# "CALL ME BILL": SOCIAL JUSTICE AND THE ADMINISTRATIVE JURISPRUDENCE OF WILLIAM BRENNAN, JR.

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## ABSTRACT

This study examines former U.S. Supreme Court Justice William Brennan, Jr.'s opinions on the following administrative law topics: civil rights, civil liberties, human resource management, due process, and privacy. The purpose of this examination is (1) to apply Rohr's *regime values* framework to Brennan's case law, (2) to determine the usefulness of Brennan's regime values to discretionary decision making, and (3) to consider the effectiveness of these regime values as a pedagogical approach to ethics.

A purposive sample of 25 cases was selected for the study. Case briefing and discourse analysis were the primary research methods used. I found eight regime values in Brennan's opinions: freedom, accountability, flexibility, equity and equality, unconstitutional conditions, property, and social justice. Social justice was his dominant regime value and is the basis for all of his jurisprudence. Brennan's regime values reconcile two approaches to ethics, the *low road* and the *high road,* by emphasizing a Constitutional basis for the latter.

Brennan's values may help administrators learn how to think through the important decisions they make daily by providing both a foundation and justification for their choices. Public administrators can be taught how to use the regime values method to extract additional values.

## DEDICATION

I dedicate this work to my mom, Carolyn, a public servant, psychologist, and humanitarian who protects the invisible.

*"The paradox I have to deal with daily in my classroom is the amount of lying that must take place in the name of education; the amount of outright deception that goes by the name of education; how truth must be nailed to the cross in classroom after classroom; how people tremble, quake and suffer from anxiety when truth and reality is brought up by their teachers; how people are pushed out of the universities and punished because they dare talk about truth; how people think they should go to school only to be made comfortable."*

*--Dr. Amos N. Wilson*

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It's impossible in the space allotted to mention everyone worthy of recognition. I extend my deepest gratitude to all who have supported me in thought, word, or deed.

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I must add a few words in honor of the late Dr. John A. Rohr, my advisor and mentor for years. He chaired this dissertation until his untimely death. I am grateful for his loyalty on this project and for his guidance. I made it.

Ma'at Htpw.

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# TO RUN A CONSTITUTION

*In our society, it has historically been the courts that have interpreted and made acceptable the commitment to a set of values contained in a Rule of Law.*

-Justice William J. Brennan

## JOSHUA'S LAMENT

On March 8, 1984, a four-year-old boy's life was forever changed. Joshua was admitted to Mercy Hospital in Oshkosh, Wisconsin. He was unconscious and had suffered severe head trauma. Joshua was no stranger to the hospital; he had been admitted three times with injuries that ranged from cuts requiring stitches to contusions and internal bleeding. These injuries, inflicted by his father, Randy, rendered Joshua paralyzed and mentally incapacitated. Doctors predicted that for the rest of his life, Joshua would be confined to an institution for the "profoundly retarded."[1] Justice Harry Blackmun lamented Joshua's fate:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents [Winnebago County Social Services Department], who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles -- so full of late of patriotic fervor and proud proclamations about "liberty and justice for all," that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. (p. 213)

Even before the influx of administrative agencies commonly associated with President Franklin Roosevelt's New Deal programs arriving during the early 1940s, administrators were having a profound impact on the lives of American citizens. Increasingly, however, bureaucracy has gained more of a stronghold over not only

[1] *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). This case will be revisited in Chapter 7.

individuals' activities but also those of the very administrators who carry out the work in administrative agencies. In 1951, United States Supreme Court Justice Robert Jackson wrote:

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights.[2]

In the modern administrative state, not only must administrators choose among several possible courses of action, none of which may produce the desired result, but administrators also must now make decisions in policy areas that previously were reserved for communities or secular organizations. In making these decisions, administrators use their discretion to decide which action is acceptable, and the decision context often is one of competing values that not only influence how the administrator thinks through the decision but also indicate to the public what it, too, should value. As Justice Jackson wrote, administrative decisions have a significant effect on citizens' values and also have consequences of personal rights.

This chapter reviews the connection between law and public administration, explains the purpose of this work, and connects the use of administrative discretion to Rohr's *regime values*.[3] It then discusses the significance of Justice William Brennan's administrative case law and its relevance to public administration. The chapter concludes with a review of the dissertation.

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[2] *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952), Justice Jackson dissenting, p. 487.
[3] Rohr, John A. (1989). *Ethics for Bureaucrats: An Essay on Law and Values*. New York, NY: Marcel Dekker, p. 68.

## ADMINISTRATIVE LAW AND CONSTITUTIONAL THOUGHT

For Joshua Deshaney, an administrator's decision not to remove him from his abusive father most certainly changed his life. Examining the administrator's decision process reveals what values she believed to be important at that time. Similarly, one may gain insight into what values should have been considered by looking at the courts' review of the administrative decision making. Citizens and public employees alike sometimes turn to both the state and the federal judiciary for relief and for clarification on the limitations of administrative authority. The United States Supreme Court's impact on public administration is well documented. For example, Phillip Cooper,[4] John Rohr,[5] David Rosenbloom et al.,[6] and Kenneth Warren[7] all have noted the effect of Supreme Court decisions on the work of public administrators and on the citizenry. In fact, Spicer and Terry[8] see nothing less than a Constitutional School of thought in the field of public administration and describe its scholars' contributions to understanding the legitimacy of public administration: "We argue that an active public administration may also be grounded in the logic of a Constitution in general that pertains to the checking of power" (p. 239). Their contractual view of constitutionalism differs from Rohr's view; however, both maintain the importance of an administrative ethic grounded in the Constitution.

I continue this emphasis on constitutionalism in public administration by exploring Justice William Brennan, Jr.'s opinions across several administrative law

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[4] Cooper, Philip J. (2007). *Public Law and Public Administration*. 4th ed. Belmont, CA: Thomson Wadsworth.
[5] Cf. Rohr 1989, p. 77.
[6] Rosenbloom, David, James D. Carroll, and Jonathan D. Carroll (2000*). Constitutional Competence for Public Managers: Cases and Commentary*. Istasca, IL: Peacock.
[7] Warren, Kenneth (1997). *Administrative Law in the Political System*. 3rd ed. Saddle River, NJ: Prentice Hall.
[8] Spicer, Michael and Larry Terry (May/June 1993). "Legitimacy, History, and Logic: Public Administration and the Constitution." *Public Administration Review*. Vol. 53, No. 3. pp: 239-246.

topics: civil rights, civil liberties, human resource management, due process, and privacy. I have chosen these subjects in part because they are of personal interest to me but also because they are topics that consume much space on court dockets at both the state and federal levels. In addition, Rohr mentions aspects of all of these as being a significant part of the discussion of regime values, a set of values associated with a regime's founding that can be used to guide administrative decision making.[9]

Brennan's jurisprudence on these subjects offers a pedagogic approach to administration that has at its forefront an enlightening assessment of public values. The dissertation examines the administrative and constitutional values in Justice William Brennan's administrative law opinions. Specifically, I draw upon those opinions as an informative guide for public administrators who must use discretion in their role as promoters of the public interest and preservers of individual liberty. Brennan's assessment of constitutional values may help administrators learn how to think through the important decisions that they make daily.

Two research questions guide the dissertation: (1) What regime values are present in Justice William Brennan's administrative case law? and (2) How can Justice Brennan's administrative case law be used to guide public administrators' discretionary decision making? My first purpose in writing is to describe how Brennan determined which values would take precedence in a decision. Often judges mention that there must be a balance of competing interests in a case. In fact, judges often devise judicial tests to provide a definitive answer as to which value or set of values is to emerge victorious. How did Brennan think through the administrative cases that involved such balances? Why did he determine some values to be more significant than others? Is there a

[9] Rohr 1989.

discernable pattern to his reasoning on public administration issues? I answer these questions. My second purpose in writing is to assess whether Brennan's approach to resolving administrative law conflicts provides any constructive insight that administrators may use to guide decision making. And, if it does, then how can administrators make the most out of Brennan's jurisprudence?

My emphasis on constitutionalism, case opinions, and public administration places this dissertation within the field of administrative law. Cooper[10] notes that there is no single and commonly accepted definition of administrative law. However, he points out that *administrative law* consists of statutes and regulations constructed and put into operation by all branches of government, and it also includes case law resulting from court litigation. Cox, Buck, and Morgan[11] conclude that any definition of administrative law must include the following factors:

1. Administrative law includes case law but is not restricted to case law.
2. Administrative law includes a vital discretionary component that operates at every level of the administrative process, including agency and court behavior.
3. Administrative law, because of its intimate relationship with the legislature, the executive, the courts, and the bureaucracy, is intensely political both in its origins and its implementation. Any study of administrative law must include these political relationships.

Drawing from these definitions of administrative law, one can surmise the significance of this nexus between law and public administration in general. The discretionary tasks of administration present a complex yet important web of activity that courts have just begun to untangle over the past 40-50 years. Put simply, judicial opinions may serve as a guide for administrators who must make discretionary decisions on a daily basis.

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[10] Cf. Cooper 2007.
[11] Cox, Raymond W., Susan J. Buck, and Betty N. Morgan (1994*). Public Administration in Theory and Practice*. Englewood, NJ: Prentice Hall, p. 94.

Therefore, the relationship between the exercise of administrative discretion and the instructive content of judicial opinions is one that deserves further investigation.

This approach to judicial opinions is not new. John Rohr has noted the importance of judicial opinions as a source of instruction for public administrators.[12] He writes that an analysis of U.S. Supreme Court opinions reveals *regime values*—public values solidified by the ratification of the Constitution and that help to define the American republic. At times, the opinions seem to take the form of a conversation-style narrative analysis regarding many issues relevant to public administrators. Rohr also states that the dialectic nature of court opinions exposes the reader to multiple perspectives on a single issue. Hence, the reader (presumably the administrators themselves) gains an analytical foundation that may not be otherwise available.

## THE ROLE OF DISCRETION IN PUBLIC ADMINISTRATION

Public administrators are bound by constitutional limits placed on administrative actions. However, within those limits there is room for discretion in administrative decision making. The exercise of administrative discretion is not well understood because it has produced inconsistent decisions within some public organizations, decisions in which the reasoning was not clear, and decisions that have simply left some scratching their heads. When a Winnebago County social worker decided not to remove Joshua DeShaney from his father's custody after an adult who lived in the house reported the abuse, after Joshua had been treated three times at the hospital for his injuries and after the social worker's home visits made her conclude that abuse was likely, we may wonder what justification could be given for the decision not to act. What sense can we make of this discretionary decision?

[12] Rohr 1989, p. 84.

The exercise of administrative discretion also is misunderstood because it is one of several terms used in common discussions of administrative ethics. Other terms include *conflict of interest* and *accountability*. Warwick[13] notes:

> But if the central concern of organizational analysts has been with the politics of discretion, the prevailing focus among those writing about the ethics of administration has been on honesty, obedience, and personal integrity. The most commonly mentioned ethical dilemmas have to do with conflicts between conscience and obedience to superiors; the use of deception, bribery, and other morally objectionable means; the uses and limits of administrative secrecy; conditions permitting or requiring "whistleblowing"; and the circumstances calling for resignation from the public service. The emphasis of such writings has been on the dilemmas of professional integrity rather than the ethics of policy discretion.

Certainly, these are important subjects to consider. But ethical dilemmas exist outside the ones mentioned. Such dilemmas include decisions about how resources should be distributed, how to interpret a statute, and how to choose among qualified applicants.

The Administrative Procedure Act of 1946 was enacted in part to standardize the operations of federal government agencies, including procedures for rulemaking and adjudication. Similar state statutes were passed for the same purpose. Still, discretionary decisions have proven to be the lifeblood of administrative agencies. In 1928, Ernst Freund wrote about administrative discretion: "When we speak of administrative discretion, we mean that a determination may be reached, in part at least, on the basis of considerations not entirely susceptible of proof or disproof".[14] Philip Cooper describes administrative discretion as "the power of an administrator to make significant decisions that have the force of law, directly or indirectly, and that are not specifically mandated by

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[13] Warwick, Donald (1981). "The Ethics of Administrative Discretion" in Joel Fleishman, Lance Liebman, Mark Moore, eds. *Public Duties: The Moral Obligations of Government Officials*. Cambridge, MA: Harvard University Press, p. 93.

[14] Freund, Ernst (1928). *Administrative Powers over Persons and Property: A Comparative Survey*. Chicago, IL: University of Chicago Press, p. 71.

the Constitution, statutes, or other sources of black letter law."[15] Administrators at all levels of organizations use discretion, whether they are managers or "street-level bureaucrats."[16] Administrators must have discretion because statutes typically are vague and are not written to include a response to all possible administrative situations. Similarly, technical expertise is beyond the sphere of most legislators but is well within the sphere of an administrator's capabilities. Further, public managers emphasize the need for flexibility in responding to public problems. Flexibility allows the administrator to consider individual circumstances in decision making and may increase a citizen's perception of fairness and responsiveness. We should not assume, though, that the greater the degree of discretion, the more fair and just an administrative decision would be. We must ask additional questions like fair to whom and flexibility for what purpose? These are questions that only can be answered adequately by reflecting on public values.

Cooper goes on to provide an excellent description of the three types of discretion: substantive, procedural, and complex.

> A substantive discretionary determination is a decision in which the administrator by discretion determines a right, duty, or obligation, or promulgates a rule on particular questions of policy…. A procedural discretionary decision is selection of a procedure to be used to gather facts or make policy decisions….Finally, a complex discretionary decision is both substantive and procedural.[17]

Each type of discretion has its own set of administrative implications, and we will see in Brennan's opinions that he criticized the use of all three types of discretion when they did not produce the outcome he favored.

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[15] Cooper 2007, p. 310.
[16] "Street-level bureaucrats" are front line workers in service delivery and include police officers, social workers, public school teachers, etc. See Lipsky, Michael (2010). *Street-Level Bureaucracy: Dilemmas of the Individual in Public Service, 30th Anniversary Expanded Edition.* New York, NY: Russell Sage.
[17] Cooper 2007, p. 94.

Few debate the necessity of administrative discretion, but questions remain concerning the amount of discretion, the potential abuse of discretion, and the impact on decision making. Administrative discretion will not simply disappear; it is the very nature of bureaucratic decision making even though statutes as well as agency rules and procedures sometimes place limitations on the exercise of that discretion.

**REGIME VALUES**

Rohr's concept of regime values may be useful to those who study administrative law. He uses this term to describe a set of norms and values that are inherent in the creation of the American regime through the ratification of the U.S. Constitution.[18] He makes several points regarding regime values. First, ethical standards are derived from the most prominent values of the regime. Second, these values bind public administrators because of the oath each one takes to uphold the Constitution. Finally, these values are present in the public law of the regime.

Rohr goes on to explain that regime values may be found in U.S. Supreme Court decisions and suggests that administrators may use the Court's opinions to frame debate on issues they face every day as administrators. These decisions, he believes, expose administrators to several conflicting interpretations of American values by allowing them to observe a dialogue among judicial decision makers.

Regime values may be used to guide an administrator's discretionary decision making. When choosing among alternatives in which no clear answer is available, the administrator can consider which public values to reinforce. In order to do so, he or she must first be able to identify what the values are and then determine which ones apply to the decision context. Suppose a college admissions committee must choose between two

[18] Rohr 1989, p. 68.

comparably qualified students—one Latino male and one Caucasian female. The two students have similar grade point averages, and comparable SAT scores; both have excelled in extracurricular endeavors, and both present strong letters of recommendation in their application. Which student should gain admission? On one hand, an emphasis on individual merit may cause the committee to weigh more heavily factors such as which student has the higher grade point average although the two are comparable. Or, the committee may select the student who has a 1251 SAT score instead of the student who scored 1250. On the other hand, the committee may choose to emphasize the value of equity and hence consider each student's racial or ethnic background, sex classification, socioeconomic status, geographic location, and the history of available opportunities for some or all of the group identities with which the student is associated. The outcome could differ depending on which value(s) the committee stresses.

Michael Spicer uses the term *value pluralism* to describe the context of administrative decision making. He asserts that there are many perceptions of what is morally good and bad, and these values are often in conflict with one another. No common ethical standard exists to settle the conflicts.

> Value pluralism affects all of us as we make moral choices in our lives. It is the source of our moral regrets and, on occasion, even our moral tragedies. However, value pluralism would seem especially relevant to the ordinary experience of public administration where practitioners are often called upon to grapple with and make judgments about value conflicts, when making policy and administrative decisions, and where their actions are often, either explicitly or implicitly, coercive in character and affect large numbers of people.[19]

It is from this perspective that I explore the decisions of Justice William Brennan on matters of administrative law. I contend that his case opinions reveal a set of regime

[19] Spicer, Michael W. (December 2009). "Value Conflict and Legal Reasoning in Public Administration." *Administrative Theory & Praxis*. Vol. 31, No. 4, pp. 537–555, p. 539.

values that administrators would do well to consider in discretionary decision making. Important, too, is the reasoning behind the values he puts forth. Through his reasoning, we can understand why some values are more important than others, or at the very least how to prioritize values in decision making.

