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*For what avail the plough or sail
Or land or life, if freedom fail?*

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ANNUAL SURVEY OF AMERICAN LAW

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This Volume of the Annual Survey of American Law

is respectfully dedicated to

THE HONORABLE

JUSTICE WILLIAM J. BRENNAN, JR.

DEDICATION

Each year of its forty year history, the *Annual Survey of American Law* has been dedicated to an outstanding member of the legal community. The list of past honorees includes some of our foremost judges and legal educators. There is probably no one on this list, however, who has reached the level of respect and admiration which is accorded to this year's recipient, Justice William J. Brennan, Jr. The Justice occupies a singular position in the hearts of law students, educators, lawyers, judges, and all who are involved with American law today. Justice Brennan honors us by accepting this dedication.

As the following tributes describe so well, Justice Brennan, in his twenty-six years on the Supreme Court, has led American law through one of its brightest periods. His achievements are remarkable. From his rise through the ranks of the New Jersey courts to the Supreme Court of the United States, all within an eight year span, to his authorship of many of the major decisions of the Warren era, to the intellectual contributions of his many articles and speeches, Justice Brennan has achieved a record that is matched by few in the history of American law.

But his contributions reach more than the legal profession or the body of law. By his strong advocacy of the Bill of Rights, he has changed the very way in which we look at the role of government and government's relation to the individual. Those searching for compassion and humanity in the law need only read the opinions of Justice Brennan.

On behalf of the New York University School of Law and the entire legal community, the *Annual Survey* is honored to dedicate its 1981 volume to Justice Brennan. He serves as a reminder to all of us what law can and should be.

THE BOARD OF EDITORS

TRIBUTES

TRIBUTE TO MR. JUSTICE BRENNAN

As a very recently appointed circuit judge, it would ill become me to attempt to comment on the substantive achievements of a Supreme Court Justice, who may soon be asked to affirm or reverse my decisions; any praise I offered would appear to be an attempt to curry favor with one of my superiors in the federal judicial hierarchy. What is more important, any praise from me would be superfluous in the extreme; Justice Brennan's position as one of the most influential Justices in history of the Supreme Court is secure and requires no words from me to confirm.

I can, however, I hope without being thought obsequious or redundant, speak to the personal qualities of the Justice for whom I clerked in the 1962 Term of Court. An intimate working relationship of the kind that a law clerk has with a judge creates an angle of observation different from that of the usual observer of a judge and his work. Although it has been said that no man is a hero to his valet, I can testify that no law clerk emerges from his year with Justice Brennan without the greatest enthusiasm for the Justice's human qualities. Certainly that was my reaction. Justice Brennan's complete freedom from the self-importance that high office induces in so many of its holders, his many personal kindnesses not only to me but to my family, his modesty and warmth, and his unassuming friendliness provide a model of democratic decency in public office.

It has been almost twenty years since I clerked for Justice Brennan. While the Justice remains a beacon of liberal judicial thought, my own view of law and policy has become, as the Justice is well aware, distinctly conservative. I have occasionally criticized in print positions with which Justice Brennan is closely identified—even opinions that he has written. Yet his kindness toward me has been unaffected by the divergence in our thinking on matters of fundamental importance to both of us; the notes he wrote me on the occasion of my nomination and then confirmation as a circuit judge are among my most treasured possessions. In his generosity toward an acolyte turned critic he has displayed a rare magnanimity which deserves to be remembered no less than the public accomplishments that have made him one of the most important Supreme Court Justices in our history.

RICHARD A. POSNER

Judge
United States Court of Appeals
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JUSTICE WILLIAM BRENNAN AFTER TWENTY-FIVE YEARS

On October 16, 1981, Justice William J. Brennan, Jr., completed his twenty-fifth year on the Supreme Court of the United States. In years of service, he now ranks nineteenth among the 106 Justices in the Court's history. In quality of service and magnitude of contributions, his place among the very greatest of our Justices is already ensured. The Justice's present and former clerks gathered in Washington, D.C., to celebrate the occasion. Virtually all 73 clerks attended, not merely to honor the judge, but also to enjoy the man, and his enchanting, vivacious wife. As usual, he remembered each of us, our families, and our Term with him as though it were only yesterday; and his energy, wit, and affection once again amazed and inspired us.

