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Constitutional Vision

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Justice William J. Brennan, Jr., is a committed civil libertarian who believes that the Constitution guarantees "freedom and equality of rights and opportunities . . . to all people of this nation." For Brennan, courts are the last resort of the politically disenfranchised and the politically powerless and constitutional litigation is often "the sole practicable avenue open to a minority to petition for redress of grievances." Thus, in Brennan's view, the courts play an indispensable role in the enforcement, interpretation, and implementation of the most cherished guarantees of the United States Constitution. As Brennan observed, the Constitution's "broadly phrased guarantees ensure that [it] need never become an anachronism: the Constitution will endure as a vital charter of human liberty as long as there are those with the courage to defend it, the vision to interpret it, and the fidelity to live by it."[1]

Brennan was especially influential in the areas of Equal Protection, Due Process, freedom of expression and criminal procedure. In his interpretation of the Equal Protection Clause, Brennan evinced little tolerance for invidious governmental discrimination. When Brennan joined the Court in 1956, the Equal Protection Clause was high on the Court's agenda for the Court had just handed down its explosive decisions in *Brown v. Board of Education I*[2] and *Brown v. Board of Education II*.[3] Despite these decisions, and to the Court's mounting frustration, segregation of southern schools remained largely intact more than a decade after *Brown*. In *Green v. County School Board of New Kent County*,[4] however, Brennan's opinion for the Court finally dismantled the last serious barriers to desegregation by invalidating the "freedom of choice" plans that had been used to forestall desegregation in the rural south. Putting aside the "all deliberate speed" formula, Brennan emphatically expressed his own and the Court's impatience at the pace of desegregation: "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."

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* Dean and Harry Kalven, Jr. Professor of Law, University of Chicago Law School; Law Clerk to Justice William Brennan, October 1972 Term.

1. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 12 (1988).
2. 347 U.S. 483 (1954).
3. 349 U.S. 294 (1954).
4. 391 U.S. 430 (1968).

When the Court first considered the lawfulness of school segregation in a northern city that had never expressly mandated racially segregated education by statute, it was again Brennan, writing for a closely-divided Court in *Keyes v. School District Number One, Denver, Colorado*,[5] who took a strong stand on the issue:

> A finding of intentionally segregative school board action in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system in not adventitious [and] shifts to school authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions.

Although Brennan naturally assumed a leadership role in condemning discrimination against racial minorities, he sharply distinguished race-conscious "affirmative action" programs designed to protect such minorities. Brennan explained the distinction in his separate opinion in *Regents of the University of California v. Bakke*,:[6]

> Against the background of our history, claims that law must be 'color' blind or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. [We] cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by law and by their fellow citizens.

Brennan therefore concluded that the purpose of "remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious" affirmative action programs "where there is a sound basis for concluding that minority representation is substantial and chronic and that the handicap of past discrimination is impeding access of minorities to the [field]."

Brennan also played a pivotal role in the evolution of the Equal Protection doctrine in the area of gender discrimination. In *Frontiero v. Richardson*,[7] Brennan, writing for a plurality of four Justices, argued that classifications based on sex are inherently suspect and, like racial classifications, must be subjected to strict scrutiny. Taking a strong stand on the issue, Brennan explained that "our Nation has had a long and unfortunate history of sex discrimination"[8] and this history has traditionally been "rationalized by an attitude of 'romantic

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5. 413 U.S. 189 (1973).
6. 438 U.S. 265 (1978).
7. 411 U.S. 677 (1973).
8. *Id.* at 684.

paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."

Although Brennan never garnered the crucial fifth vote for this position, he did gain a decisive victory in *Craig v. Boren*[9], in which the Court held that gender-based classifications must be subjected to intermediate scrutiny. "To withstand constitutional analysis," he wrote, such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."

Brennan also opened the door to the Court's reapportionment revolution. Prior to 1962, the Court had consistently declined to consider claims that state laws prescribing legislative districts that were not approximately equal in population violated the Constitution. As Justice Frankfurter explained in *Colegrove v. Green*[10], such controversies concern "matters that bring courts into immediate and active relations with party contests," and "courts ought not to enter this political thicket." In *Baker v. Carr*,[11] Brennan rejected this reasoning and held that a claim that the apportionment of the Tennessee General Assembly violated the appellants' rights under the Equal Protection Clause "by virtue of the debasement of their votes" stated "a justiciable cause of action." Brennan explained that "the question here is the consistency of state action with the Federal Constitution," and such claims are not non-justiciable merely "because they touch matters of state governmental organization." Brennan's opinion for the court in *Baker* led the way to *Reynolds v. Sims*,[12] and its progeny, which articulated and enforced the constitutional principle of "one person/one vote."