**SIGNIFICANCE OF BRENNAN'S JURISPRUDENCE**

Why have I chosen Justice William J. Brennan's jurisprudence as the subject of this work? I must admit my study of Brennan began disingenuously. Many years ago, I devoted time to studying Justice Thurgood Marshall's judicial legacy on civil rights law. Rarely did I find writing about Marshall that did not also mention Brennan. At the time, I was not interested in Brennan but found it peculiar that the two of them appeared so closely linked. Upon further investigation, I also noticed that it was Brennan who authored several civil rights opinions[20] that Marshall joined. Most often, the two of them voted together in the majority or in the dissent, but it was Brennan who wrote many of the opinions on school desegregation, employment discrimination, sex discrimination, and affirmative action. I became interested enough to look further into his jurisprudence, albeit initially to determine why his civil rights opinions seemed to overshadow Marshall's. Eventually, I moved past his civil rights jurisprudence into other areas of law and discovered what many already knew: Brennan was a Justice ahead of his time.

To be sure, some exceptional texts already have been written about Brennan, many of them biographies that explore his life and legacy on the nation's highest court. For example, E. Joshua Rosenkranz and Bernard Schwartz have edited a book in which

[20] See for example, *United States v. Paradise*, 480 U.S. 149 (1987) and *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

scholars assess Brennan's legacy on the U.S. Supreme Court.[21] Two books cover his jurisprudence on civil liberties. First, David Marion[22] examines Brennan's philosophy of freedom and his political leanings while on the Court. Second, Roger Goldman and David Gallen[23] present a major contribution to the literature on Brennan by thoroughly analyzing his First Amendment philosophy. In addition to these works, Peter Irons compares Brennan's constitutional ideas with those of his colleague William Rehnquist.[24] To date, none of the literature explores how Brennan's jurisprudence can be used to inform public administration or to bring together Brennan's ideas across several areas of public policy to reveal common themes that provide insight into the administrative process. Brennan is among several Justices whose administrative law jurisprudence, principles, and ideas have been neglected.

Conspicuous by its absence is a text that seriously considers how Brennan's administrative ideas have influenced the practice of public administration and has changed the field of administrative law. This exploratory study will determine what, if any, useful regime values are present in Brennan's opinions. He was a forerunner in carving out in some instances and expanding in others public employee rights as well as due process and equal protection guarantees for both public employees and citizens. It is time to give serious attention to the place of administration in the thought of a Justice who was considered a leader on the Court for nearly 34 years during a period of substantial social, political, constitutional, and administrative change. Imagine the

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[21] Rosenkrantz, E.J. and Schwartz, B. (1997). *Reason and Passion: Justice Brennan's Enduring Influence*. New York, NY: W.W. Norton.

[22] Marion, David E. (1997). *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of "Libertarian Dignity"*. Lanham, MD: Rowman & Littlefield.

[23] Goldman, Roger and Gallen, David (1994). *Justice William J. Brennan, Jr.: Freedom First*. New York, NY: Carroll & Graf.

[24] Irons, Peter (1994). *Brennan v. Rehnquist: The Battle for the Constitution*. New York, NY: Alfred A. Knopf.

plentiful opportunities that this tenure afforded Brennan to consider issues of administration! Lee Epstein notes that between 1790 and 1995, the U.S. Supreme Court produced 209 major decisions.[25] Brennan wrote the opinion for thirty-eight of these cases, more than any other justice. Kim Isaac Eisler writes that "more than any justice in United States history, Brennan would change the way Americans live…."[26]

## CONCLUSION

The dissertation is empirical insofar as it describes Justice Brennan's approach to the Constitution and to administrative issues. I analyze the themes present in his opinions and also examine his reasoning throughout the opinions. The empirical part of the project spans Chapters Three through Eight. The analysis is limited to the case opinions themselves because, according to Rohr's discussion,[27] it is this dialectic in the judicial opinions that is most instructive for public administrators.

The dissertation is also prescriptive since I suggest the normative lessons administrators may take away from his jurisprudence. This is accomplished by linking Brennan's jurisprudence with the concept of regime values presented by John Rohr.[28] The prescriptive part of the project is the subject of Chapter Nine. In that chapter I answer the following questions: (1) What regime values are present in Brennan's jurisprudence? (2) Why did Brennan choose to emphasize these values? (3) How can these values be used to guide administrative decision making? The prescriptive analysis provides an action plan for how administrators might incorporate Brennan's regime values into their decision making.

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[25] Epstein, Lee (2010). Supreme Court Compendium.
[26] Eisler, Kim Isaac. (1993). *A Justice for All: William J. Brennan, Jr. and the Decisions that Transformed America*. New York, NY: Simon & Schuster, p. 13.
[27] Rohr 1989, p. 79.
[28] Rohr 1989, p. 68.

This project brings together concepts such as administrative discretion and regime values in the context of administrative law. The remainder of the work is organized as follows. Chapter 2 details the project's theoretical perspective and methodology. Chapter 3 reviews the literature on Justice Brennan's jurisprudence. My purpose in reviewing the literature is to gather support necessary to (1) outline Brennan's philosophy of the Constitution and its purpose and (2) provide a basis for his understanding of administrative issues. Chapter 4 focuses exclusively on Brennan's approach to the protection of women and ethnic minorities in the public sector. In Chapter 5, I examine Brennan's approach to civil liberties, including an analysis of his jurisprudence on religious freedom and freedom of speech for citizens. Chapter 6 explores Brennan's interpretation of the Constitution as applied to human resource management issues affecting public administrators, focusing on his carving out of freedom of speech liberties for public employees and his outright rejection of the rights-privilege dichotomy. Chapter 7 considers Brennan's approach to due process and both its substantive and procedural requirements. Chapter 8 addresses his opinions on privacy. Chapter 9 concludes the work, beginning with an analysis of the regime values found in Brennan's administrative case law. It connects his jurisprudence to a normative dimension of public administration in which these regime values are used to guide administrative decision making. Discussion ends with reflections of both general and specific applicability to public administrators and public administration curricula.

What does Justice Brennan offer administrators who sometimes run afoul of the Constitution in performing their daily tasks? To answer this question, one must place oneself in the position of the administrator(s) and engage in an inquisitive process of

active reading. One may discover in Brennan's jurisprudence lessons critical to maintaining a democracy-centered and social justice-centered public administration.

# CHAPTER TWO
# ANALYTICAL APPROACH

*We do not yet have justice, equal and practical, for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the technological revolution, for alienated youth, for the urban masses….Ugly inequities continue to mar the face of our nation. We are surely nearer the beginning than the end of the struggle.*

-Justice William J. Brennan

## RESEARCH QUESTIONS

As chapter one noted, two research questions steered this project:

1. What regime values are present in Justice William Brennan's administrative case law?

2. How can Justice Brennan's administrative case law be used to guide public administrators' discretionary decision making?

Examining these questions allows me to explore what Brennan's jurisprudence teaches public administrators about their role in democratic governance and how to make more effective decisions.

## CASE SELECTION

During his nearly 34-year tenure as an Associate Justice of the U.S. Supreme Court, Justice Brennan authored more than 1,360 majority, concurring, and dissenting opinions.[29] His large number of writings spans many Constitutional topics. Given the purpose of this project, it was not reasonable to use a probability sampling method. To have done so might have yielded a sample of cases that were not related to administrative law. In addition, the primary purpose of probability sampling is to provide a sample

[29] 1,360 is the number most commonly cited, but I have seen the number range from 1,200 to 1,500, and it includes only his majority opinions or opinions of the Court, regular concurrences, and dissenting opinions. See, for example, Rosenkranz, E. Joshua and Schwartz, Bernard, eds. (1997). *Reason & Passion: Justice Brennan's Enduring Influence*. New York, NY: W.W. Norton & Co., Patricia Brennan's *Washington Post* article, "Seven Justices, On Camera" (Sunday, October 6, 1996; Page Y06). I could not locate a comprehensive list of all Brennan's opinions. For that reason, I made one. I reconstructed the population in order to produce an accurate sampling frame as shown in Appendix A.

whose characteristics are representative of a larger population. No such representativeness is needed for this work. Therefore, to select cases for analysis, a nonprobability sampling method was more appropriate, and I chose to use purposive sampling. Leedy and Ormrod state, "qualitative researchers are intentionally nonrandom in their selection of data sources. Instead, their sampling is *purposeful:* They select those individuals or objects that will yield the most information about the topic under investigation."[30] Purposive sampling sometimes is referred to as judgmental sampling or relevance sampling. According to Klaus Krippendorff:

> Relevance sampling is not probabilistic. In using this form of sampling, an analyst proceeds by following a conceptual hierarchy, systematically lowering the number of units that need to be considered for analysis. The resulting units of text are not meant to be representative of a population of texts; rather, they are the population of relevant texts, excluding the textual units that do not possess relevant information.[31]

After deciding to use purposive sampling, the next step was to determine what criteria would be used to guide the selection of cases. The opinions that bear the strongest relevance for public administration are those that address bureaucratic procedure and process, civil rights and liberties, human resource management, privacy, and due process. I chose these areas specifically because they bear significant implications for a democratic society. American democratic theory is steeped in ideas about procedural fairness, government regulation of individual liberties, equal protection of the laws, and limits on government authority. However, narrowing the cases even to those that deal with these subjects still left many opinions to consider. To fulfill the

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[30] Leedy, Paul D. and Jeanne E. Ormrod (2001). *Practical Research: Planning and Design*. Upper Saddle River, NJ: Pearson. P. 145.
[31] Krippendorff, Klaus (2004). *Content Analysis: An Introduction to Its Methodology*. Thousand Oaks, CA: Sage, p. 119.

purpose of this work, I chose cases that provided an opportunity to instruct administrators through dialogue, introduction of ethical or administrative dilemmas, and presentation of direct conflict between individuals and the administrative state. Based on the criteria listed in Table 1, I selected 25 cases for analysis. Twenty-five cases was not only a manageable number of cases but the number also is large enough to draw meaningful conclusions about Brennan's approach to administrative law. Five cases were selected for each of the following subjects: civil rights, civil liberties, human resource management, due process of law, and privacy. Although not a selection criterion, the cases span 31 years of Brennan's 33-year tenure on the Court.

**Table 1: Criteria for Case Selection**

| Criterion | Justification |
|---|---|
| The majority, concurring, or dissenting opinion must be written by Brennan. | Ensures the goal of examining Brennan's case law is attained |
| The selected case can be classified as an administrative law case using the definitions provided by Cooper[32] and by Cox, Morgan, and Buck.[33] | Ensures the work is firmly rooted in the body of literature identified as administrative law |
| The case must be cited in two or more frequently used administrative law textbooks.[34] | Ensures the administrative significance of each case has at least been mentioned by other scholars and also ensures the pedagogical value of the case to public administrators |
| The legal question before the Court must stem from an administrative actor or action. | Ensures only cases that involve administrative decision making are eligible for analysis |
| The case must illustrate Brennan's thought pattern on administrative matters, including ethical dilemmas, a conflict among values, | Ensures the cases selected are relevant to public administration |

[32] Cooper 2007.
[33] Cox, Buck, and Morgan 1994.
[34] The textbooks used for this requirement were Cann, Steven J. (2006). *Administrative Law*. 4th ed. Thousand Oaks, CA: Sage; Cooper, Phillip J. (2007). *Public Law & Public Administration*. 4th ed. Belmont, CA: Thompson Wadsworth; DeLeo, John D. (2008). *Administrative Law*. Florence, KY: Delmar Cengage; Hall, Daniel (2011). *Administrative Law: Bureaucracy in a Democracy*. 5th ed. Upper Saddle River, NJ: Prentice Hall. Harrington, Christine B. and Lief H. Carter (2009). *Administrative Law: Cases and Comments*. 4th ed. Washington, DC: CQ Press.

| | |
|---|---|
| or limitations on government authority. | |
| The case must belong to one of the following categories: (1) civil rights/equal protection of the laws, (2) civil liberties/individual freedom, (3) human resource management/employment decision making, (4) procedural or substantive due process of law, (5) privacy. | Ensures the cases have implications for democratic governance and also present issues pertinent to the values that must be considered in administrative decision making |

Table 2 lists the cases selected for analysis along with the type of opinion that Brennan wrote in each case.

**Table 2: Cases Selected for Analysis**

| Case Citation | Brennan's Opinion |
|---|---|
| *Bell v. Burson*<br>402 U.S. 535 (1971) | Majority |
| *Bishop v. Wood*<br>426 U.S. 341 (1976) | Dissent |
| *Bivens v. Six Unknown Federal Narcotics Agents*<br>403 U.S. 388 (1971) | Majority |
| *Cleveland v. Loudermill*<br>470 U.S. 532 (1985) | Concur in part, Dissent in part |
| *Connick v. Meyers*<br>461 U.S. 138 (1983) | Dissent |
| *Craig v. Boren*<br>429 U.S. 190 (1976) | Majority |
| *DeShaney v. Winnebago County Department of Social Services*<br>489 U.S. 189 (1989) | Dissent |
| *Elrod v. Burns*<br>427 U.S. 347 (1976) | Plurality |
| *Frontiero v. Richardson*<br>411 U.S. 677 (1973) | Plurality |
| *Goldberg v. Kelly*<br>397 U.S. 254 (1970) | Majority |
| *Grand Rapids School District v. Ball*<br>473 U.S. 373 (1985) | Majority |
| *Green v. County School Board of New Kent County*<br>391 U.S. 430 (1968) | Majority |
| *Greer v. Spock*<br>424 U.S. 828 (1976) | Dissent |
| *Immigration and Naturalization Service v. Delgado*<br>466 U.S. 210 (1984) | Concur in part, Dissent in part |

| | |
|---|---|
| *Lynch v. Donnelly*<br>465 U.S. 668 (1985) | Dissent |
| *Metro Broadcasting v. FCC*<br>497 U.S. 547 (1990) | Majority |
| *New Jersey v. T.L.O.*<br>469 U.S. 425 (1985) | Concur in part, Dissent in part |
| *New York v. Burger*<br>482 U.S. 691 (1987) | Dissent |
| *Owen v. City of Independence*<br>445 U.S. 622 (1980) | Majority |
| *Public Citizen v. Department of Justice*<br>491 U.S. 440 (1989) | Majority |
| *Rutan v. Republican Party of Illinois*<br>497 U.S. 62 (1990) | Majority |
| *Schlesinger v. Ballard*<br>419 U.S. 498 (1975) | Dissent |
| *Sherbert v. Verner*<br>374 U.S. 398 (1963) | Majority |
| *Speiser v. Randall*<br>357 U.S. 513 (1958) | Majority |
| *United States v. Miller*<br>425 U.S. 435 (1976) | Dissent |

## THEORETICAL PERSPECTIVE

A theoretical perspective is a general framework that defines a point of view within a field of study. The framework includes a set of assumptions that draws attention to particular aspects of an issue or problem and generates questions about it. As an orienting framework, the theoretical perspective guides the focus of the analysis by determining how ideas are prioritized.

I read Brennan's case opinions from a Critical Legal Theory perspective. Critical Legal Theory (also called Critical Legal Studies) is a broad label that includes many sub-perspectives, including Critical Race Theory and Critical Gender Theory. There is no

overall agreement on all tenets of the perspective.[35] I use the term to indicate a theoretical perspective generally rooted in two assumptions: (1) anti-formalism and (2) legal indeterminacy. Formalism suggests that law is logically deduced from impersonal purposes and principles. Anti-formalism, or legal realism, is the assumption that law is neither neutrally nor objectively formulated nor applied.[36] I assume the application of law is inherently political; law and politics are not separate as formalists suggest. I also assume legal indeterminacy, meaning the outcome of a case reflects more than just the application of a set of legal rules.[37] The existence of a law does not speak to whether it is a just law. Law does, however, reflect the values of those who create it. Likewise, discretionary administrative decisions reflect the values of those who interpret and apply law. In essence, both the majority opinion and the dissenting opinion are justified. The difference between the two is the set of values the Justice chooses to emphasize in the case. This concept helps to explain why issues that the courts have "settled" still may reappear in future cases.

Using this framework helped me to reach conclusions about seemingly contradictory aspects of Brennan's opinions. For example, one finds in his case law both the theme of individual rights and that of group rights. Are the two necessarily in conflict? What can an administrator take away from Brennan's discussions on individual and group rights? Critical Legal Theory provides a way to think about these concerns. In

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[35] A good discussion is found in Tushnet, Mark (1991). *Critical Legal Studies: A Political History*. 100 *Yale L.J*. 1515.

[36] For a review of anti-formalism see Tushnet, Mark (1985). *Anti-Formalism in Recent Constitutional Theory. Michigan Law Review*, Vol. 83, No. 6: 1502-1544.

[37] Winter, Steven (1990). *Indeterminacy and Incommensurability in Constitutional Law*. *California Law Review*, Vol. 78, No. 6: 1441-1541.

fact, contradictions rooted in the conflict among goals and objectives are a central theme of Critical Legal Theory.