Justice Brennan's contributions to the Court and to the nation have been numerous and profoundly important. Preeminent among them, he has been an advocate for the Bill of Rights. While other Justices have led the Court on one constitutional issue or another, Justice Brennan has been the most consistent civil libertarian in the Court's history. While Court majorities over the years have altered their approach to constitutional protections, Justice Brennan has consistently advanced a generous view of those rights. When he joined the Court, he frequently dissented from decisions of the Court majority, led by Justices Frankfurter and Harlan; later, he became part of, and frequently led, the Warren Court majority; under Chief Justice Burger, he is once again predominantly in dissent, although his influence remains great. The Court has changed; he has not.

Justice Brennan has articulated lasting principles of constitutional liberty in many areas. Few Court decisions have been as important to American political life as those recognizing and enforcing the one-person, one-vote principle. The most important step in that line of cases was Justice Brennan's opinion in *Baker v. Carr*,¹ which confirmed that reapportionment issues are appropriate subjects for the Court to consider. His decision in *New York Times Co. v. Sullivan*,² and its progeny, will provide enduring protection to the free press, helping to ensure that public debate is "uninhibited, robust, and wide-open." His decision in *Goldberg v. Kelly*,³ even as subsequently limited, established that the Constitution

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1. 369 U.S. 186 (1962)

2. 376 U.S. 254 (1964)

3. 397 U.S. 254 (1970).

requires fair procedures when government operates welfare programs for the poor and, more broadly, demands that government adhere to constitutional standards of fair procedure in dealing with individuals in its bureaucracies as well as in its courts. He has fashioned the contours of our freedom of association, so as to help protect Americans from the sometimes fickle passions of majority sentiment.⁴ And he has eloquently and unwaveringly pressed for racial equality in all aspects of American life, taking a central place among the group of Justices whose efforts during recent decades have led this nation away from racism and toward hope.

Justice Brennan's influence stems partly from his creative and courageous legal craftsmanship. His opinions are characterized by their clarity, cogency, and honesty. They are a mix of the frankly avowed values that he finds in the Constitution, and a probing, reasoning intellect. The mark of his impact as a lawyer on the Court is the weight accorded his views in such nonconstitutional areas as labor law, administrative regulation, and state taxation of interstate commerce. His keen understanding of the importance of procedure in protecting constitutional rights reflects a sophisticated awareness of how law works in the real world. And his use of procedural devices has important substantive implications. As Stephen J. Friedman explained: "He has turned to matters of procedure, not to avoid adjudication, but to insure that the Court is called upon to balance competing interests of state and citizen only when the judgment . . . has been made in a setting which is designed to discriminate between protected and unprotected activity."⁵

Justice Brennan's life, like his work, has been a triumph at the bar. As a young man, he joined one of New Jersey's most illustrious law firms and rapidly rose within it to a position of leadership. During the Second World War he served the nation with the Army General Staff Corps, using his great personal and professional skills to help our defense industry operate at maximum efficiency; he resigned at the rank of Colonel, decorated with the Legion of Merit. He became involved through his state bar association in judicial reform activities under the leadership of Chief Justice Vanderbilt of the New Jersey Supreme Court. His magnetism, enthusiasm, intelligence, and capacity made him one of New Jersey's most important spokesman for reforming its judicial system.⁶ He accepted a position as Superior Court Judge, giving up great wealth and influence at the private bar. Very soon, he was promoted to the Appellate Division, and then to the New Jersey Supreme Court, where he distin-

4. *NAACP v. Button*, 371 U.S. 415 (1963).