Closely related to the Court's reapportionment decision was the Equal Protection doctrine of implied fundamental rights. Prior to 1969, the Court had hinted on several occasions that the rational basis standard of review might not be applicable classifications that penalize the exercise of such rights. Building upon these intimations, Brennan held in *Shapiro v. Thompson*,[13] that a law that denied welfare assistance to residents who had not resided within the jurisdiction for at least one year immediately prior to their application for assistance penalized the right to interstate travel by denying newcomers "welfare aid upon which may depend the ability of families to subsist." Brennan concluded that because the classification penalized an implied fundamental right it amounted to unconstitutional "invidious discrimination" unless it was "necessary to promote

9. 429 U.S. 190 (1976).
10. 328 U.S. 549 (1946).
11. 369 U.S. 186 (1962).
12. 377 U.S. 533 (1964).
13. 394 U.S. 618 (1969).

a compelling governmental interest." Brennan's opinion in *Shapiro* crystallized the implied fundamental rights doctrine and thus opened the door to a series of subsequent decisions invalidating classifications that unequally affected the right to vote, the right to be listed on the ballot, the right to travel, and the right to use contraceptive.

Although Brennan played a central role in shaping the Equal Protection doctrine in the 1960s, by the 1970s and 1980s he often found himself fighting rear-guard actions in an effort to protect his earlier Equal Protection decisions, particularly in the areas of reapportionment and implied fundamental rights. Occasionally, however, he won a hard-earned victory. In *Plyer v. Doe*,[14] for example, Brennan mustered a five-Justice majority to invalidate a Texas statute that denied free public education to children who had not been legally admitted into the United States. Although conceding that education is not a fundamental right and that undocumented aliens are not a suspect class, Brennan nonetheless persuaded four of his colleagues that intermediate scrutiny was appropriate because the statute imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status."

As these decisions suggest, Brennan was consistently ready and willing actively to assert judicial authority to enforce the constitution's guarantee of "the Equal Protection of the Laws." This same activism was evident in Brennan's due process opinions as well. *Goldberg v. Kelly*,[15] is perhaps the best example. Traditionally, the Court defined the "liberty" and "property" interests protected by the Due Process Clause by reference to the common law. If government took someone's property or invaded his bodily integrity, the Court held that the Due Process Clause required some kind of hearing; but if government denied an individual some public benefit to which he had no common law right, such as public employment, a license or welfare, the Court deemed the clause inapplicable. This doctrine seemed increasingly formalistic with the twentieth century expansion of governmental benefit programs and governmental participation in the economy, for while more and more individuals grew increasingly dependent upon government, prevailing doctrine gave no constitutional protection against even the most arbitrary withdrawal of governmental benefits.

In *Goldberg*, Brennan dramatically redefined the scope of the interests protected by the Due Process Clause. Brennan explained that "much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property," and it is "realistic today to

14. 457 U.S. 202 (1982).
15. 397 U.S. 254 (1970).

regard welfare entitlement as more like property than a 'gratuity.'" This being so, Brennan held that a state could not constitutionally terminate public assistance benefits without affording the recipient the opportunity for an evidentiary hearing prior to termination. In this opinion, Brennan launched a new era in the extension of Due Process rights, and in subsequent decisions, the Court, building upon *Goldberg*, held that the suspension of drivers' licenses, the terminating of public employment, the revocation of parole, the termination of food stamps, and similar matters all must be undertaken in accordance with the demands of due process.

Despite his extraordinary contributions to governing principles of our Equal Protection and Due Process jurisprudence, Brennan's greatest legacy may be in the area of free expression. When Brennan joined the Court, the country was in the throes of its efforts to suppress communism, and this undoubtedly affected Brennan's views on free expression. Brennan's influence on the Court in this area of the law was felt almost immediately. Two years before Brennan's appointment, the Court in *Barsky v. Board of Regents*,[16] reaffirmed the right/privilege distinction in upholding the suspension of a physician's medical license because of events arising out of his communist affiliations. Four years later, in *Speiser v. Randall*,[17] Brennan's opinion for the court explicitly rejected the right/privilege distinction. *Speiser* involved a California law that established a special property tax exemption for veterans, but denied the exemption to any veteran who advocated the violent overthrow of government. Brennan rejected the state's argument that the disqualification was lawful because it merely withheld a "privilege":

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' . . . its denial may not infringe speech.