> Still the central motif in critical legal studies is that of contradictions. This motif, which crucially permeates all the other themes of the movement, has been almost invariably construed in either of two ways: (l) as a theme dealing with conflicts or oppositions between poles that define each other by being wholly exterior; or (2) as a theme dealing with conflicts between poles that have not only defined and bounded each other but have also partially constituted and interpenetrated each other….In a conflict as understood by many critical legal scholars, each pole ends where the other pole bas begun. And, equally important, where one pole ends and the other pole begins will be settled--arbitrarily settled--only when an authorized judgment has determined where the line separating the two poles should be drawn. A legal system, according to this view, must amount to an elaborate structure for drawing lines in order to mediate conflicting goals and ideals.[38]

## ANALYTICAL METHODS

Devising an effective analytical method for this dissertation was challenging. On one hand, the research questions required that certain structural elements of each case be identified first. On the other hand, the questions also necessitated that I go beyond the structural components that identify the facts, the legal question(s), the decision, the reasoning, and the precedent of a judicial decision. I chose both case briefing and discourse analysis as analytical methods. I used an inductive research approach by collecting data, observing patterns in the data, and forming conclusions.

### CASE BRIEFING

Members of the legal profession often use case briefs to summarize the major points of a judicial opinion. Deborah Bouchoux writes:

> Few people find it natural to read cases. The language used by courts is often archaic and the style of writing can make it difficult to comprehend the court's reasoning. The most common technique used to impose some order or structure on the confusing world of case law is case briefing. Do not confuse the word "brief" in this context, in which it means a summary of the key elements of a case,

[38] Kramer, Matthew (1994). *Critical Legal Studies and the Challenge of Feminism*. Lanham, MD: Rowman & Littlefield, pp. 43-44.

> with the written argument an attorney presents to a court, which is also called a "brief."[39]

Briefs include an outline of the majority or plurality opinion, the dissenting opinions, and any concurring opinions. Case briefing is useful because it forces the reader to focus on the pertinent facts of the case, the relevant legal question(s), and the reasoning of the opinion writer. In doing so, the reader is able to notice linkages across cases that may otherwise appear to be unrelated. For each case, I have included the following case brief components: (1) the case citation, (2) the facts, (3) the legal question(s), (4) the decision and vote, (5) the Court's reasoning, and (6) the precedent(s). Table 3 summarizes these elements.

**Table 3: Elements of a Case Brief**

| Element | Explanation |
|---|---|
| Case Citation | The case citation is provided for reference purposes. |
| Case Facts | The background facts of the case summarize the actions taken by the parties involved prior to litigation. The facts essentially tell the Justice what s/he needs to know in order to render a decision. |
| Legal Question(s) | The legal question is the issue of law that the Justice must declare as Constitutional or Unconstitutional. This question tells us the primary matters of disagreement between the parties and what they wish the Court to settle. An example of a legal question is: Did the University of California's affirmative action policies violate the Fourteenth Amendment's equal protection clause? There may be more than one legal issue in a case. |
| Decision and Vote | The Court's decision provides an answer to the legal question(s) presented in the case. |

[39] Bouchoux, Deborah E. (1998). *Legal Research and Writing for Paralegals*. New York, NY: Aspen, p. 121.

| | |
|---|---|
| | The vote records how many Justices were in the majority or plurality versus how many were in the dissent. |
| Reasoning | I included an explanation of the Court's majority or plurality opinion. The reasoning tells us how the majority of the Court thought about the issues involved and also lets us know the logic followed in reaching the decision. |
| Precedent | The case precedent is the rule of law applicable to future cases that present a similar legal question. The precedent establishes the principles henceforth bind the lower courts. |

The descriptive case briefs (1) identify the administrative subject to which the case pertains, (2) describe the administrative action that is being challenged, (3) examine how Brennan views the administrative conflict presented—either through his majority, concurring, or dissenting opinions, (4) determine what guiding principles or criteria Brennan uses to reach a decision regarding the conflict, and (5) uncover the values, goals, or desires revealed by comparing Brennan's opinion and the other opinion(s) in the case.

**DISCOURSE ANALYSIS**

There is a story behind each case, and the story can inform us about the context of public administration decision making by making us aware of the events that preceded the decision. In other words, every case has a history that begins with laws, policies, or regulations. John Rohr, for example, has noted that despite the significant holding in *Regents of the University of California v. Bakke*[40] and its enduring effect on education policy, the case begins and ends in a state university's admissions office.[41] Legal analysis of the case tends to focus more on the affirmative action policy in question than

[40] 438 U.S. 265 (1978)
[41] Rohr 1989, p. 131.

on those who must implement the policy—the administrators. So, legal analysis is of limited use if not supplemented by an analysis of the decision context. There are administrative lessons to be discovered there. The story behind each case can provide insight into why administrators made a particular decision or chose one course of action as opposed to another, and that is as important as the Court's decision in the case.

Rohr's use of the term *dialectic* to describe Supreme Court opinions provided a sufficient starting point for thinking about how best to approach the case analysis.

> The presence of concurring and dissenting opinions in Supreme Court decision makes the work of the Court dialectic….Because constitutional cases usually turn on the interpretation of such vague phrases as "due process of law," "equal protection," or "commerce among the states," these public debates necessarily point to higher questions on the nature of the common good….Concurring and dissenting opinions offer bureaucrats alternative ways of looking at the same problem and thereby help them avoid the danger of accepting dogmatic assertions uncritically.[42]

*The Merriam-Webster* dictionary defines dialectic as "(1) of, pertaining to, or of the nature of logical argumentation (2) the art or practice of logical discussion as employed in investigating the truth of a theory or opinion."[43] Understanding the meaning of a text is sometimes a complex process. This is especially true of judicial opinions since they are the result of negotiation, an evaluation of multiple interests, and language that requires compromise among the decision makers. Still, the dialogue among Justices in each case helps us determine how Brennan's perspective is either similar to or dissimilar to the other perspectives in the case. This comparison reveals what principles are distinctively Brennan's and may therefore be included in a discussion of his jurisprudence.

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[42] Rohr 1989, p. 79.
[43] Webster's *New Dictionary of the English Language*, p. 92.

I used discourse analysis to uncover themes in Brennan's jurisprudence. Roger Shuy describes such analysis:

> One of the defining characteristics of discourse analysis is that it is capable of application in a wide variety of settings and contexts. Wherever there is continuous text, written or spoken, there is a potential analysis of such text. The area of law provides an open opportunity for discourse analysis, especially since law is such a highly verbal field. It is generally regarded as a field containing written discourse, for care is taken to record in print all written interactions that occur in court. Cases are preserved in written form to serve as the basis for later decisions and to record the cases for later review.[44]

According to Phillips and Hardy, "discourse, in general terms, refers to actual practices of talking and writing….We define a discourse as an interrelated set of texts, and the practices of their production, dissemination, and reception, that brings an object into being...."[45] Discourse analysis is a systematic way of putting together parts of texts to identify meaning through interpretation.[46] Analyzing the discourse among Justices in Brennan's case opinions provided the opportunity to identify common themes and potentially instructive thought patterns among the four administrative subjects chosen for this study. To complete a discourse analysis, one must determine the kinds of messages to be sampled, the sample size, and the unit of analysis. Then, a systematic method of analysis must also be chosen. As noted previously, I analyzed Justice Brennan's case opinions in a sample of 25 purposively selected opinions. The unit of analysis was values; in reading the cases, I searched across the selected cases for public values that could be used to guide administrative decision making. According to Clyde Kluckhohn,

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[44] Shuy, Roger (2003). "Discourse Analysis in the Legal Context" in Schiffrin, Deborah et. al., eds. *The Handbook of Discourse Analysis*. Hoboken, NJ: Wiley-Blackwell, p. 437.
[45] Phillips, Nelson and Hardy, Cynthia (2002). *Discourse Analysis: Investigating Processes of Social Construction.* Thousand Oaks, CA: Sage, p. 3.
[46] Witter-Merithew, Anna (2001). "Understanding the Meaning of Texts and Reinforcing Foundation Skills Through Discourse Analysis" in Nettles, C., ed. *Tapestry of Our Worlds, Proceedings of the 17th National Conference of the Registry of Interpreters for the Deaf*, pp.177-192.

"A value is a conception, explicit or implicit, distinctive of an individual or characteristic of a group, of the desirable which influences the selection from available modes, means, and ends of action." [47]

There are many ways to do discourse analysis.[48] I used an eight-step discourse analysis process based on a ten-step model described by Anna Witter-Merithew.[49] I found Witter-Merithew's model to be the most comprehensive and the most adaptable to the type of text under review. Her model[50] was intended for those who must analyze discourse and then translate the content into another language. Three steps in her model deal specifically with the translation of the text, which I eliminated from my process. Because of the complexity of legal writing, I added a step to the process—an additional view and recall. I also changed the sequence based on my needs. The eight steps I used for the discourse analysis were: prediction, first view and recall, second view and recall, retell, content mapping, feature identification, abstraction, and interpretation.

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[47] Kluckhohn, Clyde (1962). "Values and Value Orientations in the Theory of Action" in Parsons, T. and E.A. Shills, eds. *Toward a General Theory of Action*. New York, NY: Harper, p. 395.

[48] See, for example, Mills, Sara (2004). *Discourse*. 2nd ed. New York, NY: Routledge; Johnstone, Barbara (2008). *Discourse Analysis*. 2nd ed. Malden, MA: Blackwell; Wetherell, Margaret et.al., eds. (2001). *Discourse as Data*. Thousand Oaks, CA: Sage.

[49] Cf. Witter-Merithew 2001

[50] The complete ten-step model that she presents includes the following: (1) Prediction, (2) View and Recall, (3) Content Mapping, (4) Feature Identification in the Source Language, (5) Abstraction, (6) Retell in the Source Language, (7) Feature Identification in the Target Language, (8) Visualization, (9) Retell in the Target Language, (10) Interpretation. I have eliminated steps (7), (8), and (9) to make the process suitable for this work.

**Table 4: Comparison Between Witter-Merithew's Discourse Analysis Process and the Adapted Process**

| Witter-Merithew's Model | Adapted Model |
|---|---|
| Step 1: Prediction | Step 1: Prediction |
| Step 2: View and Recall | Step 2: First View and Recall |
| Step 3: Content Mapping | Step 3: Second View and Recall |
| Step 4: Feature Identification in the Source Language | Step 4: Retell |
| Step 5: Abstraction | Step 5: Content Mapping |
| Step 6: Retell in the Source Language | Step 6: Feature Identification |
| Step 7: Feature Identification in the Target Language | Step 7: Abstraction |
| Step 8: Visualization | Step 8: Interpretation |
| Step 9: Retell in the Target Language | |
| Step 10: Interpretation | |

Step one in the discourse analysis process was *prediction*. The purpose of this step is for the reader to draw on prior knowledge of the subject matter in order to predict the likely content of the text being subject to analysis. Witter-Merithew explains that prediction prepares the reader for the communication that is in the text by giving the mind an initial focus. In the prediction step, I made a list of ideas, topics, and relationships that I believed would emerge in the text of the case. Some of the items on the list were the result of having previously been exposed to the text or having seen or heard discussion of the case.

Step two of the process was *view and recall*. In this phase, the analyst reads the text completely for a substantive understanding of the information being communicated.

No notes are taken, and the analyst recalls only from memory the major points of the text. I found this step to be especially useful during the first reading of each case. Step three was the *second view and recall*. I re-read the case for a more in-depth understanding of the content. In this step, I produced the case briefs mentioned earlier in the chapter. I also produced detailed notes about the ideas, themes, and values being communicated. Step four of the discourse analysis was *retell*. In this phase of the process, the analyst retells the primary details of the text in her own words to determine whether she has captured the essence of the text's major points. Paraphrasing the major points of the opinions in each case helped me to determine where there was agreement and disagreement among the Justices. For this step, I produced an audio recording of each case's facts and conclusions as well as my own thoughts about the case, which was useful for the next step.

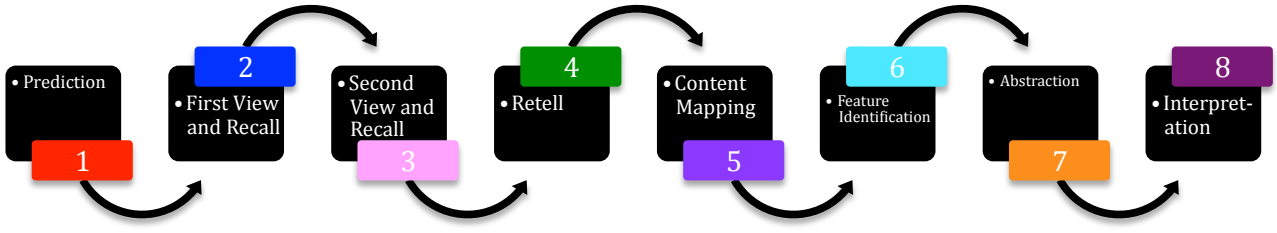
Step five was *content mapping*. A content map, or chart, is a visual representation of how the content fits together. Information is organized according to main ideas and supporting details. The analyst also notes any potential relationships among those ideas. I produced the content maps from both the text of the case and the audio recordings. Step six was *feature identification*, an analysis of how the message is communicated. The meaning of text is gathered not only by what is said but also by the language used and the style of the writing. In this step, I looked for features such as text emphasis (italicized or bolded script, for example), and the repetition of key words, phrases, or Constitutional principles. I also noted the evident tone of the writing. Brennan's writing style was fairly consistent across cases; he wrote concisely, decisively, and with confidence, yet, his tone is also mild and at times slightly emotional. There are exceptions, however. For

example, in *Greer v. Spock*, the Justice's tone was stern and admonishing. He admonished the Court's majority: "Despite the Court's oversight, if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security."[51] An analysis of the features of the text helped to determine the intent in Brennan's writings.

Step seven was *abstraction*. During the abstraction phase, the analyst makes inferences from the text itself, noting any implied meaning and also noting the supporting evidence. It was at this step that I considered the context of the case and inferred what Brennan might have wanted to convey about administrative decision making. What general principles did Brennan want us to recognize about how decisions should be made? I answered this question during step seven.

The final step was *interpretation*, by far the most difficult step in the discourse analysis process. In this step, I combined all of the data from steps 1-7 to produce a comprehensive interpretation of Brennan's administrative law cases. Figure 1 shows the discourse analysis model I used, and Appendix B illustrates the process using *DeShaney v. Winnebago County Social Services Department* as an example.

**Figure 1: Discourse Analysis Model**




[51] 424 U.S. 828 (1976), pp. 852-853.

## ANALYTICAL ASSUMPTIONS

Without a doubt, I faced limitations in this project. These limitations begin with two assumptions I made regarding public administration as a field composed of multiple disciplines. First, the legitimacy of public administration is not questioned here; scholars have debated that topic profusely since the field's formal inception. Instead, I assume the legitimacy of both public administration and the discretionary decisions administrators make. Second, I assume that incorporating an analysis of U. S. Supreme Court decisions into public administration education is both desirable and productive. If John Rohr is persuasive in his analysis of regime values and their sources, then the incorporation of judicial decision analysis into public administration curriculums is indispensable. I believe this work serves little purpose at all if it cannot be used to help administrators at all levels of the public sector. Therefore, I approached this project not just as an academic endeavor but also as one that may be of use to any public administrator who must make difficult decisions about how to prioritize values. When I worked in the non-profit sector, I often faced ethical dilemmas, as did my colleagues. We sometimes shared our stories and talked about the best way to handle those situations. We were all missing a framework for decision making, and I believe we could have done better had we had one.

A second assumption is inherent in the project's methodology. A more substantial contribution can be made through an analysis of all of Brennan's administrative law opinions. Unfortunately, that was not a feasible choice. Taking a purposive sample rather than a random or representative one may raise questions about whether the conclusions would have been substantiated were all of his administrative law

decisions included in the analysis. The criteria ensure that the cases are relevant to public administrators, but they do not ensure that the cases represent the most pressing issues that administrators face. Although five subject matters are covered in the work, administrators face many more. The cases presented for analysis are not intended to be representative of Brennan's entire body of administrative case law. Instead, they are used as examples for how we might think through important values by observing a dialogue in which some of these values are center stage.

# CHAPTER THREE
# CALL ME BILL

*Human dignity can only flourish in a society that protects the individual from the 'absolute state' and from arbitrary officials.*

-Justice William J. Brennan

## WHO IS JUSTICE BRENNAN?

Inez Moore did not want her grandson, John, to leave her home. He came to live with her when his mother died. Under an East Cleveland city ordinance, he was forced to leave Moore's home, or she would face a criminal conviction for violating the ordinance. The housing ordinance limited occupancy of a dwelling unit to one single nuclear family—a husband, wife, and unmarried children. Moore refused to move John out of the home; she was tried and convicted of violating the ordinance. She was fined $25 and received a five-day jail sentence. Moore appealed her conviction and challenged the ordinance as a violation of her constitutional right to liberty.