5. S. Friedman, *An Affair With Freedom* 367 (1967).

6. Hall, Mr. Justice Brennan—The Earlier Years, 15 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 286 (1980).

guished himself both as a jurist and as an administrator. He has established an extraordinary record of scholarship, having written numerous articles and speeches, which have influenced the course of the law. He has been a teacher of judges over the years, and continues selflessly to devote himself to improving the system of justice.⁷ Throughout his career, Justice Brennan has spoken out on the social responsibilities of attorneys.⁸ His life is an illustrious example of the high standards to which attorneys are called.

Justice Brennan's great influence at the Supreme Court is attributable not only to his prodigious skills as a lawyer but also to his deep commitment to the Court's cohesiveness and stature. He is not interested in notoriety. Rather, he seeks to "inspire and instruct" through the medium of the Court. In recent years he has frequently been forced to dissent, and he has played that role as well as any of the Court's great dissenters. But even when disagreeing he is reaching out to the other Justices, urging them to respect prior rulings, pointing out the limits of his own positions so as to make clear his willingness to accommodate other legitimate interests.⁹ Professor Owen Fiss, another of the Justice's former law clerks, aptly described this quality as "judicial statesmanship":

[T]he judicial statesman aspires to speak through the Court, not above it. A dissent or separate concurrence comes only as a last resort, when there is a division over principle, when the views of the majority are fundamentally at odds with his. The judicial statesman is also a realist. He understands that an authoritative position for the Court can only be created through bargaining and compromise.¹⁰

Other great Justices may similarly be characterized, most notably Chief Justice Marshall, who sought always to carry the Court, and was similarly

7. See, e.g., Brennan, *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. Fla. L. Rev. 225 (1966); Brennan, *Efficient Organization and Effective Administration for Today's Courts: The Citizens' Responsibility*, 48 J. Am. Jud. Soc'y 145 (1964); Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. Rev. 945 (1964); Brennan, *Education and the Bill of Rights*, 113 U.Pa. L. Rev. 219 (1964).

8. E.g., Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121 (1968).

9. E.g., *Fisher v. United States*, 425 U.S. 391, 414-30 (1976) (Brennan, J., concurring in the judgment).

10. Fiss, *Dombrowski*, 86 Yale L.J. 1103, 1161 (1977).

statesmanlike in avoiding confrontations with the other branches of our national government.¹¹

An eloquent and dramatic instance of Justice Brennan's commitment to the Court is his Address at the dedication of the Samuel I. Newhouse Center for Law and Justice, in Newark, New Jersey.¹² As author of several of the Court's leading decisions that protect the press in its statements and activities,¹³ Justice Brennan might well have been tempted to remain silent amidst the barrage of criticism aimed at the Court for more recent decisions that limit press freedoms.¹⁴ He had dissented or disagreed in part with the recent decisions, so the criticism was not aimed at him personally. But his role as an effective Justice is far more important to him than the adulation of the press. He came to the Court's defense. He firmly defended the majority with whom he had disagreed against what he felt were irresponsible and exaggerated charges. In the process, he explained the differences between the "speech" and "structural" models for deciding press-related issues, noting that the former, absolutist view was inapplicable outside the core right to publish, but arguing that a qualified protection must be extended to "the myriad tasks necessary . . . to gather and disseminate the news."¹⁵ His theory of the need to protect "the indispensable conditions of meaningful communication," but to balance the interests supporting such conditions against competing interests, appeared later in his concurring opinion in *Richmond Newspapers, Inc. v. Virginia*.¹⁶ Professor Archibald Cox has called the concurrence "eloquent" and speculated that it "may yet become the law of the first amendment."¹⁷

In addition to thus instructing us, the Justice characteristically urged the press to temper its claims so as to strengthen its influence with the Court in its work of striking the proper balance between the needs of the press and other social interests. "This may involve a certain loss of innocence," he said, "a certain recognition that the press, like other institutions, must accommodate a variety of important social interests. But the sad complexity of our society makes this inevitable, and there is no alternative but a shrill and impotent isolation."¹⁸

11. On occasion the great Chief Justice was known to write an opinion for the Court even though he disagreed with the result. E.g., *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 178-79 (1804).

