During the second half of his tenure, these same sentiments shaped his strategy of resistance. Dissent was always a possibility, but his first priority was that the Court speak to the issue in an authoritative manner, because he continued to believe in the Court and that law mattered. He remained committed to working through the institution, not to propounding his views, speaking his mind, or otherwise indulging himself. Dissent was a reluctant last resort—almost an acknowledgment of failure.

In this way, Brennan served as the bridge between the Constitution that was and the Constitution that is. He was the mediating force in the negative dialectic between the Warren and Rehnquist Courts. I can assure you that there is no one left on the Court, not even Justice Marshall (for whom I also clerked), who can play that role in quite the way that Brennan did. At the hands of Rehnquist and those inclined to follow him, the Warren Court has suffered grievously, and today, without Brennan on the bench, the work of that institution stands more in jeopardy than ever. Some, like Scalia, appear determined to chart their own process of revision, but the danger they pose to the body of law associated with the Warren Court is every bit as great.

Of course, Justice Brennan has left us a written legacy. The pages of the United States Reports are filled with his opinions, both dissents and majority opinions. A few years back, still another of his law clerks surveyed the leading casebooks on constitutional law and reported that of all the so-called “principal” cases featured in those books, Justice Brennan had written more than any other justice in the entire history of the Supreme Court. These opinions define the field within which the present Court operates; for some they will act as constraints, for others a resource—and if the testimony of Brennan’s replacement, David Souter, is to be believed, for some they might even act as an inspiration. But these opinions will not compensate for the loss of Brennan’s vote, even less for his absence within the councils of the Court.

During the October 1965 Term, the conferences were held on Fridays. Later that day, or more commonly on Saturdays, when the Justice would regularly have lunch with his clerks, he would describe what transpired at conference, or at least what he thought we should know about the conference. Some sense of the inner workings of the Court was also conveyed during the dinners he had with his clerks during the late 1960’s and early 1970’s. At that time the law clerk dinners were an annual event and the number of former clerks small enough that we could sit around a table upstairs at the Occidental. Those were also the days—prior to the publication of *The Brethren*—when he could assume that law clerks could be trusted with a confidence. The Justice was not a man for gossip, or small talk about his colleagues (though his interest in the personal lives of his clerks was boundless—he treated us as members of his family). But

he saw himself as a teacher, supplementing and enriching what we might have learned in the classroom, and he believed that understanding the dynamics among the justices was a crucial part of our education, especially if, as he hoped, we would go on to become teachers. He wanted us and our students to know how law was truly made.

His role in the deliberations was not the principal point of these conversations, but one could see in an instant how the personal qualities that drew us to the man—the quickness and clarity of his mind, the warmth of his personality, the energy that he brought to argument, his sensitivity to the views of others—were present in the Conference Room and, even more, accounted for much of what happened there. In conference, Justice Brennan always had more than one vote. Who could possibly resist him when he grabbed you by the elbow, or put his arm around your shoulder, and began, “Look, pal . . .”?

For many, including myself, the Justice’s retirement will only compound the sense of disaffection with the Court that now pervades the academy and large sections of the profession. For a previous generation, the Supreme Court was an institution of respect and admiration. Today the Court is seen as alien and hostile, less devoted to reaffirming and actualizing our national ideals than to protecting the established order, strengthening the hand of those who serve it and belittling those who might challenge it. It is this perception that contributed to the rise of the Critical Legal Studies movement and its many cognates during the late seventies and that gives this movement such widespread support in the academy today. Yet the same disaffection is shared by those who have more moderate or centrist commitments, those who still believe in the redemptive possibility of law.

This disaffection is rooted in the overall pattern of decisions over the last two decades. It is exacerbated, however, by the person of the Chief Justice who, despite his amiability, appears so determined in his mission that he is willing to disregard even the most elementary principles of the craft, and who managed, in his two confirmation proceedings, to cast doubt on his own integrity. In the first, he mischaracterized Justice Jackson’s position in the deliberations leading to *Brown* in an effort to explain away a memorandum he wrote as a law clerk supporting *Plessy v. Ferguson*; in the second, he failed to explain adequately why he did not recuse himself in a case involving military surveillance of civilians during the Nixon administration in which, of course, he was an assistant attorney general.

The Warren Court had its critics, as was known to anyone who, like myself, studied at Harvard in the early sixties and witnessed Justice Brennan’s anger—soon abated—at the leading faction of the Harvard professorate and a number of scholars associated with that school who denounced the Court in terms most emphatic. This anger expressed itself in many ways, one quite trivial: the Justice decided to end his practice of taking his clerks, as a matter of course, from his own law school. My fellow clerk was his first from

Yale—the stronghold of support for what the Court was then trying to accomplish—and on the last day of my clerkship I received a poem written by a friend in the name of the Justice entitled “Ode to My Last Harvard Clerk.” This too would pass. But even in those days it was understood that Harvard did not speak for the profession as a whole, and even less so for the young, who looked to the Court as an inspiration, the very reason to enter the profession. Today, the situation is completely different. The disaffection with the Court is not localized, but pervades the profession, and swells within those who are just now being initiated into it. For some, the Rehnquist Court speaks to their ideals, but for most it is a source of cynicism and doubt.

Under these circumstances it is often difficult to see or present the body of learning known as constitutional law as worthy of respect and admiration. It is also difficult to know how the Court might continue to play its historic function in the republic: how can it speak authoritatively and effectively to the issues that divide us if the bar feels so alienated from it? To some, this loss of authority might not seem so tragic, given the present course of decision. But I wonder whether such a view is inappropriately short-sighted, seeing only what is, without regard to what was and what might be. For all that it accomplished, and still might, there is reason to believe in the Court. Yet I recognize that it becomes more and more difficult to do so under the terms and conditions of the governing coalition.

In musing on this predicament, my mind often turns to the Justice, and I glance at the photograph that appears as the frontispiece of these Tributes. While the Justice represents many things for me, probably none is more important than his attachment to the Court as an institution. It is this attachment that unifies the two phases of his career and accounts for the unusual role that he created for himself during the last twenty years, as he saw so much that he created and so much that he believes in dismantled and destroyed. Justice Brennan served through these years in a cheerful and determined manner, always with an unqualified devotion to the Court. I wonder whether those, like myself, who wish to honor him and that extraordinary age of American law that he helped bring into being, might not look to him as an exemplar and an inspiration. He resisted, tenaciously, but kept the faith—why can't we?