The city justified its ordinance as a means of preventing overcrowding, reducing traffic, and avoiding an undue burden on the school system. For Brennan, these were legitimate government interests but not substantial enough to deny Moore the liberty to determine who resided in her home. In *Moore v. East Cleveland*,[52] he wrote a concurring opinion:

> I agree that the Constitution is not powerless to prevent East Cleveland from prosecuting as a criminal and jailing a 63-year-old grandmother for refusing to expel from her home her now 10-year-old grandson who has lived with her and been brought up by her since his mother's death when he was less than a year old. (p. 506)

[52] 431 U.S. 494 (1977)

Brennan saw the city's ordinance as an affront to African-American family traditions and wrote that the city could not define *family* in such a way that it infringed on the Constitutional liberty of Inez Moore, an African-American grandmother providing care for her grandson.

> I write only to underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the light of the tradition of the American home that has been a feature of our society since our beginning as a Nation - the "tradition" in the plurality's words, "of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children…." The line drawn by this ordinance displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society. (pp. 507-508)
>
> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living. The "extended family" that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants who populated our cities, remains not merely still a pervasive living pattern, but under the goad of brutal economic necessity, a prominent pattern - virtually a means of survival - for large numbers of the poor and deprived minorities of our society. For them compelled pooling of scant resources requires compelled sharing of a household. (p. 508)
>
> The "extended" form is especially familiar among black families. We may suppose that this reflects the truism that black citizens, like generations of white immigrants before them, have been victims of economic and other disadvantages that would worsen if they were compelled to abandon extended, for nuclear, living patterns. (p. 509)

In his opinion, Brennan expressed a philosophical view of social justice that took center stage in every opinion he wrote. He believed the fundamental purpose of the Constitution was to protect the human dignity of each individual from arbitrary, discriminatory, and erroneous government decision making.

"If we look at justices in terms of their role in the decision process, William J. Brennan, Jr. was actually the most influential associate justice in Supreme Court

history."[53] With these words, Bernard Schwartz echoes the sentiments of numerous Constitutional scholars who have both praised and criticized Brennan for the decisions he made while on the U.S. Supreme Court. Former *New York Times* reporter Martin Tolchin recalled, "At dinners and social gatherings, when strangers are uncertain whether to call him 'Justice' or 'Mr. Justice,' he invariably advises, 'Call me Bill.'"[54]

Brennan was no stranger to contradictions. He was a Democrat who was appointed by a Republican president (Dwight D. Eisenhower). The Justice was a devout Roman Catholic who pushed the Court in pro-choice and church-state separatist directions. He believed strongly in individual rights but urged the Court to limit the impact of exclusively individualist language in the Constitution in order to foster inclusive protection for groups, specifically for women and racial minorities. Jeffrey T. Leeds, a former Brennan clerk, interviewed the Justice in 1986, where the following exchange took place:

> **Leeds:** You are often described in the press, and have been attacked by members of the current Administration, as the Justice on the "extreme left." Are you at all surprised to find yourself labeled that way?
> **Brennan:** Quite honestly, I don't understand it. Anyone familiar with what I have done here, the opinions, and anyone with historical perspective, would have to know that I am not on the extreme left. It does make me chuckle. I have never gone as far as the extreme left on the Court, let alone the country. How would you characterize Justices Black and Douglas? We didn't see eye to eye in so many things. They were, I suppose, far to the left of me.
> **Leeds:** It doesn't bother you?
> **Brennan:** No. People have short memories and times change. Maybe one day, someone will talk about Brennan the right-winger.[55]

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[53] Schwartz, Bernard (1997). "How Justice Brennan Changed America" in E. Joshua Rosenkranz and Bernard Schwartz, eds. *Reason and Passion: Justice Brennan's Enduring Influence*. New York, NY: W.W. Norton & Co., p. 31.
[54] Tolchin, Martin (July 22, 1990). "Vacancy on the Court: A Man in Close Touch With People as Well as With History." *New York Times*. Retrieved: http://www.nytimes.com/1990/07/22/us/vacancy-on-the-court-a-man-in-close-touch-with-people-as-well-as-with-history.html.
[55] Leeds, Jeffrey T. (October 5, 1986). "A Life on the Court." *New York Times*. Retrieved: http://www.nytimes.com/books/97/07/06/reviews/brennan-interview.html.

At first read, one might be tempted to dismiss the idea of Brennan as conservative. However, the Justice was quite serious in his response. He can be seen as a statesman whose jurisprudence transcends the controversies of his day. It seems that a Justice whose dissenting opinions are cited in administrative and constitutional law textbooks and law reviews almost as frequently as his majority opinions might contribute to our understanding of constitutional issues in public administration.

I do not maintain that Brennan presents us with a grand theory of bureaucracy; it simply was not his primary concern. Nor do I assert that administrators who read his case opinions will instantly know how to make the right decisions. However, given his tenure on the Court, his opinions on criminal justice, on race and social policy, on labor law, and on many other policy areas, he simply could not avoid public administration. When he addressed administrative behavior, he did so with clarity and with purpose. One may study other justices to determine what regime values are present in their opinions. In fact, the values of several justices can be compared and contrasted to determine which ones are more frequently supported by case law.

Reviewing scholars' writing about Brennan as well as some of his own writing is useful. It helps us understand Brennan's philosophy of the Constitution; it also sheds light on his legal priorities. Here, "relevant literature" refers to sources that considerably focus on Brennan's jurisprudence, including biographies, interviews, and his speeches. The scholarship on Brennan provides an especially enlightening opportunity to explore more deeply the contradictions, tension, and competing values and interests that characterize the administrative state.

In this chapter, I briefly review the events leading to Brennan's Supreme Court appointment. I also discuss his approach to Constitutional interpretation. Then, I review his philosophical position on the purpose of law and how it should be applied. I conclude by mentioning the significance of Brennan's jurisprudence to public administration.

## THE EARLY YEARS

William Brennan, Jr. was born in Newark, New Jersey on April 25, 1906. He was the son of Irish immigrants who came to the United States in 1890. Brennan's father (William Brennan, Sr.) was very active in labor unions, and as a trolley worker, the elder Brennan helped to organize both strikes and marches.[56] Brennan grew up in a household where the plight of the working class often was mentioned. In 1917, his father was elected as one of five commissioners on Newark's police commission board. Each commissioner was in charge of separate parts of the city's government; Brennan Sr. oversaw fire and police operations. While a commissioner, he pursued an agenda of civic representation for working people. He also won the support of the local Urban League when he appointed three additional African American patrolmen to the police force (to date, there had been only one). Brennan commented that his father's values influenced him greatly.[57]

As a child, Brennan attended a Roman Catholic elementary school. His father's Catholic beliefs were generally labeled progressive and appeared to be influenced by the ideas of Catholic priest and social justice advocate John A. Ryan. After attending a public high school, Brennan was accepted to and graduated from the University of Pennsylvania in 1928. He graduated from Harvard Law School in 1931. While at Harvard, Brennan

[56] Stern, Seth and Wermiel, Stephen (2010). *Justice Brennan: Liberal Champion*. New York, NY: Houghton Mifflin Harcourt, p. 7.
[57] Cf. Stern and Wermiel 2010.

joined the Legal Aid Bureau, an organization that assisted poor residents in Cambridge with housing disputes and personal injury cases. After graduation, Brennan clerked for a private law firm and also took criminal defense cases assigned by an Orange, New Jersey judge. As a private attorney, Brennan mostly practiced labor law. In 1942, he took a leave of absence from his firm to accept a position in the U. S. Army. He served as an advisor on labor relations in the Ordnance Department from 1942-1946. Prior to Brennan's appointment, labor strikes threatened war efforts, and he was brought in to help negotiate the disputes and bring quick resolution to them. He returned to private practice in 1946 and remained there until 1949, when he was appointed a superior court judge in New Jersey. Brennan served in the New Jersey state court system from 1949-1956, first as a district judge, then as an appellate division judge, and finally as a New Jersey State Supreme Court judge. By most accounts, his state judicial tenure was relatively uneventful. He did, however, gain a reputation for efficient administration of his caseloads and for broadening the scope of criminal defendants' rights.

In 1956, Brennan began his tenure on the United States Supreme Court where he remained until his retirement in 1990. President Eisenhower evidently came to regret his decision. Only one Senator opposed his confirmation—Joseph McCarthy, Brennan's nemesis. David Marion suggests three reasons why Brennan was appointed.[58] Eisenhower believed these factors would appeal to swing voters and also allow him to keep a campaign promise to Catholics in New York. First, he was a Catholic Democrat. Second, Brennan was a state court judge. As a constituency, state court judges had become vocal in their demand for representation on the U.S. Supreme Court. Third,

[58] Marion, David (1997). *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of "Libertarian Dignity."* Boulder, CO: Rowman & Littlefield, pp. 2-4.

Eisenhower believed he was getting a centrist judge; however, David Marion also suggests that there was evidence that would have suggested otherwise had Eisenhower looked more closely. Stern and Wermiel offer a fourth reason for Brennan's appointment.[59] They suggest that Eisenhower was interested in an appointee who was not near retirement age.

As a U.S. Supreme Court Justice, Brennan participated in many decisions that fundamentally changed the political and social landscape of the country. For example, he wrote the majority opinion in *Baker v. Carr,*[60] the landmark case that establishes the principle of one person, one vote. He wrote the majority opinion in *New York Times v. Sullivan,*[61] which made it more difficult for public officials to file libel claims and affirmed the importance of free speech in a democratic society. Also, he ruled in *Texas v. Johnson*[62] that burning the American flag was protected under the First Amendment's free speech clause. These are just three examples of significant case opinions that Brennan authored. We will see as well that he authored equally notable administrative law opinions. In 1993, President Bill Clinton awarded Brennan the Presidential Medal of Freedom for his tireless commitment to protecting civil liberties.

**CONSTITUTIONAL INTERPRETATION**

Justice Scalia called Brennan "probably the most influential Justice of the century…the intellectual leader of the movement that really changed, fundamentally, the

[59] Stern and Wermiel 2010.
[60] 369 U.S. 186 (1962)
[61] 376 U.S. 254 (1964)
[62] 491 U.S. 397 (1989)

court's approach toward the Constitution."[63] In describing Brennan as a political theorist, Frank Michelman observes:

> He was one of our judiciary's committed moral readers of the Constitution, one of those judges for whom intellectually and morally defensible constitutional interpretation includes conscious application to the work of some more or less distinct, substantive theory of good politics.[64]

Michelman also argues that Brennan's jurisprudence must be read as him rejecting judicial restraint and instead pursuing an agenda. He sees Brennan's approach to the Constitution as one of classic liberalism—a term used to refer to an emphasis on individualism, individual rights, and the capacity for human self-direction. Similarly, Marion calls Brennan's approach to the Constitution as one of libertarian dignity,[65] a phrase that Brennan himself used descriptively. Brennan believed that the Constitution must be interpreted as a mandate to protect the human dignity of all citizens. He commented in an interview: "our whole constitutional structure and objective is the protection of the dignity of the human being."[66] Brennan wrote:

> So fashioned, the Constitution embodies the aspirations to social justice, brotherhood, and human dignity that brought this nation into being. The Declaration of Independence, the Constitution, and the Bill of Rights solemnly committed the United States to be a country where the dignity and rights of all persons were equal before all authority. In all candor, we must concede that part of this egalitarianism in America has been more pretension than realized fact. Be we are an aspiring people with faith in progress. Our amended Constitution is the lodestar for our aspirations.[67]

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[63] Biskupic, Joan. The Biggest Heart in the Building." *Washington Post*. Friday, July 25, 1997. Page A15. Retrieved: http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/brennan/brennan2.htm.
[64] Michelman, Frank (2005). *Brennan and Democracy*. Princeton, NJ: Princeton University, p. 63.
[65] Cf. Marion 1997.
[66] "Mr. Justice Brennan." Videorecording. Public Affairs Television. Princeton, NJ: Films for the Humanities, 1994.
[67] Brennan, William J. "The Constitution of the United States: Contemporary Ratification" in O'Brien, David M. (1997). *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House, p. 200.

Brennan did not believe that the Supreme Court puts its own meaning into the vague phrases of the Constitution. Instead, he believed it was the role of the Court to draw out the meaning that was already in the writing. Brennan stated:

> Like every text worth reading, it is not crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure. This ambiguity of course calls forth interpretation, the interaction of reader and text. The encounter with the Constitutional text has been, in many senses, my life's work….[68]

In an interview with Bill Moyers, Brennan stated that the Framers of the Constitution deliberately set up a brief, general, ambiguous Constitution that guaranteed the rights of every individual.[69] And, the Framers intended judges to interpret the Constitution so that the document would endure and would not lose its effectiveness over time. According to Brennan, the Court must interpret the Constitution in light of changing political and social times. He believed there had been controversy over how to interpret the Constitution from its inception. He explained that the Framers knew that change was inevitable but they could not foresee how new technologies (wiretapping, for example) would affect the interpretation of the Constitution. They set only the basic principles to govern society and left it to the judges to determine what laws are consistent with those basic principles. Brennan rejected the idea that Supreme Court Justices have unlimited power to interpret the Constitution as they personally see fit; Justices are constrained by the words of the Constitution and by its history. Hence, Brennan speaks about the importance of precedent in Constitutional interpretation. He understood that judicial interpretations have immediate and direct consequences.[70]

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[68] Brennan 1997, p.200.
[69] "Mr. Justice Brennan" 1994.
[70] Brennan 1997.

Brennan insisted that Justices were not bound by *original intent*—that is, an approach to Constitutional interpretation in which Justices discern exactly what the Framers would have thought about the question at hand and then make a decision consistent with the Framers' intent. He said:

> It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility. It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions. All too often, sources of potential enlightenment such as records of the ratification debates provide sparse or ambiguous evidence of the original intention. Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality. Indeed, it is far from clear whose intention is relevant—that of the drafters, the congressional disputants, or the ratifiers in the states?—or even whether the idea of an original intention is a coherent way of thinking about a jointly drafted document drawing its authority from a general assent of the states.[71]

Brennan believed that each new generation of Americans adds to the pre-existing Constitutional principles because the original Framers could not have foreseen new circumstances. The value of the Constitution is its ability to adapt to modern times and current problems. This interpretive position may be summarized fairly as *instrumentalist*. Randall Kelso uses this term to describe judges who are non-originalists and who also take a pragmatic and activist approach to jurisprudence.[72] He observes that instrumentalist judges:

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[71] Brennan 1997, p. 202.

[72] Kelso, R. Randall (1994). "Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History." *Valparaiso University Law Review*. Vol. 29, No. 1: 121-233.

1. Interpret the Constitution, a statute, or a policy with the understanding that there are ambiguities in the law that can be resolved through judicial considerations of social policy;

2. Do not accept judicial restraint. Instead, they see the judiciary as co-equals with the other branches of government;

3. Believe laws must be interpreted in light of their social purpose;

4. Give weight to the context of an issue when making a decision;

5. Trust in an evolving Constitution;

6. Use history and intent as reference points to deduce principles that may be then generalized to the subject matter at hand;

7. Are not unnecessarily bound by case precedent. They will vote to overrule a precedent if they think it no longer matches the needs of society.

Brennan knew that some citizens wonder whether there should be greater judicial accountability in a representative democracy. Some fear that judges' unbridled interpretation of the Constitution is diametrically opposed to democratic principles. Brennan responded: "Judicial power resides in the authority to give meaning to the Constitution; the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation."[73] Brennan thought the purpose of the Constitution was to provide a foundation upon which the society could grow; it was not intended to preserve a preexisting society. However, the principles found in it must be applied consistently and in manner that maximizes individual rights and self-determination.

**THE PURPOSE AND APPLICATION OF LAW**

[73] Brennan, William J. Speech to the Text and Teaching Symposium, Georgetown University. October 12, 1985.

In Bill Moyers's interview with Justice William Brennan, Brennan discussed his views on the role of the U.S. Supreme Court in the American legal system.[74] The Justice believed his duty was to enforce individual rights guaranteed by the Constitution. He said that it is imperative for the Supreme Court to enforce the rights of minorities regardless of the reaction of the majority. Brennan agreed with Justice Black's assertion that the United States is the "greatest country in the world" because of its commitment to the Bill of Rights, and he notes that without a Bill of Rights, it could be one of the worst countries. Brennan further explained that the Bill of Rights and the Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments), which extend the Bill of Rights to the states through the Fourteenth Amendment, created a new Constitution. This new Constitution has the ability to protect individuals against the government in ways that were not possible prior to their passage.

In the general scheme of governance, Brennan said there must be some final arbiter to make decisions regarding these broad principles; that responsibility lies with the Supreme Court. According to Brennan, the Constitution set up an independent judiciary whose members cannot be punished for its decisions and whose Justices serve life tenure during good behavior. Decisions regarding the constitutionality of a law lay with the courts and are, in theory, insulated from the pressures of politics and majority rule. Also, decisions of the Court are binding on all parties and at all levels of government—local, state, and federal.

Discussions of American constitutional theory are often framed as a clash between government responsibilities and citizens' liberties. For Brennan, this dichotomy was important to consider. He was an adamant supporter of individual rights; yet he was

[74] "Mr. Justice Brennan 1994.

no sworn enemy of government. This is an interesting nexus, because it is not too far fetched to assert that those in favor of maximum civil liberties for the individual might view government as an obstruction to those liberties. When reading Brennan's opinions, one can discern a pattern of advocacy—one in which government is protector of civil liberties. He explored the tension between bureaucracy and democracy as well as the tension between the freedom of the individual and the rapidly expanding administrative state. His lesson is unmistakably clear: administrative convenience will not suffice when fundamental rights are in the balance.