12. Brennan, Address, 32 Rutgers L. Rev. 173 (1979).

13. E.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

14. *Herbert v. Lando*, 441 U.S. 153 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972).

15. Brennan, *supra* note 12, at 177.

16. 448 U.S. 555, 584-98 (1980).

17. Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 24, 25 (1980).

18. Brennan, *supra* note 12, at 181.

It has recently been argued that Justice Frankfurter's failure over the long run to lead the Court may be attributed in part to his tendency to characterize the views of colleagues and Court majorities with whom he disagreed as unprincipled, undisciplined, and unlearned.¹⁹ Justice Brennan has no such failing. His consistent respect for opposing views and for the Court as an institution is a source of his remarkable ability to carry and speak through the Court on issues of the greatest significance. A limited but useful measure of the Justice's influence is provided in a 1979 publication of the Congressional Quarterly entitled *Guide to the United States Supreme Court*. Part VII of that work digests the "Major Decisions of the Court," some 376 cases that Dean Erwin Griswold assures us in his foreword have been carefully selected. Some 132 decisions were selected from the 23 Terms between 1956, when Justice Brennan went on the Court, until 1978, the last year covered by the study. Of those, Justice Brennan wrote 29; the closest Justices to him in the number of such decisions were Chief Justices Burger and Warren, with 14 and 13 respectively.²⁰ The decisions selected, and the many highly significant omissions, cover a range of issues, showing the Justice's versatility. Of course, many grant protection to individuals under the Bill of Rights, especially the first amendment. Several of the decisions demonstrate, however, the Justice's willingness to reject what he finds are impractical and historically or conceptually indefensible claims to constitutional protection.²¹ A great number of the Justice's most important decisions, moreover, are in fields other than constitutional law, most notably in labor law.

Thanks in large part to his efforts, one of the dominant themes of Justice Brennan's jurisprudence has become a dominant theme of constitutional law as a whole in the past quarter century. Justice Brennan has been the moving force behind the Supreme Court's expansion of access to the federal courts for redress of federal, and in particular of constitutional, grievances. His opinion in *Fay v. Noia*, by removing obstacles to the filing of petitions for writs of habeas corpus, gave state prisoners broad new access to federal courts for review of the constitutionality of their convictions.²² His opinion in *Dombrowski v. Pfister* gave individuals new federal-court protection against the misuse of state legal process by state officials seeking to impair the exercise of constitutional rights.²³ Both decisions

19. See Dorsen, Book Review, 95 Harv. L. Rev. 367, 384-85 (1981) (review of H. Hirsch, *The Enigma of Felix Frankfurter* (1981)).

20. Congressional Quarterly's *Guide to the United States Supreme Court* (1979).

21. E.g., *Schmerber v. California*, 384 U.S. 757 (1966); *Warden v. Hayden*, 387 U.S. 294 (1967).

22. 372 U.S. 391 (1963).

23. 380 U.S. 479 (1965).

grant access to federal courts at some expense to the independence and finality of state court adjudications, and subsequent cases have given narrower readings to *Fay v. Noia* and *Dombrowski* than Justice Brennan hoped.²⁴ Nevertheless, the two decisions fundamentally changed the role of the federal courts, helping to make them vital forces for the protection of individual rights in American life.

Justice Brennan, in fact, has led the present Court in expanding federal judicial power to protect federal rights. He wrote the Court's opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, recognizing for the first time a cause of action directly under the Constitution—in that case, under the fourth amendment.²⁵ In *Davis v. Passman*,²⁶ Justice Brennan wrote the opinion that extended the *Bivens* principle to violations of the fifth amendment, even when committed by a Member of Congress. Justice Brennan also wrote the three leading decisions extending the reach of liability under 42 U.S.C. § 1983 for violations of federal law. He wrote *Monell v. New York City Dep't of Social Services*,²⁷ which held that municipalities (and local officials in their official capacities) could be sued under section 1983. Two years later he wrote *Owen v. City of Independence, Missouri*,²⁸ which held that municipalities have no immunity from section 1983 liability, not even immunity based on the good faith of the officials who take the challenged action. Finally, he wrote the opinion of the Court in *Main v. Thiboutot*,²⁹ extending section 1983 liability for claims based not on constitutional law but solely on federal statutory law. This group of cases, together with *Bivens* and its progeny, greatly enhance the capacity of individuals to protect their federal rights in federal court.