Brennan's rejection of the right/privilege distinction in *Speiser* was a critical step in the evolution of First Amendment doctrine. It did not, however, end the case, and Brennan proceeded to articulate a second -- and equally important -- principle of First Amendment doctrine. Turning to the procedure mandated by the California law, Brennan held that the law violated the First Amendment because it required the applicant to prove that he had not advocated the violent overthrow of government. Brennan explained that "the vice of the present procedure is that, where particular speech falls close to the line separating the

16. 347 U.S. 442 (1954).
17. 357 U.S. 513 (1958).

lawful and the unlawful, the possibility of mistaken fact-finding -- inherent in all litigation -- will create the danger that the legitimate utterance will be penalized." Moreover, "the man who knows that he must bring forth proof and persuade another if the lawfulness of his conduct must steer far wider of the unlawful zone than if the State must bear these burdens."

This emphasis on the procedure by which government regulates expression was a hallmark of Brennan's First Amendment jurisprudence. Indeed, Brennan was the principal architect of both the First Amendment vagueness principle and the overbreadth doctrine. Brennan first fully articulated the vagueness principle in *Keyishian v. Board of Regents*,[18] which invalidated a New York law prohibiting school teachers from uttering "seditious" words. Building upon his opinion in *Speiser*, Brennan grounded the vagueness principle in his observation that "when one must guess what conduct or utterance may lose him his position, one necessarily will steer far wider of the unlawful zone."

Brennan first coined the term "overbreadth" in *NAACP v. Button*,[19] and he first fully explained the rationale of the doctrine in *Gooding v. Wilson*.[20]

> The transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' . . . This is deemed necessary because person whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Brennan's view on free expression were influenced not only by governmental efforts to suppress communism, but by the civil rights movement as well. In *NAACP v. Button*,[21] for example, Brennan held that a Virginia law prohibiting any organization to retain a lawyer in connection with litigation to which it was not a party was unconstitutional as applied to the activities of the NAACP. Brennan explained that "in the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for [achieving] equality of treatment [for] the members of the Negro community." In such circumstances, litigation "is a form of political expression," and "groups which find themselves unable to achieve their objectives through the ballot

18. 385 U.S. 589 (1967).
19. 371 U.S. 415 (1963).
20. 405 U.S. 518 (1972).
21. 371 U.S. 415 (1963).

frequently turn to the courts." Indeed, for the group whom the NAACP assists, "litigation may be the most effective form of political association." By bringing litigation within the ambit of First Amendment protection, Brennan's opinion for the Court in *Button* both highlighted the central role of courts as effective instruments of political and social change and, at the same time, empowered organizations like the NAACP to aggressively pursue the vindication of constitutional rights without obstruction from often hostile state governments.

Perhaps Brennan's most important First Amendment opinion, *New York Times v. Sullivan*,[22] also grew out of the civil rights movement. At issue in *Sullivan* was the Alabama law of libel, which permitted a public official to recover damages for defamatory statements unless the speaker could prove that the statements were true. The case itself was brought by a Montgomery city commissioner on the basis of several inaccurate statements contained in an advertisement that described the civil rights movement and concluded with an appeal for funds. An Alabama jury found in favor of the commissioner and awarded him damages in the amount of $500,000.

Prior to *Sullivan*, it was settled doctrine that libelous utterances were "unprotected" by the First Amendment and could be regulated without raising "any constitutional problem." With a sensitivity to the history of seditious libel and an awareness of the dangers even civil libel action pose to free and open debate in cases like *Sullivan*, Brennan rejected settled doctrine and held that "libel can claim no talismanic immunity from constitutional limitations." To the contrary, libel "must be measured by standards that satisfy the First Amendment." Moreover, considering the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[23] Brennan maintained that the "advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for Constitutional protection." Balancing the competing interests, Brennan concluded that, because "erroneous statement is inevitable in free debate" and must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' "the First Amendment must be understood to prohibit any public official to recover damages for libel unless "he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Brennan also played a central role in the evolution of the law of obscenity. In *Roth v. United States*,[24] the Court's first confrontation with the obscenity

22. 376 U.S. 254 (1964).
23. *Id.* at 270.
24. 354 U.S. 476 (1957).