> The modern activist state is a concomitant of the complexity of modern society; it is inevitably with us. We must meet the challenge rather than wish it were not before us. The challenge is essentially, of course, one to the capacity of our constitutional structure to foster and protect the freedom, the dignity, and the rights of all persons within our borders, which it is the great design of the Constitution to secure.[75]

Brennan also wrote:

> There exists in modern America the necessity for protecting all of us from arbitrary action by governments more powerful and more pervasive than any in our ancestors' time. Only if the amendments are construed to preserve their fundamental policies will they ensure the maintenance of our constitutional structure of government for a free society.[76]

When Brennan lectured at Georgetown University on October 12, 1985,[77] he chose to speak on the importance of the Bill of Rights and the Civil War Amendments. Brennan stated that the Constitution provides for three branches of government that have very different responsibilities; there is a separation of powers. The judiciary affords citizens an opportunity to file lawsuits for a redress of grievances. He noted many controversial issues arrive at the Supreme Court, and legal issues are sometimes ill-

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[75] Brennan 1997, p. 206
[76] Brennan, William J. (1977). "State Constitutions and the Protection of Individual Rights." *Harvard Law Review.* Vol. 90, No. 3: 489-504, p. 495.
[77] Brennan 1985.

defined. The judiciary, according to Brennan, must settle these disputes that often stem from remarkably different viewpoints. As arbiters, judges can potentially make mistakes that affect the entire nation socially, economically, and politically. Brennan supposed that judicial decisions have tangible consequences not just for the parties involved but also for society as a whole. For this reason, judges must apply the law narrowly to allow flexibility in future decision making.

Brennan opposed the perception that Constitutional governance requires judges to exercise maximum restraint in their decision making. The foundation for this perception is that elected representatives are accountable through the election process and should make the major decisions for citizens. Advocates for this approach believe that judicial review is appropriate only to the extent that it ensures the proper functioning of the elected branches of government. Brennan criticized this position and stated that it is usually impossible to resolve social policy issues according to majority rule. This is why, in his view, a Bill of Rights was necessary. The Bill of Rights ensures that minority and individual rights are protected. The Constitution's text places some decisions beyond the power of the majority—the prohibition on cruel and unusual punishment and the denial of equal protection of the laws, for example. Brennan saw nothing wrong with the courts actively protecting citizens from the whims of the majority when a specific Constitutional provision called for such protection.

According to Brennan, the Constitution is a document that limits government action. This is the fundamental relationship between the citizen and the state. The Constitution defines how far the government can intrude on a person's liberty. In a discussion of the value of limited state action, Brennan noted that citizens have an ever-

increasing contact with government to acquire subsidies, unemployment benefits, licenses, etc. Government is much more active in an individual's life at this point than it has been in other phases of American history. The role of government has expanded, and it is important "to ensure that government act with integrity and consistency in its dealing with these citizens," stated Brennan.[78] Many areas that had previously been dubbed private are now within the public sphere and are thus subject to government intervention. It is inevitable that conflict will arise as government plays a greater role in the lives of its citizens. If individual dignity is to prevail, then government actions must be confined by the limitations in the Constitution. Modern society created a large state, and it must be controlled. Brennan once again turned to the Constitution as a tool for controlling the powers of government over the citizens. The first eight amendments protect individuals from infringement on their rights and liberties by the federal government, and the Fourteenth Amendment applies those first eight amendments to the states.

In a lecture given to the New Jersey State Bar Association, Brennan once again spoke about his Constitutional vision.[79] This time, he focused on the role of state constitutions in protecting individual rights. Brennan explained that it is vital to an individual's liberty that the federal Bill of Rights be applied to the states. Fundamental rights, such as the right to free speech, the right to freely practice one's religion, and the right to peacefully assemble, are essential to securing human dignity. Brennan says that the federal government does not have the right to completely control the states; however, it does have the right to ensure that individual rights are not being violated by the states. Further, it is the Supreme Court's job to ensure that the state and federal governments act

[78] "Mr. Justice Brennan" 1994.
[79] Brennan, William J. "Guardians of Our Liberties: State Courts No Less Than Federal" in O'Brien, David M. (1997). *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House.

in a manner that is consistent with the Bill of Rights. Brennan said, "state courts no less than federal are and ought to be the guardians of our liberties."[80]

By concluding that individuals enjoy two levels of protection for their individual rights, Brennan espoused a total incorporation theory—a theory that holds the liberties found in the first eight amendments are totally incorporated into the scheme of protection from state infringement. This is important to note because not all Justices adhere to the total incorporation theory, and the Court has not fully and formally incorporated all of those amendments.

Brennan had a word of caution regarding state court systems. He said that state court judges are more likely to be swayed by the majority because they are often elected. Brennan saw this fact as a potential threat to the protection of minorities. He also noted that it is easier to amend state constitutions than the federal Constitution. For these reasons, Brennan believed the majority might ignore the rights of the minority in the states. He emphasized that states cannot provide less protection than is called for in the Bill of Rights. They may, however, provide more protection. For Brennan, it was imperative that federal courts be able to review state court decisions regarding the protection of rights and liberties outlined in the federal Constitution.

**SIGNIFICANCE FOR PUBLIC ADMINISTRATION**

Justice Brennan's constitutional philosophy is what guided his decision making. Therefore, it was important to determine what these philosophical principles were. As seen in this chapter, Brennan's theories of limited government action, maximum protection for individual rights and liberties at both the state and federal level, and, especially, protection for minority rights—racial, religious, ideological or otherwise—are

[80] Cf. "Mr. Justice Brennan" 1994.

very important parts of his Constitutional philosophy. Brennan's instrumentalist approach to Constitutional interpretation afforded him an opportunity to consider the social purposes of government policies and to intervene on behalf of underrepresented minority interests.

In the coming chapters, I explore how Brennan applied some of these principles in his administrative law decisions. Doing so not only provides insight into the processes, procedures, and dynamics inside government agencies but also provides practical instruction for public administrators. Well after Brennan's retirement from the Court, constitutional issues affecting countless policy arenas, public personnel decisions, and managerial procedures have continued to plague administrators. Normative values are present in Brennan's jurisprudence, and those values are instructive when applied to cases involving equal protection and representative bureaucracy, substantive and procedural due process, religious freedom, federalism, and the balance between individual rights and the authority of the administrative state. As Peter Irons notes, Brennan believed that government officials are agents of the people and thus have only limited authority; Brennan wanted bureaucrats to replace their arbitrary tendencies with an enthusiasm for perpetuating human dignity.[81] This philosophy can be seen throughout his opinions and proved to be the fundamental tenet of his jurisprudence. But, is this philosophy of any value to public administrators? I begin to address this question in the next chapter.

[81] Irons, Peter (1994). *Brennan v. Rehnquist: The Battle for the Constitution*. New York, NY: Alfred A. Knopf, p. 299.

# CHAPTER FOUR
# A JUDICIAL MARCH ON WASHINGTON

*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 the law and by their fellow citizens.*

-Justice William Brennan

## ANTI-DISCRIMINATION LAW

When Allan Bakke was denied admission to the Medical School at the University of California at Davis, he did not believe he had been treated fairly in the process. He was denied admission twice, once in 1973 and again in 1974. In both years, applicants were admitted under the "special" admissions track with GPAs, MCAT scores, and admissions rankings lower than Bakke's. He believed the medical school's affirmative action policy had unfairly disadvantaged him, and he subsequently sued the university.

The case was argued before the Court in 1977, and it was the first time that a university's affirmative action policy was decided on its merits. Brennan wrote an opinion concurring in part and dissenting in part. In 1973, the medical school began a two-track admissions system designed to increase the number of "disadvantaged" students admitted in each class. Under the "regular" admissions track, applicants were initially screened based on their grade point averages. All applicants whose GPA was below a 2.5/4.0 were not considered for admission. One out of every six applicants who passed the GPA prerequisite was invited for an interview and was then ranked by an admissions committee based on the following factors: interviewers' ratings, overall grade point average, grade point average in science courses, letters of recommendation,

Medical College Admissions Test scores, extracurricular activities, and biographical data. The committee made offers of admission as space became available.

Under the "special" admissions track, the admissions committee was composed of mostly minority races. On the 1973 application, all applicants were asked to indicate whether they wished to be considered as members of a "economically and/or educationally disadvantaged group," and this later changed in 1974 to "minority group," which the medical school considered Black, Chicano, Asian, or American Indian. If the applicant indicated membership in the group, his or her application was forwarded to the "special" admission track committee. The committee then rated the applicants in a similar manner as those in the "regular" admissions track, but those in the "special" track were not required to meet the 2.5/4.0 GPA standard. Special track applicants were not compared to the regular track applicants. The special track committee recommended applicants until the number prescribed by faculty vote were admitted, which was 16 seats out of the 100 seats available in 1974. The Court had to determine whether this two-track admissions plan violated the Fourteenth Amendment's Equal Protection Clause. There was no majority opinion, and the decision produced six separate opinions.[82]

Discrimination based on both race and sex has been a recurring theme in American public policy. The white supremacist and patriarchal foundation of the country has ensured the exclusion of opportunities for African Americans and other non-white races as well as for women. Anti-discrimination case law arises from the equal protection clause of the U.S. Constitution and various state and federal statutes. It seeks to reduce widespread forms of discrimination that pervasively disadvantage people based on inaccurate judgments about their worth or capabilities. These judgments are based on

[82] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)

race, sex and gender stereotypes, and other preconceptions. Anti-discrimination law is based on the idea that everyone should have equal opportunities regardless of race, sex, religion, nationality, age, or disability.

Anti-discrimination law asks us not to recognize immutable attributes such as race and sex because the attributes may introduce irrational, prejudiced judgments. During the 1970s, many referred to this concept as *colorblindness and sexblindness*, ideas that Brennan did not fully support. Instead, he believed that as public policies are formed, we must consider how those policies affect traditionally disadvantaged groups. Justice Blackmun put it more succinctly in his opinion in *Regents of the University of California v. Bakke*:

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetuate racial supremacy. (p. 407)

Brennan insisted that anti-discrimination law go further than mere colorblindness, and his position is clear in his case opinions. For Brennan, anti-discrimination law had more than the conventionally understood purpose of minimizing the effects of race and sex stereotypes. For him, it also had a transformative purpose of defending the interests of traditionally unprotected groups. He used anti-discrimination law to attack public policies that systematically disadvantaged individuals based on their group identifications.

Brennan wrote many of the Court's majority opinions as well as some dissenting opinions during the 1960s through the 1980s when many federal and state discriminatory policies were challenged. Most often, these challenges were brought under the Fifth

Amendment's due process clause and the Fourteenth Amendment's equal protection clause.

The due process clause of the Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[83]

Section 1 of the Fourteenth Amendment contains the equal protection clause:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[84]

The Court's involvement in the implementation of statutes that either intentionally target or adversely affect citizens or public employees based on race or sex is the subject of this chapter. The purpose is to investigate how applying Justice Brennan's discrimination jurisprudence can guide administrative decision making where race and sex are variables. Long after Brennan's retirement, policy issues such as affirmative action, achieving workplace diversity, and how best to attain race and sex equity have continued to reach the Court. Normative lessons appear in Brennan's framework as applied to cases of equal protection of the laws. We can use his vision of equality to help

[83] Fifth Amendment to the U.S. Constitution. Retrieved at http://www.law.cornell.edu/constitution/billofrights#amendmentv.
[84] Fourteenth Amendment to the U.S. Constitution. Section 1. Retrieved at http://www.law.cornell.edu/constitution/amendmentxiv.

us think through pertinent questions surrounding the debate. A few of these questions include:

1. Is it permissible for administrators to consider race or sex in decision making?
2. How should administrators think about the competing values of individualism and social justice?
3. How will fairness be defined in administrative decision making?

In this chapter, I examine both sex and race discrimination in administrative decision making. The following cases will be analyzed in detail: *Frontiero v. Richardson,*[85] *Schlesinger v. Ballard,*[86] *Craig v. Boren,*[87] *Green v. County School Board of New Kent County,*[88] and *Metro Broadcasting, Inc. v. FCC.*[89] These five cases illustrate Brennan's position on both sex and race discrimination and also span a period of seventeen years. We can see how he remained consistent in the application of his jurisprudence and also solidified some anti-discrimination principles from which the Court has yet to waiver. After analyzing sex discrimination case law and then race discrimination case law, I conclude by discussing the themes present in Brennan's jurisprudence.

**SEX-BASED DISCRIMINATION**

In 1971, sex discrimination cases began to occupy the Court's docket with some frequency. Beginning with *Reed v. Reed (1971),*[90] the Court issued favorable decisions for women's equality. From then until Brennan's retirement in 1990, the Court decided

[85] 411 U.S. 677 (1973), plurality opinion.
[86] 419 U.S. 498 (1975), dissenting opinion.
[87] 429 U.S. 129 (1976), majority opinion
[88] 391 U.S. 430 (1968), majority opinion.
[89] 497 U.S. 547 (1990), majority opinion.
[90] 404 U.S. 71 (1971)

nine more landmark cases involving sex discrimination; of the ten total,[91] Brennan wrote six of the majority opinions.

According to Norma Riccucci:

> Although women have made some gains in government jobs, gender differences in the workplace, just like racial and ethnic diversity, have resulted in a host of discriminatory practices and biases against women, which ultimately hinder the overall effectiveness and productivity of government organizations."[92]

However, the equal protection clause itself did not apply to sex discrimination until 1971.[93] In *Reed*, Justice Brennan was part of a unanimous Court that determined that the equal protection clause should apply to cases of sex discrimination in the public sector. Just two years after this determination, the Court heard a case in which a federal employee, Air Force Lieutenant Sharron Frontiero, alleged specific sections of the U.S. Code created unconstitutional sex discrimination in violation of the Fifth Amendment's due process clause. In *Frontiero v. Richardson*, Justice Brennan took the lead in trying to have sex qualify as a suspect classification.[94] He failed. Nevertheless, his majority opinion in the case set forth important considerations for public administrators.

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[91] *Reed v. Reed*, 404 U.S. 71 (1971); ***Frontiero v. Richardson,*** 411 U.S. 677 (1973); ***Weinberger v. Wiesenfeld***, 420 U.S. 626 (1975); ***Califano v. Goldfarb***, 430 U.S. 199 (1977); ***Orr v. Orr,*** 440 U.S. 268 (1979); *Michael M. v. Superior Court*, 450 U.S. 464 (1981); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); ***Johnson v. Transportation Agency,*** 480 U.S. 616 (1987); *Board of Directors, Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); ***Price Waterhouse v. Hopkins,*** 490 U.S. 228 (1989). Brennan's majority opinions are bolded. The Court also decided lesser-known sex discrimination cases such as *Schlesinger v. Ballard*, 419 U.S. 498 (1975), whose opinion Brennan wrote.

[92] Riccucci, Norma (2002). *Managing Diversity in Public Sector Workforces*. Boulder, CO: Westview, p. 61.

[93] The majority opinion in *Reed v. Reed*, 404 U.S. 471 (1971), brought sex discrimination into the Court's scheme of Equal Protection Analysis. Under the *Reed* decision, sex was to be analyzed at the lowest tier of protection: the Rational Basis Test.

[94] Suspect classes are ones in which members share an ascribed and immutable characteristic that has been accompanied by a history of discrimination based on that characteristic and have little to no political power. Discrimination based on a suspect classification is subject to the Court's highest level of equal protection analysis—strict judicial scrutiny. The Court does not consider females a suspect class; sex discrimination is analyzed at intermediate scrutiny.

Sharron Frontiero was a lieutenant in the U.S. Air Force. She sought a dependent's allowance for her husband who was a graduate student with limited income. 37 U.S.C. 401, 403 and 10 U.S.C. 1072, 1076 stated that the wives of members of the military automatically qualified for dependency status for purposes of medical benefits and allowances. The husbands were not required to prove that their wives were actually dependent. Instead, the husbands were simply required to submit an affidavit attesting to the fact that their wives were dependent. Husbands of female members of the military, however, were not automatically given dependency status. Instead, the wives had to prove that their husbands were dependent on their wives for more than one-half of their financial support. Frontiero's request for dependent status for her husband was rejected because she was not able to meet the statutory standard. She and her husband Joseph brought suit against the Secretary of Defense alleging unconstitutional sex discrimination inconsistent with the mandates of the Fifth Amendment's due process clause. The Court had to determine whether the federal law requiring different qualification criteria for male and female military spousal dependence unconstitutionally discriminated against women and therefore violated the Fifth Amendment's Due Process Clause. In a plurality decision, the Court determined that the sex-based differential treatment was unconstitutional.