Fully consistent with his support for the authority of the federal courts to define and defend federal rights³⁰ has been Justice Brennan's career-long advocacy of active and independent protection for individual liberties by Congress and the state courts. His decision for the Court in *Katzenbach v. Morgan*³¹ confirmed Congress' authority under section five of the fourteenth amendment "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees" of that amendment. The decision recognized the existence of an important source of individual liberty outside judicial pronouncements, permitting Con-

24. See Fiss, *supra* note 10.

25. 403 U.S. 388 (1971).

26. 442 U.S. 228 (1979).

27. 436 U.S. 658 (1978).

28. 445 U.S. 622 (1980).

29. 448 U.S. 1 (1980).

30. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

31. 384 U.S. 641, 651 (1965).

gress to extend the protections of the fourteenth amendment beyond the minimum requirements established by the Court. In 1977, he likewise urged state courts to “thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”³² “State constitutions, too,” he wrote, “are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”³³ Thus, the Justice reminded us all that, like judicial review itself, federalism was designed as a safeguard of individual liberty, “provid[ing] a double source of protection for the rights of our citizens.”³⁴ Paul Freund remarked that “[i]n thus identifying federalism not as something to be cherished for the sake of form but as an instrumental measure for the securing of freedom, Justice Brennan is allied with federalism’s most ardent encomiasts.”³⁵ Such a call is especially fitting from one of only four Justices appointed since 1900 from the ranks of state judges.³⁶

Justice Brennan has by no means limited his efforts to constitutional questions. His work in statutory fields displays the same commitment to justice and the same acute sense of legal and social complexity evident in his constitutional decisions. In his first term, for example, Justice Brennan wrote the Court’s opinion in *Rogers v. Missouri Pacific R. Co.*, holding that a jury award to a plaintiff in a case under the Federal Employers’ Liability Act should not be disturbed if a reasonable jury could conclude that “negligence played any part, even the slightest,” in the plaintiff’s injury.³⁷ In one bold stroke, the Court solved a major problem of judicial administration and, by radically curtailing judicial review of FELA jury verdicts, squarely vested the power of decision, in all but the most unusual cases, exclusively in the jury, as Congress intended. In labor cases in general, Justice Brennan has become the Court’s most influential member, its acknowledged leader. In cases such as *Boys Markets, Inc. v. Retail Clerks Local 770*,³⁸ he has led the Court in elaborating the legal structure, built of many competing national policies, that constrains the solution of

32. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977).

33. *Id.* at 491.

34. *Id.* at 503; Freund, William J. Brennan, Jr., 86 Yale L.J. 1015, 1015 (1977).

35. Freund, *supra* note 34, at 1016.

36. In addition to Justice Brennan, Justices Holmes, Cardozo, and O’Connor went to the Supreme Court from state courts.

37. 352 U.S. 500, 506 (1957).

38. 398 U.S. 235 (1970). The same virtues are evident in his important labor-antitrust opinion in *American Federation of Musicians v. Carroll*, 391 U.S. 99 (1968).

complex economic and human problems. In a recent survey of the labor cases of the 1980 Term, William Gould concluded that the term's theme was "the work of Justice Brennan, the labor lawyer by profession, who well understands trade union concerns with solidarity, who has been responsive to employer concerns with industrial peace, and who simultaneously recognized the interests of individual workers, sometimes arrayed against the larger, more sophisticated forces of industrial self-government."³⁹