issue, Brennan wrote for the Court that obscenity is "utterly without redeeming social importance" and is thus "not within the area of Constitutionally protected speech." Characteristically, however, Brennan emphasized that "sex and obscenity are not synonymous" and that it is "vital that the standards for judging obscenity safeguard the protection of . . . material which does not treat sex in a manner appealing to prurient interest." Sixteen years later, after struggling without success to satisfactorily define "obscenity," Brennan came to the conclusion that the very concept is so inherently vague that it was impossible to "bring stability to this area of the law without jeopardizing fundamental First Amendment values." Brennan therefor concluded in his dissenting opinion in *Paris Adult Theatre I v. Slaton*,[25] that "at least in the absence of distribution to juveniles or obtrusive expose to unconsenting adults," the First Amendment prohibits the suppression of "sexually oriented materials on the basis of their allegedly 'obscene' contents." Not surprisingly, this analysis once again revealed the essential touchstones of Brennan's First Amendment jurisprudence -- a recognition of the need for precision of regulation and a sensitivity to the practical dynamics of governmental efforts to limit expression. As Brennan cautioned in *Paris Adult Theatre*, "in the absence of some very substantial interest" in suppressing even low-value speech, "we can hardly condone the ill effects that seem to flow inevitably from the effort."

As in the Equal Protection area, and as suggested in *Paris Adult Theatre*, Brennan spent most of his energies in free speech cases in the 1970s and 1980s in dissent. This was especially true in cases involving content-neutral regulations of expression, such as *Heffron v. International Society for Krishna Consciousness*,[26] and cases involving the regulation of sexually-oriented expression, such as *FCC v. Pacifica Foundation*.[27] As in the equal protection area, however, Brennan won a few notable victories. In *Elrod v. Burns*,[28] for example, Brennan wrote a plurality opinion holding the patronage practice of dismissing public employees on a partisan basis violative of the First Amendment; in *Board of Education v. Pico*,[29] he wrote a plurality opinion holding unconstitutional removal of books from a public school library; and in *Texas v. Johnson*[30] and *United States v. Eichman*[31] he wrote the opinions of the Court holding that individuals who burned the American flag as a form of political protest had engaged in constitutionally protected conduct that could not be prohibited under a state flag desecration statute.

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25. 413 U.S. 49 (1973).
26. 452 U.S. 640 (1981).
27. 438 U.S. 726 (1978).
28. 427 U.S. 347 (1976).
29. 457 U.S. 853 (1982).
30. 491 U.S. 397 (1989).
31. 110 S. Ct. 2404 (1990).

Brennan's opinion is in the realm of criminal procedure followed a similar pattern -- landmark opinions expanding civil liberties during the Warren Court, vigorous and often bitter dissents during the Burger and Rehnquist Courts. Brennan's earlier opinions are illustrated by *Fay v. Noia*,[32] *Davis v. Mississippi*,[33] and *United States v. Wade*.[34] In *Noia*, Brennan significantly expanded the availability of federal habeas corpus, holding the writ available not only to persons challenging the jurisdiction of the convicting court, but to any individual who was convicted in a proceeding that was "so fundamentally defective as to make imprisonment . . . constitutionally intolerable." In *Davis*, Brennan limited the use of dragnet investigations and invalidated as an unreasonable search and seizure the detention of twenty-five black youths for questioning and fingerprinting in connection with a rape investigation, where there were no reasonable grounds to believe that any particular individual was the assailant. And in *Wade*, Brennan held that courtroom identifications of an accused must be excluded from evidence where the accused was exhibited to witnesses before trial at a post-indictment lineup without notice to the accused's counsel. The common theme of these and other Brennan opinions in the area of criminal procedure is that the judges must be especially vigilant to protect those individuals whose rights to fair, decent, and equal treatment in the criminal justice system might too easily be lost to intolerance, indifference, ignorance, or haste.

William Brennan will be remembered as one of the most influential Justices in the history of the United States Supreme Court. Throughout his long and distinguished tenure, Brennan unflinchingly championed the rights of the poor, the unrepresented, and the powerless. There are, of course, those who challenge Brennan's vision of the Constitution, but there can be no doubt that for more than three decades, Brennan expressed his unique and powerful vision of the Constitution as "a vital charter of human liberty" with rare eloquence, intelligence, clarity, and courage.

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32. 372 U.S. 391 (1963).
33. 394 U.S. 721 (1969).
34. 388 U.S. 218 (1967).