In the first part of his opinion, Brennan observed that the primary reason for the different qualification criteria was administrative convenience. He wrote: "Indeed, given the fact that approximately 99% of all members of the uniformed services are male, the District Court speculated that such differential treatment might conceivably lead to a 'considerable saving of administrative expense and manpower'" (pp. 681-682). This

speculation did not constitute concrete evidence of the potential savings, according to Brennan. He said, for example, that the government would need to demonstrate that it is actually cheaper to grant increased benefits to all male members of the military than it is to determine as a matter of fact that each member qualifies for the benefits. Even if the government were able to prove the administrative efficiency of such a practice, it would not be enough to justify the sex-based classification. While he did not deny that administrative convenience is a legitimate interest, he does deny that it is a more valuable interest than not discriminating on the basis of sex. Quoting the Court's decision in *Stanley v. Illinois,*[95] Brennan stated, "…although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency'" (p. 690). He also wrote that when subject to strict judicial scrutiny, administrative convenience will not qualify as a compelling interest, and therefore would not be enough to sustain a sex-based classification on its own. To assume for purposes of administrative efficiency that wives are automatically dependent on their husbands while requiring wives to prove their husbands are dependent is not tolerable under the Fifth Amendment.

Next, Brennan explained why a stereotypical approach to sex differentiation is unacceptable, even if it is convenient. He acknowledged that ideas about appropriate roles for women and men in society were deeply ingrained in what he called romantic paternalism—the notion that women are fragile, timid, delicate, and without much cognitive ability. Men must therefore serve as their protectors and also be the defenders of their virtue and innocence. Belief in such ideas had caused many laws to be passed that systematically hindered women's progress in the workplace and in society in general.

[95] 405 U.S. 645 (1972)

Brennan likened these discriminatory laws to that of pre-Civil War slave codes, arguing that both differential treatment based on sex and differential treatment based on race had placed women and African Americans at a tremendous disadvantage. For this reason, Brennan said the Courts must scrutinize sex discrimination thoroughly.

Brennan's comparison of sex discrimination to race discrimination is not inconsequential. He made this comparison to convince the other Justices that sex discrimination should be subject to the same level of scrutiny as race discrimination. He made two important points about sex classification. First, he said that like race, sex is an immutable characteristic—it is a biological characteristic based solely on chance at birth. Second, he said that sex usually bears no relationship to how well an individual may perform tasks or contribute to society. To continue to make broad generalizations based on sex (usually to the detriment of women) would be to relegate as inferior an entire class of persons without considering them as individuals. In this analysis, Brennan returned to his philosophy of individual human dignity being the primary mandate of the U.S. Constitution. He wanted both women and men to be considered on their own merits, not as aggregate members of a sex-based class.

To provide further evidence that his thinking was in line with the current direction of Congress (and therefore the current direction of society reflected in representation), Brennan noted that eight years prior to this case, Congress passed the Civil Rights Act of 1964, which prohibits employers from discriminating based on sex. He also mentioned the passage of the Equal Pay Act of 1963 and the pending ratification of the Equal Rights Amendment. These were proof, according to Brennan, that Congress recognized the fallibility of generalized sex-based distinctions.

Brennan concluded that sex-based classifications were inherently suspect and the Courts must subject them to the highest level of scrutiny. Only three Justices agreed with that part of Brennan's opinion—Justices Marshall, Douglas, and White. Brennan was not able to convince the remaining five Justices to move sex-based classifications into the category of strict judicial scrutiny. Although disappointed in this failure to secure a fifth vote, he remained positive that it would happen in a future case.

Justice Rehnquist wrote a dissenting statement, noting only that the Court should have applied the rational basis test. In Justice Powell's concurring opinion, he agreed with Brennan that the sex-based classification in the case was unconstitutional. But, he disagreed that all sex-based classifications are unconstitutional and/or should be subject to strict scrutiny. He wrote that the decision of whether to maintain sex-based classifications is a political one, not a judicial one. He wanted to reserve that decision for the will of the people. The Equal Rights Amendment, which had been passed by Congress and was awaiting ratification, had reached no final conclusion. Justice Powell was willing to reserve judgment on the issue of sex-based classifications until after a political decision on the Equal Rights Amendment was made.

> There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes. (p. 692)

Clearly, Justice Stewart as well as Chief Justice Burger and Justice Blackmun, both of whom joined Powell's concurring opinion, also believed the Court should restrain itself until a more democratic decision could be made regarding sex-based classifications.

Why was Brennan not willing to do the same? The answer lies in the value he placed on realizing the Constitution's ultimate goal of protecting the dignity of all human beings. As he noted in the interview with Bill Moyers,[96] some subjects are beyond the reach of majority rule. For Brennan, the decision of whether to allow discrimination based on sex, barring some compelling government interest that is sufficiently specific and narrowly tailored, was not a decision that should be subject to the whims of a majority. In fact, he already explained in his opinion how a majority had helped to create and sustain such discrimination in the first place to the unjust detriment of both women and African Americans.

Sex-based classification aside, Brennan and the majority of the Court did agree that administrative convenience was a legitimate pursuit. This point is important for public administrators to understand. Often, administrators look for the most efficient and most effective methods of approaching tasks. The Court recognized that this must continue. However, the Court also was clear that efficiency and effectiveness are not the only values to consider, nor are they necessarily the most important ones. Just how important these values are will be weighed against any competing value in a given case. And, depending on the level of scrutiny the actions are subject to, efficiency and effectiveness may not be sufficient justification for administrative practices. In this case, efficiency and effectiveness did not justify sex discrimination.

Two years after *Frontiero*, the Court revisited sex-based classifications in the military context in *Schlesinger v. Ballard* (1975). This time, the case involved separate promotion policies for male and female officers. Pursuant to 10 U.S.C. 6382 and 10 U.S.C. 6401, male and female Navy lieutenants were subject to separate promotion

[96] "Mr. Justice Brennan" 1994.

policies, which allowed females to remain in service for thirteen years before being discharged after failing twice to be promoted while allowing only 9 years for similarly situated males. After twice failing to be promoted, Lieutenant Robert Ballard was subject to a mandatory discharge from the Navy. He brought suit to enjoin the Secretary of Defense from enforcing the discharge order. In his claim, he argued that the separate promotion policies for males and females violated the due process clause of the Fifth Amendment. The question before the Court was whether the separate tenure policies for males and females before mandatory discharge violated the due process clause of the Fifth Amendment. In a 5-4 decision, the Court determined that it did not.

If we return to the court's decision in *Frontiero*, Brennan warned that administrative convenience alone would not suffice as a reason to justify sex-based discrimination. The government appears to have heeded this warning. While it did assert administrative efficiency as a reason for the sex-based discrimination, the government also argued that the sex-based classification in this case differed from the classification in *Frontiero* because it was not an overbroad generalization stemming from sex-based stereotypes. In the majority opinion, Justice Stewart described the difference.

> In contrast, the different treatment of men and women naval officers under 6382 and 6401 reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service….Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs." (p. 508)

Stewart also noted that where male and female lieutenants are similarly situated, Congress did not prescribe a sex-based promotion and tenure policy. Therefore, according to the Court's majority, the sex-based classification did not violate the Fifth Amendment.

The number of lieutenant commanders in the Navy was set by statute, and the number of lieutenants eligible for promotion at any time depended on the number of vacancies at that rank. If there were no vacancies, the promotion candidates were placed on a waitlist to be considered as vacancies occurred. This process applied to the lieutenant commander rank and to other categories of officers in order to prevent stagnation; the availability of fewer positions at higher levels of the organization made a mandatory attrition necessary. Stewart reasoned that it was this organization structure that necessitated the difference in treatment for men and women, not just administrative convenience.

> Section 6401 is the mandatory-attrition provision that applies to women officers appointed under 5590, including all women line officers and most women officers in the Staff Corps. It provides for mandatory discharge of a woman officer appointed under 5590 when she "is not on a promotion list" and "has completed 13 years of active commissioned service in the Navy." 6401. Section 6401 was initially intended approximately to equate the length of service of women officers before mandatory discharge for want of promotion with that of male lieutenants discharged under 6382 (a). Subsequently, however, Congress specifically recognized that the provisions of 6401 would probably result in longer tenure for women lieutenants than for male lieutenants under 6382. When it enacted legislation eliminating many of the former restrictions on women officers' participation in the naval service in 1967, Congress expressly left undisturbed the 13-year tenure provision of 6401. And both the House and the Senate Reports observed that the attrition provisions governing women line officers would parallel "present provisions with respect to male officers except that the discharge of male officers probably occurs about 2 years earlier." S. Rep. No. 676, 90th Cong., 1st Sess., 12; H. R. Rep. No. 216, 90th Cong., 1st Sess., 17. (pp. 504-505)

With these facts, Stewart analyzed whether the provisions of the statute amounted to unconstitutional sex discrimination. He reviewed the holding and the reasoning in *Reed* and *Frontiero* and determined that the sex discrimination present in *Schlesinger* was different because it was not based on outdated gender stereotypes. Rather, it was based on the fact that men and women did not have similar career opportunities in the military.

> Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U.S.C. 6015. Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs." (p. 508).

Stewart finally mentions that in corps where men and women were similarly situated, Congress did not call for separate promotion and tenure policies. Based on this analysis, he concludes that the policy challenged is constitutionally sound.

In his dissenting opinion, Brennan took a different approach to the case. To begin, he reaffirmed his commitment to having sex-based classifications analyzed at the level of strict judicial scrutiny. Recall in *Frontiero* that Brennan fell just one vote short of convincing a majority that strict scrutiny was the correct standard of review. He tried again in this case to elevate the level of scrutiny. With an elevated standard of review, Brennan could then require the government to have more than just a legitimate objective; he could require it to have a compelling objective. He examined the government's objective and concluded that it was not compelling.

When examining the government's objective, Brennan relied on the legislative history of the two statutory provisions in question. He examined the debate records to understand the purpose behind separate tenure policies for male and female Navy lieutenants. He noted that Congress's original purpose was to "create the same tenure in years for women lieutenants as for the average male lieutenant before involuntary separation was permitted" (p. 513). In his examination, he discovered that Congress intended for most of the restrictions placed on women's opportunities in service to be eliminated.

> In 1967, Congress decided to eliminate many of the provisions restricting career opportunities for women. In doing so it wished, as the Court notes, to provide women with fair and equitable career advancement programs. H.R. Rep. No. 216, supra, at 5. However, contrary to the Court's assumption, Congress determined to achieve this goal, not by providing special compensatory treatment for women, but by removing most of the restrictions upon them and then subjecting them to the same provisions generally governing men. Id., at 3: S. Rep. No. 676, supra, at 2. (p. 514)

He concluded that "in light these statements, Congress could not have had the purpose of compensating women line officers for their inferior position in the Navy by retaining longer tenure periods for women" (p. 516). Thus, for Brennan, the congressional objective that the Court's majority infers is not consistent with the legislative intent. If the government's actions are not consistent with the legislative intent of the statute, then the government has no compelling interest, and the differences in treatment of men and women cannot be substantiated.

> Therefore, the separation provisions for women line officers, given the rest of the statutory provisions applicable to them, had to be pegged to time served rather than to opportunities for promotion. The number of years selected for women line lieutenants, 13, corresponded exactly to the normal number of years Congress intended to precede separation for a male officer not chosen for promotion. See ante, at 504-505, n. 9. Thus, Congress' original purpose in enacting slightly different separation provisions for men and women is quite certain - to create the

> same tenure in years for women lieutenants as for the average male lieutenant before involuntary separation was permitted. (p. 513)

Brennan simply disagreed with Stewart about the legislative intent of the sex-based discrimination. Stewart argued that the purpose of allowing females more time than males in the promotion process for some positions was to compensate for the unequal opportunities women faced in Navy service. To the contrary, Brennan concluded that the separate promotion process is based on time served, not on opportunities available.

> Second, the legislative history of the 1967 Act makes quite clear that Congress' purpose in retaining the 13-year tenure for women line lieutenants was not to take account of the limited opportunities available to women in the Navy. Congress explicitly recognized that in some instances involuntary retirement and separation provisions "permit women to remain on active duty for longer periods than male officers." It believed that "[u]nder current circumstances, there is no logical basis for these differences." (pp. 515-516)

Brennan once again maintained his commitment to upholding policies designed to correct the effects of past discrimination against a group. He did not believe this is such a case.

> Further, while I believe that "providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect" can serve "the compelling . . . interest of achieving equality for such groups," *Kahn v. Shevin*, (BRENNAN, J., dissenting), I could not sustain this statutory scheme even if I accepted the Court's supposition that such a purpose lay behind this classification. Contrary to the Court's intimation, ante, at 508, women do not compete directly with men for promotion in the Navy. Rather, selection boards for women are separately convened, 10 U.S.C. 5704, the number of women officers to be selected for promotion is separately determined, 10 U.S.C. 5760, promotion zones for women are separately designated, 10 U.S.C. 5764, and women's fitness for promotion is judged as compared to other women, 10 U.S.C. 5707. In this situation, it is hard to see how women are disadvantaged in their opportunity for promotion by the fact that their duties in the Navy are limited, or how increasing their tenure before separation for nonpromotion is necessary to compensate for other disadvantages. (p. 518)

Brennan's approach to decision making in this case rests firmly on his philosophy that any sex-based discrimination by government must be accompanied by a compelling interest or objective. If none is present, then the discrimination is unconstitutional. In this instance, Brennan also showed his willingness to apply the same criteria to cases of sex-based discrimination regardless of whether the person adversely affected is male or female. This is interesting because Brennan often was seen only as a champion of women's rights. For example, Rosenkranz and Schwartz refer to Brennan as "the most constant speaker for women's equality."[97] In *Schlesinger*, however, Brennan clearly required the same standard for sex-based discrimination for both males and females.

He does so again in *Craig v. Boren,*[98] a case in which Brennan met with some success in having the level of judicial scrutiny elevated for cases of sex-based discrimination. In order to understand the significance of the Court's decision in *Craig*, it is necessary to return to the equal protection analysis in place prior to this decision and then compare it to the modified analysis used after the decision. Table 5 describes how the Court analyzed Fourteenth Amendment equal protection cases after determining that sex-based discrimination was a violation of equal protection in *Reed v. Reed*[99] but prior to *Craig v. Boren*.

[97] Rosenkranz, Joshua and Bernard Schawtz, eds. (1997). *Reason and Passion*. New York, NY: Norton, p. 186.
[98] 429 U.S. 190 (1976)
[99] 404 U.S. 71 (1971)

**Table 5: Equal Protection Analysis from 1971-1976**

| Level of Analysis | Analytical Questions |
|---|---|
| Lowest Tier: Rational Basis Test | 1. Does the state have a legitimate policy objective?<br>2. Are the means used to achieve that objective reasonably or rationally related to that objective? |
| Highest Tier: Strict Scrutiny Test | 1. Does the state have a compelling policy objective?<br>2. Are the means used to achieve that objective narrowly tailored to be the least restrictive effective means of achieving that objective? |

From 1971-1976, the Court applied the lowest tier of analysis to cases of sex discrimination: the Rational Basis Test. In the *Craig* decision, the Court added a new tier of analysis, one that fits between the Rational Basis Test and Strict Scrutiny Test. Table 5 shows how the courts analyze Fourteenth Amendment equal protection cases after *Craig v. Boren*:

**Table 6: Equal Protection Analysis After 1976**

| Level of Analysis | Analytical Questions |
|---|---|
| Lowest Tier: Rational Basis Test | 1. Does the state have a legitimate policy objective?<br>2. Are the means used to achieve that objective reasonably or rationally related to that objective? |
| Middle Tier: Intermediate Scrutiny Test | 1. Does the state have an important policy objective?<br>2. Are the means used to achieve that objective substantially related to that objective? |
| Highest Tier: Strict Scrutiny Test | 1. Does the state have a compelling policy objective?<br>2. Are the means used to achieve that objective narrowly tailored to be the least restrictive effective means of achieving that objective? |

When a government's classification of people is unreasonable or arbitrary, it violates the equal protection clause of the Fourteenth Amendment. In considering equal protection challenges, the standard of review is a critical factor. Since *Craig*, the courts have consistently applied a three-tier analysis to equal protection cases. First, the rational basis test applies to state regulation of business and discriminatory classifications against some non-suspect classes (e.g., a particular age group) and assumes that the state's law is constitutional. The challenging party has the burden of proving the discrimination unconstitutional. Here, the courts ask whether the state has a legitimate goal that requires creating a category of persons and whether the means chosen to achieve the goal are rationally or reasonably related to the goal. Discrimination based on age, for example, would be analyzed at this level. The second tier is the intermediate scrutiny test. Here, the government must have an important interest or goal, and the classification must be substantially related to achievement of that goal. All sex discrimination cases currently are evaluated at this level of analysis. The third tier of review, strict scrutiny, applies where there is a suspect classification (an ascribed physical characteristic, a history of discrimination because of that characteristic, and little to no access to political power) or denial of a fundamental right. Any classification based on race is assumed to be both suspect and unconstitutional, and the state has to show (1) a compelling interest in the discrimination, and (2) that the discriminatory policy is narrowly tailored to meet that compelling goal.