The achievements of Justice Brennan will endure. He has avoided the dangers of judicial statesmanship by refusing to compromise on issues of principle and of lasting importance. Even as he has sought and now seeks to keep the Court with him, and hence to stay with the Court, the Justice has actively advanced the interests he finds are favored and protected by the Constitution. His opinions for the Court are forthright and direct in their aims, and he has aimed high indeed. That some of his most important decisions have been limited by the present Court underscores their breadth and boldness. He has not settled for equivocal pronouncements on issues demanding authoritative and principled resolution. Even the opinions whose promise has not been fulfilled remain "an authoritative reminder of a judicial era that was and that could be,"⁴⁰ and the vast bulk of his work is an authoritative guide even to the present Court's decisions.

I will conclude with some personal remarks. I believe that Justice Brennan's great success on and off the Court has been achieved because he is an ebullient, generous, charismatic human being. Anyone who has had close contact with the man, however brief, knows how deeply and completely he relates to whomever he is with, and how positively infectious are his enthusiasm and concerns. When I was at the Court in 1966 I was fortunate enough to meet not only Justice Brennan, but also his beloved friend Chief Justice Earl Warren. These two had a certain exuberance and personal warmth that filled the environment around them. However much one disagreed with anything they did, it was impossible to regard a disagreement as reflecting more than simply a difference of opinion among persons of good will. There was something beguiling about those two Justices. One's affection and admiration for their humanity and generosity of spirit—for their positive and hopeful natures—made one doubt even the most strongly held contrary views. When I disagreed with the Justice or the late Chief Justice, for example, I could not help

39. Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Colo. L. Rev. 1, 100 (1981) (footnotes omitted).

40. Fiss, *supra* note 10, at 1164.

worrying that perhaps my disagreement stemmed from the Ebenezer Scrooge or Mr. Magoo in me rather than from any significant flaw in their position. Theirs was always the view of hope and progress, pervaded with an unflinching and therefore an awesome faith in man's capacity to be rational and constructive. My point is not that Justice Brennan has always been right. Rather, it is that the human qualities of the man have placed him at a formidable advantage in any dispute over the wisdom and propriety of his decisions.

I also believe that Justice Brennan has derived great strength and influence from his consistency and commitment to the principles he espouses. The notion that Justices who generously construe and apply the Bill of Rights are wilful and unprincipled is a myth, propounded by those who would construe and apply those provisions ungenerously. The Court has always been required to decide cases in which legal precedent fails to provide authoritative guidance, and in which the social and political interests at stake demand sensitive adjustment. Easy formulas are seldom available to resolve the issues confronting the Court, and few Justices have satisfied very many observers that all of their views on the Constitution have been fairly and neutrally derived. Of course a great Justice must seek to justify his choices on the basis of principle. But a Justice's judicial character is perhaps even more clearly reflected by the coherence and detachment with which the Justice expresses and applies, on a broad range of issues, the principles that he or she has come to believe inhere in the Constitution. By this standard, Justice Brennan is a standout. He is predictable, as Justice Cardozo said a judge should be.⁴¹ He decides cases in accordance with the principles he articulates, irrespective of whether he personally favors or sympathizes with one cause or another. I know it is no breach of faith for me to tell you that, contrary to what some may believe, the Justice is not "soft on crime" or a "bleeding heart." I have witnessed his revulsion at a record reflecting vicious, criminal behavior. I have watched him struggle with his very strong feelings in such cases, once privately expressed in memorably colorful terms. But he is as much the master of his feelings as any judge I have known. He has repeatedly put aside his feelings and beliefs, not only in criminal procedure cases, but on church-and-state issues, and in cases involving the control of allegedly pornographic material. In this very real way, he has gained the respect of even his ideological adversaries, most of whom have not approached his level of consistency and personal discipline.

Finally, in contemplating Justice Brennan's work, my background leads me to view the function he has sought to serve from a historical perspective larger than the two hundred years of history under our present Constitution. While forms of human life on Earth have existed for perhaps

41. B. Cardozo, *The Nature of the Judicial Process* (1921).