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William J. Brennan, Jr.

Paul A. Freund†

The completion of twenty years of fruitful and important service on the Supreme Court is happily and fitly honored by the dedication of an issue of the *Yale Law Journal* to Mr. Justice Brennan. Why it is especially fitting that a number devoted to federalism should be the vehicle for this tribute may not be so obvious. For Justice Brennan has been the most persistent, unwavering voice in support of a judicial review most tolerant of the range of national powers and most intensive in the application of the guarantees of the Bill of Rights to state (no less than to national) authority.

Justice Brennan himself has not ignored the relevance of our federal structure to the issue of judicial review of state action. For him the proper judicial response turns on the purposes, not the forms, of a federal system, and among those purposes he would give first rank to the protection of individuals against arbitrary domination by the concentrated power of officialdom. "Federalism," he has recently reminded us, "need not be a mean-spirited doctrine that serves only to limit the scope of human liberty."[1] Federalism and judicial review were designed, after all, as twin safeguards against oppressive power. And judicial review itself, operating as it does on both the state and national levels, under two sets of constitutional standards, can furnish a double security. Such, at any rate, is clearly the philosophy of Justice Brennan: "[O]ne of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens. Federalism is not served when the federal half of that protection is crippled."[2]

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1. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).
2. *Id.*

In thus identifying federalism not as something to be cherished for the sake of its form but as an instrumental measure for the securing of freedom, Justice Brennan is allied with federalism's most ardent encomiasts. "No domain of continental extent," Dean Roscoe Pound wrote, "has been ruled otherwise than as an autocracy or as a federal state."[3] Lord Acton's praise was especially fulsome: "By multiplying centres of government and discussion it promotes the diffusion of political knowledge and the maintenance of healthy and independent opinion. It is the protectorate of minorities, and the consecration of self-government."[4]

Matched against the actual performance of certain state and local governments, this tribute to federalism may seem romantic or even ironic. That is why a Bill of Rights is a natural corollary, not an antagonist, of the federal system. It is not a mere striking coincidence that the specific values enumerated by Lord Acton are the very ones that Justice Brennan has striven to fortify through judicial review: freedom of thought and expression; diffusion of political participation; protection of minorities. These are not only the common values of federalism and guaranteed rights; these are also the values whose safeguarding is most appropriate for the judicial function in a democracy. They are at the heart of the structure and process which must be relied on, and therefore kept open and unobstructed, if the political decisions made through the system are to deserve and receive respect.

As Justice Brennan is a realist in his perception of federalism, so he recognizes that the majestic standards of the Bill of Rights require for their translation into action a set of middle-level principles responsive to the various contexts of experience. In this work of judicial translation he has been exceptionally resourceful in fashioning justice with the armament of procedure. Thus in giving the press a margin of error, or breathing space, in the area of political defamation, he resisted the allure of an absolute privilege and instead adopted a standard of proof that would not wholly close the door to redress yet would prevent all but the most flagrant cases from going to trial or at least from going to the jury.[5]

This mode of thought, apprehending substantive rights in terms of procedural variants, is perhaps a product of his experience as a trial lawyer and state court judge. Perhaps it is an appreciation of the value

3. Pound, *Law and Federal Government*, in FEDERALISM AS A DEMOCRATIC PROCESS 3, 23 (1942).

4. J. ACTON, *The History of Freedom in Antiquity*, in THE HISTORY OF FREEDOM AND OTHER ESSAYS 1, 20-21 (J. Figgis & R. Laurence eds. 1919).

5. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

of accommodation, whether among rights or among judges who must assess them. Whatever the derivation, this resourceful employment of procedural options has been a notable characteristic of Justice Brennan's judicial method. In one of his early opinions on the Supreme Court he voiced this dominant theme:

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.[6]

In that case, speaking for the Court, he rejected a procedure that would have put on a state taxpayer the burden of proving the truth of an affidavit of loyalty. Fifteen years later, again for the Court, he approached a thorny issue by way of presumptions, this time raising a rebuttable presumption, where there was shown to be purposeful racial discrimination in a part of a school district, that racial imbalance in the remainder of the district was attributable to the same cause.[7] Procedural though they are, these are powerful levers in the enforcement of constitutional guarantees.

Justice Brennan's resourcefulness springs in the end not only, perhaps not so much, from the skill of a craftsman as from the passion of a committed believer—from that passion combined with high moral courage, shown not least in his unflinching protection of politically odious speech and his rigorous insistence on the separation of church and state in the face of the short-term seductiveness of public financial support. His vision, resourcefulness, passion, and courage have made him a redoubtable champion of a free, open, and just society.

6. Speiser v. Randall, 357 U.S. 513, 520-21 (1958).
7. Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).