As we saw in *Frontiero v. Richardson*, Brennan was unsuccessful in convincing a majority of the Court to analyze sex discrimination at the level of strict scrutiny. Two years later in *Schlesinger v. Ballard*, Brennan continued to push for this elevated level of

scrutiny but still was not successful. Finally, in *Craig*, he succeeded in convincing four Justices at least to create a new and higher tier of analysis for sex discrimination cases, even though it fell short of his aspiration for strict judicial scrutiny. While not an ultimate victory for Brennan, the new tier of analysis (the intermediate scrutiny test) was a signal that the Court would no longer defer to the wisdom of the states in matters of sex discrimination. From this point, states would need more than a legitimate policy objective to justify sex discrimination. Instead, the state would need an important policy objective, and sex-based discrimination would need to be substantially related to that objective. This increased burden on the states to prove the necessity of sex-based distinctions affords more protection against sex discrimination—which was Brennan's goal.

In *Craig*, the state of Oklahoma passed a statute that prohibited the sale of 3.2% non-intoxicating beer[100] to males under the age of 21 and females under the age of 18.[101] Under this statute, Appellees Whitener (an Oklahoma licensed seller of the 3.2% non-intoxicating beer) and Craig (a male in the prohibited purchaser age range of 18-21) brought suit against the state for violating the Fourteenth Amendment's equal protection clause. They alleged that the sex-based discrimination was unconstitutional. The Court had to decide if not allowing males between the ages of 18 and 21 to purchase 3.2% non-intoxicating beer while allowing females to do so violated the equal protection clause of the Fourteenth Amendment. As we know from our prior two cases, among the first

[100] Some states allow the sale of non-intoxicating beer to minors. It is also called low-alcohol beer, small beer, and non-alcoholic beer. The alcohol content in this beer usually ranges from .05% to 1.5% alcohol by volume. For example, West Virginia's Nonintoxicating Beer Act defines nonintoxicating beer as "containing at least one half of one percent alcohol by volume, but not more than nine and six-tenths of alcohol by weight, or twelve percent by volume, whichever is greater…." West Virginia Code, Chapter 11, Article 16, Section 3.

[101] Oklahoma Statute Title 37, Sections 241 and 245

questions that the Court will ask is what, precisely, is the government's objective in having the sex-based policy. In this case, the government said its objective was traffic safety. Drawing on national studies, Oklahoma concluded that females between 18 and 21 years old were less likely to be involved in alcohol-related traffic accidents than were their male counterparts. The Court agreed that traffic safety was as an objective. Prior to this case, the government would only need to show that traffic safety was a reasonable or legitimate objective. However, in *Craig*, the Court asked the government to show that traffic safety was an important objective. This subtle yet significant change in the language signaled that a new standard was present. What is the difference between an "important" objective and a "legitimate" objective? The distinction is not easily explained semantically; however, the Court indicated that it was a higher standard requiring the government to show the objective in question had more value than others. Even being subject to the higher standard, the Court accepted that traffic safety was an important government objective.

Prior to *Craig*, the government would have shown that the means of achieving traffic safety (i.e., the sex-based policy requiring different treatment of males and females) was reasonably related to achieving traffic safety. However, the Court elevated this standard, and now the government had to show that the means of achieving traffic safety was substantially related to achieving traffic safety. According to Brennan, Oklahoma failed this part of the test.

> We accept for purposes of discussion the District Court's identification of the objective underlying 241 and 245 as the enhancement of traffic safety. Clearly, the protection [429 U.S. 190, 200] of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction

> closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge. (pp. 199-200)

The statistics that Brennan referred to were ones presented by Oklahoma. To validate its position, the state relied heavily on statistics. It believed these statistics established firmly that the sex-based differential treatment was warranted. The statistics that the state provided included:

- An analysis of arrest statistics for 1973 showed that 18-20-year-old male arrests for drunkenness and for driving under the influence were significantly higher than female arrests for that same age range.
- Young persons aged 17-21 were overrepresented among those killed or injured in traffic accidents, and the number of males exceeded the number of females.
- A random roadside survey in Oklahoma City showed that young males were more likely to drink beer while driving than were young females.
- The Federal Bureau of Investigation's nationwide statistics concluded there had been an increase in arrests for driving under the influence.
- Statistics seemed to demonstrate that vehicle accidents resulting from drinking and driving was prominent among youth in other states (Minnesota and Michigan, for example).

To many, these might appear to satisfy the state's burden of proof. Even the Court does not deny the urgency of the situation in regard to youth drinking and related traffic safety issues. However, Brennan criticized these statistics:

> The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate - driving while under the influence of alcohol - the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a

> decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this. (pp. 201-202)

Brennan reasoned that there must be more than an empirically verifiable difference in the behavior of males and females in regard to alcohol consumption. For Brennan, the nexus between the different behavior and the justification for a discriminatory policy based on sex must be "substantial." In examining the statistical evidence that Oklahoma presented, Brennan found only a minimal relationship between the discriminatory policy and the goal of increasing traffic safety. In other words, the relationship was not substantial.

The implications of this part of the decision for public administrators are important. One of the justifications for administrative discretion is bureaucratic expertise. It is said that bureaucrats possess the technical knowledge and skills to implement policy. It may seem unusual for the courts to scrutinize the experts' statistics as was done in this case. But, a closer look at Brennan's comments reveals that it is not so much the statistics that he scrutinized but more so the relationship between those statistics and the government's asserted objective.

> It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. (p. 204)

So, although state officials used quantitative evidence to justify the sex-based differentiation, the Court determined that the statistics did not suffice to meet the standard required by the equal protection clause. The lesson is that although statistics may present aggregate data regarding behavior, the mandate of the equal protection clause is for individual consideration. For Brennan, the equal protection clause placed limitations on government actions.

> In fact, social science studies that have uncovered quantifiable difference in drinking tendencies dividing along both racial and ethnic lines strongly suggest the need for application of the Equal Protection Clause in preventing discriminatory treatment that almost certainly would be perceived as invidious. (p. 208)

The primary controversy among the justices in this case centered on the standard of review. The two-tier analysis that existed prior to this case was revised to include a third tier of analysis specifically for sex discrimination. Justice Powell indicated in his brief concurring opinion that he had reservations about elevating the standard of review for sex-based classifications, and he thus concurred in judgment but not in the Court's application of intermediate scrutiny. He believed the Court's approach was too ambitious. He stated that the rational basis test as established in *Reed* would have sufficed to hold Oklahoma's sex-based discrimination unconstitutional. For him, there was no reason to elevate the standard of review. Likewise, Justice Stevens wrote a concurrence in which he argued that the standard of review should be the same regardless of the type of discrimination. He wrote:

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard. (pp. 211-212)

Therefore, he advocated for only one tier of review as opposed to either two or three. Stevens also conceded that the sex-based discrimination was not irrational given the statistical evidence presented by the state. He was not convinced, though, that the state had provided an "honest" reason for the sex-based discrimination. The state alleged its interest was in maintaining safe public highways. Why not prohibit the sale of 3.2% beer altogether, according to Stevens? Further, Stevens noted that the law only prohibited the

sale of the non-intoxicating beer, not the consumption of it. He could make no sense of the state's position. Justice Stewart also concurred that the state's sex-based classification is irrational because the statistics provided are too broad. Still, he believed it was unnecessary to elevate the standard of review when the statute could be invalidated under the rational basis test.

Chief Justice Burger wrote a dissenting opinion in which he argued there were no grounds on which to move sex into a different tier of analysis. He noted that the Court's decision in effect makes "gender a disfavored classification" (p. 217) with no basis for doing so. He found no fundamental right in the Constitution that would make sex-based classifications automatically disfavored. He said that applying the rational basis test would have been sufficient to uphold the state's statute. And, he noted that although the Court may not think the sex-based classification is wise, the state should be allowed to use it as long as it is rational. He was satisfied that Brennan retreated from his effort to have sex designated as a suspect class.

> The only redeeming feature of the Court's opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero v. Richardson*, from their view that sex is a "suspect" classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis expounded in cases such as *McGowan v. Maryland* and *Williamson v. Lee Optical Co.,* and I believe that it is constitutional under that analysis. (pp. 217-218)

Burger returned to the Court's opinion in *Frontiero* and determined that its primary reason for wanting to elevate sex-based discrimination to a higher level of scrutiny was to account for the history of discrimination against women. Burger wondered why the Court chose this case to elevate the standard of review given no such history of discrimination was used against men.

> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized - the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved - so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objective, rather than related in some other way to its achievement? (pp. 220-221)

Burger also accepted the statistical evidence offered by the state. He said the statistics show the rationality of the state's sex-based discrimination, and he also commented that the state is not required to submit perfect statistics; the state is more equipped than the judiciary to evaluate the significance of the statistics.

Burger's conclusion helps explain why Brennan felt so strongly about having a higher level of scrutiny for sex-based classifications. Burger admitted that under the rational basis test, most sex-based classifications would not violate the equal protection clause. For Brennan, these types of sex-based classifications deprive a class of people (those adversely affected by a sex-based classification) of human dignity.

Clearly, Brennan placed a high value on the right of an individual to be considered as an individual and not be discriminated against because he or she was born male or female. Burger was mistaken in stating that settling for intermediate scrutiny in *Craig* meant Brennan was retreating from his effort to have sex analyzed under strict scrutiny. Brennan continued to advocate strict judicial scrutiny as the appropriate standard of review for sex-based classifications. He did so, for example, in *Geduldig v.*

*Aiello,*[102] *Weinberger v. Wiesenfeld,*[103] *Califano v. Goldfarb,*[104] *Orr v. Orr,*[105] and *Michael M. v. Superior Court.*[106] For the remainder of his time on the Court, Brennan never waivered in his position that sex-based classifications were inherently suspect and should be held to the highest level of judicial scrutiny, and he often compared the illogic of sex-based discrimination to the illogic of race-based discrimination. I turn next to Brennan's jurisprudence on such race-based discrimination.

## RACE-BASED DISCRIMINATION

### PUBLIC SCHOOL DESEGREGATION

Applying Justice Brennan's jurisprudence to public administration dilemmas involving the Fourteenth Amendment's equal protection clause in regard to race is as instructive as it is for sex. Even though these issues continue to plague public administration, normative lessons in Brennan's framework at the very least help administrators to ask the right questions. The subtleties of racism in the public sector have drawn the ire of some who view the practice as not only immoral but also illegal. For the most part, *de jure* discrimination has been replaced with *de facto* discrimination,[107] but the latter has no less significance in the lives of the victims. Critical race theorists have examined the effects of both types of discrimination across

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[102] 417 U.S. 484 (1974)
[103] 420 U.S. 636 (1975)
[104] 430 U.S. 199 (1977)
[105] 440 U.S. 268 (1979)
[106] 450 U.S. 464 (1981)
[107] *De jure* discrimination refers to official government discrimination as a matter of law and policy. *De facto* discrimination refers to unofficial government discrimination and emphasizes the discriminatory effects of policies even when there has been no discernable intent as a matter of law and policy.

several areas of public policy, education included, and some have concluded there is no difference at all.[108]

Brennan was appointed to the Court in 1956. Just two years prior to his appointment, the Court had handed down its decision in *Brown I*.[109] The political environment in regard to race was tumultuous to say the least. There was violent resistance to desegregation in public accommodations as well as education, and lynchings and other forms of brutality toward African Americans were common. Justice Brennan believed firmly that democracy required each citizen to have equal political status, and one of his first tasks was to move the Court in the direction of proclaiming solidly and without hesitation the principle of equality. Brennan was not content with either the abstract principle of political equality or theoretical equality before the law. He understood institutional reinforcement was needed to transform those principles into concrete realities. He tried to provide such reinforcement in 1968. In *Green v. County School Board of New Kent County,* Brennan firmly prioritized desegregation over administrative flexibility and condemned bureaucratic foot-dragging.[110]

Following *Brown v. Board of Education,* some states passed legislation to prevent racial desegregation in public schools. At other times, school systems used bureaucratic foot-dragging to prevent desegregation while others devised desegregation plans that in effect maintained the segregation of public schools. The county school board of New Kent County, Virginia, was one of the latter. The county's population was roughly 50% African American and 50% White, and there was no residential segregation, according to

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[108] For example, see Bell, Derrick (1993). *Faces At The Bottom of the Well: The Permanence of Racism*. New York, NY: Basic Books and Zamudio, Margaret et al. (2010). *Critical Race Theory Matters: Education and Ideology*. New York, NY: Routledge.
[109] *Brown v. Board of Education*, 347 U.S. 483 (1954)
[110] 391 U.S. 430 (1968)

the district court's documentation. The County had two public combined elementary/high schools—one that served African Americans and another that served Whites. In 1965, the County adopted a "freedom of choice" plan—a desegregation plan required in order for the school to continue to receive federal funding. The plan allowed students to choose each year which school they wished to attend. The Board assigned students who made no choice to a school. Students entering first or eighth grade were legally obligated to choose. The Court noted that in the three years that the plan operated, 85% of the African American children still attended Watkins, the designated African American school and no White children attended Watkins. New Kent County believed that since it gave all students a choice about which school to attend, it did not violate the Court's order to desegregate the public schools.

The question before the Court was whether the "freedom of choice" plan violated its desegregation orders in *Brown I and II.* In his unanimous majority opinion, Brennan examined whether the school board's plan was consistent with the goal of desegregation—to create a "unitary, nonracial system of public education" (p. 436). He concluded for a unanimous Court that the "freedom of choice" plan was unconstitutional.

Brennan conceded that desegregation was an administrative process that must be flexible. Brennan emphasized that the burden of desegregation, though, is on the school board, not the children or their parents. In describing the district court's role in reviewing desegregation plans, he wrote that there is no one plan will work for every school district:

> Consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will consider the adequacy of any plans the defendants may

> propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system Id, at 300-301. (pp. 436-437)

Brennan ultimately concluded that the “freedom of choice” plan does not achieve desegregation quickly enough to be consistent with the mandate of *Brown*. Because the plan had been in place for three years yet had failed to integrate the schools, Brennan saw no progress toward the goal of desegregating the schools with all deliberate speed. He did not go so far as to say the plan could not work at some point, but with no tangible results within a three-year time period, he was doubtful. He noted there are likely speedier ways to achieve the goal. The “freedom of choice” plan maintained a dual school system based on race, and that was not permissible.

In this case, two points are important. First, Brennan recognized that administration requires flexibility. In his analysis, Brennan said that administrative action can take time, and he also noted that there is no one best way to approach the task of desegregation. Second, he weighed this administrative flexibility against the goal of desegregation and concluded that desegregation held the stronger value. Brennan’s mandate of more effective administrative action in regard to desegregation stemmed directly from the value he placed on ensuring racial equality in the New Kent County school district, and compelling immediate administrative action was his way of forcing the school district to accept his dominant value.

> In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. Brown II

> was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. (pp. 437-438)

Brennan's decision in *Green* did not lead immediately to desegregated public schools in the South. In fact, Gerald Rosenberg questions whether courts can be the cause of such social changes.[111] He asserts that courts could influence change through a judicial path or an extra-judicial path. With the judicial path, courts have a direct influence on change by requiring action. For example, if a court orders desegregation, then segregation should end. With the extra-judicial path, courts effect change by influencing individuals to examine and change their opinions. In this latter, the courts' influence is more symbolic than substantive.

**AFFIRMATIVE ACTION**

Policies designed to correct the effects of past discrimination may raise concerns about what values should receive priority. For example, one may ask whether the consideration of a university admissions applicant's race is consistent with the value of merit. The Court's analysis of these policies, collectively referred to as *affirmative action*, is discussed in this section. Before continuing to Brennan's opinion in *Metro Broadcasting v. FCC*, I explain the significance of racial representation in public organizations.

Predictions about the future racial and ethnic makeup of workplaces and the implications for organizational operations have long been the subject of public discourse.

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[111] Rosenberg, Gerald (2008). *Can Courts Bring About Social Change?* 2nd ed. Chicago, IL: University of Chicago, p. 7.

More recently framed as issues of "diversity," some of the questions raised include: How will the workplace reflect changes in American demographics? What, if any, changes will be necessary? How will the changes be managed?

Recruiting and retaining an inclusive workforce that is representative of the public served is an important task in public organizations. However, such a goal is also controversial. The issue stirs up deeply rooted convictions, and one can hardly ignore the passionate moral, political, and legal rhetoric that follows. Few doubt the importance of a diverse and representative public workplace. However, the complications arise from the definitions of terms such as *representative* and *diverse* and furthermore from how to achieve these ideals. It is not uncommon for some to advocate, on the one hand, workplace diversity and then to denounce, on the other hand, affirmative action policies, one of the primary methods of achieving diversity. Powerful tales are told about how an unqualified candidate received a job because he was African American or she was female or of some other minority classification. Although usually inaccurate, the perception of unfairness comes across strongly in affirmative action discussions, and most affirmative action supporters are forced to explain why it is necessary to have such policies in light of the country's history of discrimination. Despite the perceptions, Norma Riccucci notes that white males have the best chance of getting jobs and of securing promotions in the public sector, particularly at higher levels of organizations.[112]

Courts consistently have ruled that racial quotas are unconstitutional (see *Regents of the University of California v. Bakke*).[113] Beyond quotas, though, there is room for an array of policies whose goal is to diversify the public workforce. Justice William J.

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[112] Riccucci, Norma (2002). *Managing Diversity in Public Sector Workforces*. Boulder, CO: Westview.
[113] 438 U.S. 265 (1978)

Brennan made significant contributions to administrative law on matters of race-based classifications and the normative value of representative bureaucracy, but he tried to do so according to principles of individual rights and social progress. As I have mentioned, the primary principle of Brennan's constitutional philosophy is human dignity. According to Brennan, the Constitution exists to preserve human dignity. Brennan extended this philosophy to include the right of individuals to obtain equal protection of the laws. Brennan's views of equal protection, affirmative action, and equal employment opportunity as guaranteed by the United States Constitution, the Civil Rights Act of 1964, and the Americans with Disabilities Act have important implications for representative bureaucracy.[114]

To implement Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, and national origin, the Equal Employment Opportunity Commission (EEOC) initially adopted a standard where the proportion of women and racial minorities who were employed in a particular occupational category in an organization would equal the percentages these groups constituted of those in the general workforce with the necessary qualifications. This standard was restricted according to the geographic area from which an agency could get qualified applicants. Such a standard presents a chicken-egg dilemma: which comes first, the opportunity or the qualified applicant? The achievement of a workforce that replicates the racial backgrounds of society generally presupposes not only open hiring processes but also equal access to educational or training opportunities to prepare for

[114] Michelman (1999) points out that Brennan did not adhere to the theory that the Constitution is colorblind. Instead, he was an ardent defender of affirmative action policies.

jobs. Further, it assumes the absence of race-based stereotypes in society and in the workplace that hinder the opportunities available to non-white people.

The changing demographics of society and the quest for a public workplace reflecting these changes create challenges as well as opportunities in public administration, especially in regard to representative bureaucracy. The literature on representative bureaucracy is vast. Representation is fundamental to the theory and reality of democracy and the democratic process, and most now acknowledge that legislatures are not the only public bodies expected to draw from the governed.

J.D. Kingsley[115] first used the term *representative bureaucracy* in his 1944 study of Great Britain. In his study, Kingsley analyzed the social background of senior civil servants in England. He noted that the image of the civil servant as a disinterested policy implementer was not an accurate one; he assumed that individuals act in accordance with their values, interests, and experiences. Just a few years later, Reinhard Bendix[116] presented a portrait of senior-level civil servants in the United States that was more or less heterogeneous. By the end of the 1920s, racial segregation was institutionalized in federal personnel administration, and non-white people were excluded from a large number of positions.[117] As time passed, some began to reject the idea that administrators are disinterested implementers of policy who are politically neutral, and a greater concern for a representative bureaucracy emerged. Normative questions such as what type of representation should exist also emerged. Frederick C. Mosher usefully distinguished between passive and active representation. *Active representation* refers to an expectation

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[115] Kingsley, J. Donald (1944). *Representative Bureaucracy*. Yellow Springs, OH: Antioch Press.
[116] Bendix, Reinhard (1949). *Higher Civil Servants in American Society*. Boulder, CO: University of Colorado Press.
[117] Rosenbloom, David and Rosemary O'Leary (2010). *Public Administration and Law*. 3rd Edition. Boca Raton, FL: CRC Press.

that individuals will advocate the interests of those whom they represent whereas *passive representation* concerns the degree to which administrators collectively mirror the composition of society. Mosher states, "While passive representativeness is no guarantor of democratic decision-making, it carries some independent and symbolic values that are significant for a democratic society."[118] In considering this perspective, Sally Coleman Selden elaborates:

> The central tenet of the theory of representative bureaucracy is that passive representation or the extent to which a bureaucracy employs people of diverse demographic backgrounds, leads to active representation, or the pursuit of policies reflecting the interests and desires of those people.[119]

Is having a representative bureaucracy a legitimate or important goal? If so, then what methods are acceptable in trying to achieve a representative bureaucracy? Opinions from the courts (1971-2012) indicated that representative bureaucracy was an important goal. In 2003, the Court reaffirmed diversity at public universities as a *compelling state interest*.[120] Also, the Civil Service Reform Act of 1978 had as a goal the diversification of the federal workplace, one that was reflective of the nation's social diversity. More specifically, it sought to eliminate underrepresentation of various groups in the federal civil service.[121] The idea is that both women and racial minorities should be visible in the public bureaucracy to serve as models to others from their respective backgrounds. If the demographics of administrators are similar to the differences represented in the society as a whole, then it may indicate an equal opportunity for members of traditionally

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[118] Mosher, Frederick C. (1968). *Democracy and the Public Service*. NY: Oxford University Press, p. 13.
[119] Selden, Sally C. (March 1997). "Representative Bureaucracy: Examining the Linkage Between Passive and Active Representation in the Farmers Home Administration." *American Review of Public Administration. 27.1:22-42, p. 22.*
[120] *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003)
[121] Rosenbloom and O'Leary 2010.

non-favored racial groups to secure public employment. Additionally, a racially representative bureaucracy may increase perceptions of legitimacy.

I mentioned earlier that relatively few disagree that workplace diversity is important, but I do not intend to dismiss the position as insignificant because the basis for its arguments has important implications for public administration and also introduces a major aspect of Brennan's jurisprudence. For example, Nathan Glazer argues that classifying people as members of groups violates some of the basic principles of the U.S. Constitution, particularly the importance of individual rights.[122] Judicial decisions regarding equal protection of the laws have had a major impact on public employment opportunities. Historically, discrimination against non-white people was common in the public service. Rosenbloom and O'Leary observe that racial discrimination was a prominent feature of the federal public service until the 1940s.[123] For the most part, statutory law and administrative actions have become the source of equal opportunity promotions in the public sector, but judicial interpretation of the equal protection clause remains critical in sustaining them. Courts have at times bemoaned affirmative action preferences in public employment, and courts remain closely divided on most affirmative action decisions.[124] Brennan's opinions, however, have never been tentative.

Affirmative action is not the same as equal employment opportunity, and the distinction is important not only for legal reasons but also for managerial reasons as well. The term *equal employment opportunity* is a minimalist approach that seeks to avoid discriminatory practices. This approach does not propose to remedy the adverse effects

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[122] Glazer, Nathan (1975). *Affirmative Discrimination: Ethnic Inequality and Public Policy*. New York: Basic Books.
[123] Rosenbloom and O'Leary 2010.
[124] See *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

of past discrimination. In contrast, *affirmative action* is a term used for more aggressive methods of obtaining a representative bureaucracy and allows for the consideration of race, nationality, and sex among other variables. In theory, affirmative action is supposed to last only as long as the remedy is needed. Still, these policies have triggered charges of *reverse discrimination*, a term used to describe cases in which majority-race individuals are allegedly disadvantaged by efforts to achieve diverse representation through minority-race preferences. The current legal mandate for all public sector hiring is for equal employment opportunity; affirmative action policies are not legally mandated in most instances but may be pursued by a public organization to achieve diversity.

Inevitably, some efforts to diversify the public sector workplace may violate the equal protection clause of the Fourteenth Amendment. Where this has happened, the courts have ruled them unconstitutional. Brennan believed, however, that if no effort is made to diversify the public sector workplace, then that too may be a violation of the Fourteenth Amendment. For him, affirmative action was a legitimate effort to bring about a permanent improvement in the human condition. In his James Madison Lecture on Constitutional Law, Brennan said:

> Congress and the judiciary did much in the decade of the 1960s to close the gap between the promise and the social and political reality envisioned by the framers of the Fourteenth Amendment. But today, although unmistakable inequities should disrupt any observer's complacency, the Court is involved in a new curtailment of the Fourteenth Amendment's scope. Although this nation so reveres the civil and political rights of the individual that they are sheltered from the power of the majority, these rights are treated as inferior to the ever-increasing demands of governmental authority.[125]

Justice Brennan relied on the equal protection clause to advocate both representative bureaucracy and equal opportunity. Some argue that the goal should be a colorblind,

[125] Brennan, William J. (1986). "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 *N.Y.U.L. Rev*. 535, p. 546.

culture-blind, and sex-blind employment policy.[126] Brennan certainly believed in efforts to bring about a permanent improvement in the human condition, but he also believed that neither the Constitution nor the public workplace could be or should be colorblind. He concluded that until society eradicates the adverse effects of race and gender discrimination, then affirmative action measures are appropriate. Further, Brennan thought that the Fourteenth Amendment's equal protection clause should be interpreted in light of the nation's history of discrimination against racial minorities. He understood that even though the language of the Amendment is individualistic and it ensures equal protection for a *person*, it should also protect classes of people, particularly those classes that have faced and still face discrimination.

Before examining Brennan's jurisprudence *Metro Broadcasting*, I want to extract a few important ideas from his opinion in *Bakke*. *Bakke* was the first affirmative action case from the public sector to be decided on its merits; it behooves us to consider it as Brennan's starting point for articulating his jurisprudence on the subject. The deeply contested ruling produced no majority opinion on all parts and included seven separate opinions. Justices White, Marshall, and Blackmun all joined Brennan's opinion in the case, but Brennan lacked the fifth vote necessary to create a majority. He tried to persuade Justice Powell (the deciding vote in the plurality decision) that quotas might be necessary to correct past discrimination. Powell instead concluded that quotas were unacceptable, but race may be considered among other factors in affirmative action plans.

Brennan made many noteworthy points in his opinion, but five in particular represent his approach to affirmative action that endured until he retired.

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[126] For example, see Justice Rehnquist's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

1. The Framers of the Constitution openly compromised the principle of equality by sanctioning slavery. The consequences of that compromise are still present.
2. The Fourteenth Amendment's equal protection clause was intended to guarantee former slaves and their descendents the rights of citizenship already enjoyed by most Whites. Soon after its ratification, the clause was turned against the very people it was designed to help.
3. Colorblindness must be viewed as an aspiration, not as a reality.
4. Affirmative action as a remedy for past discrimination does not violate the equal protection clause.
5. Affirmative action policies should be subject to intermediate scrutiny instead of strict scrutiny because they do not disadvantage a traditionally unfavored minority.

These ideas form the foundation of Brennan's commitment to equal protection for all citizens but especially for those who have been historically unable to prosper as the result of discriminatory policies. His position regarding the context and purpose of the Fourteenth Amendment is important in understanding how he justified affirmative action constitutionally. Justice Black made a similar construction in *Goldberg v. Kelly*[127]: "That Amendment came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves" (p. 275). With this background, we can examine his jurisprudence in *Metro Broadcasting Inc. v. FCC* as a continuation of his support for affirmative action programs designed either to redress past wrongs or to assure anti-discrimination in contemporary institutions.

[127] 397 U.S. 254 (1970)

In Brennan's last case before retirement, he rendered the majority opinion in *Metro Broadcasting*. In this case, the Court upheld by a 5-4 vote two Federal Communications Commission affirmative action programs designed to increase African-American and other racial minority ownership of broadcast licenses. Such minority preferences, according to Brennan, were justified by Congress's interest in safeguarding the public's right to receive diverse views and information over the airwaves. Brennan found a non-remedial goal—fostering broadcast diversity—to be substantially related to that government interest.

The FCC adopted two policies to comply with the Communications Act of 1934, which asked the agency to diversify broadcast programming. The FCC determined its past efforts to diversify programming were not successful. It adopted two affirmative action policies:

1. An award enhancement for minorities seeking new licenses;
2. A distress-sale policy that allowed a radio or television broadcaster to transfer a license in question before the FCC made a final ruling about whether the license would be revoked. The transfer could only take place if the owner transferred the license to a minority enterprise.

Two challenges to the FCC's affirmative action policies comprise the case itself. In the first, Metro Broadcasting, Inc. challenged the FCC's policy giving preference to minority owners in licensing proceedings. Three applicants applied for a license to construct and operate a new UHF television station in the Orlando, Florida. Two of the applicants, including Metro Broadcasting, Inc. were majority white owned, but a third applicant, Rainbow Broadcasting, was 90% Hispanic owned. "Metro had only one

minority partner who owned 19.8 percent of the enterprise" (p. 559). An administrative law judge determined that Rainbow Broadcasting should receive an enhancement because of its contribution to diversity. The FCC's Review Board agreed. When weighing Rainbow Broadcasting's diversity contribution against Metro Broadcasting's local residence and civil participation advantage, the Board determined that Rainbow Broadcasting would receive the license. Metro Broadcasting sought judicial review of the Board's decision, arguing it deprived him of equal protection as guaranteed by the due process clause of the Fifth Amendment.[128]

In the second instance, Faith Center, Inc. was issued a Hartford, CT television license. Years later, it petitioned the FCC for a distress sale transfer, and the petition was granted. Under the affirmative action policy, Faith Center, Inc. had to transfer its license to a minority-owned company. It tried twice to do so, and both times, the potential buyers could not complete the transfer because they lacked the finances for the purchase. Finally, Faith Center, Inc. found a minority buyer (Astroline Communications, LLC) and against petitioned the FCC for a distress sale permit. Shurberg Broadcasting, Inc., a non-minority competitor in the same market, opposed the distress sale and alleged it deprived him of equal protection of the laws.

In his opinion, Brennan found that FCC policies did not violate the Fifth Amendment. He pointed out that Congress approved the plans, that there was an important government objective, that there was a substantial relationship between the

[128] The Fifth Amendment has no equal protection clause. Instead, the Court has determined that the right to equal protection is incorporated in the Fifth Amendment's due process clause which maintains no person may be deprived of life, liberty, or property without due process of law. The Fifth Amendment's due process clause is used to challenge federal government actions that allegedly deprive persons of equal protection (See Chief Justice Warren's opinion in *Bolling v. Sharpe*, 437 U.S. 497 (1954)). The Fourteenth Amendment, which does have an equal protection clause, applies only to the states. In *Metro Broadcasting*, the challenged actions are federal actions (Federal Communications Commission policies). Therefore, the suit is brought under the Fifth Amendment instead of the Fourteenth Amendment.

government's objective and the affirmative action policies designed to achieve them, and that the policies were appropriately limited in scope. For these reasons, the affirmative action policies did not violate the Fifth Amendment's due process clause.

In his reasoning, Brennan began by noting the history of discriminatory policies in the FCC that traditionally had disadvantaged racial minorities seeking licenses. He noted that relatively few minority businesses owned radio stations and owned no television stations at all.

> Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country, and none of the more than 1,000 television stations… (p. 553)

He cited other statistics from the FCC Minority Ownership Task Force Report on Minority Ownership in Broadcasting. Written in 1978, this report detailed the problems associated with diversifying broadcast communications to include racial minority representation. Brennan observed that the FCC policies were a last resort. In fact, the FCC did not implement any type of affirmative action measures until 1977. For Brennan, this was a significant finding because it showed that the FCC considered other methods of achieving diversity without first using affirmative action policies. This helped to convince him that other means of achieving the goal simply did not produce the desired result of greater racial minority representation.

After reviewing the history of discrimination prominent in the FCC, Brennan analyzed the Commission's role in implementing Congress's legislation. Brennan found the FCC's policies to be in line with congressional intent.

> It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved - indeed, mandated - by Congress. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Chief Justice Burger, writing for himself and two other Justices, observed that, although "[a] program that employs racial or ethnic criteria . . . calls for close examination," when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to `provide for the . . . general Welfare of the United States' and `to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." Id., at 472; see also id., at 491; id., at 510, and 515-516, n. 14 (Powell, J., concurring); id., at 517-520 (MARSHALL, J., concurring in judgment). (p. 563)

Brennan noted that the goal of the legislation itself was to diversify broadcasting, and this was not just a FCC prerogative but a congressional mandate. The Court must give deference to congressional intent.

Next, Brennan addressed the applicable standard of review. In keeping with his philosophy, Brennan applied the intermediate scrutiny test rather than the strict scrutiny test. He did so because he believed affirmative action programs constituted *benign racial classification*—a term he used to describe race-based classifications that assist disadvantaged races while posing only minimal injury to the majority group.

> We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective. (p. 566)

The application of intermediate scrutiny signaled that no compelling government interest was necessary, only an important one. Important too is Brennan's comment about the non-remedial aspect of affirmative action.

> We hold that benign race-conscious measures mandated by Congress - even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally

> permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. (pp. 564-565)

He also reasoned:

> Congress found that the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications. Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. (p. 566)

The significance of this statement is that for affirmative action cases prior to *Metro Broadcasting*, a history of discrimination was the primary justification for affirmative action policies. In this case, Brennan indicated that the FCC's affirmative action policies move beyond simply correcting a history of discrimination. Instead, they focused on the goal of diversity and that alone was an important government objective. Prior *Metro Broadcasting,* the Court had not espoused this new value placed on diversity in and of itself. And, the Court once again reaffirmed a commitment to this value 13 years later.[129] Brennan also noted that the affirmative action policies were designed to remove barriers that minority applicants faced in the broadcast industry. Drawing from extensive legislative history and congressional intent, Brennan concluded that no Constitutional violation occurred in FCC's implementation of the statute.

Brennan commented that there was a link between minority ownership of broadcasting licenses and access to diverse programming, and he did not believe the relationship was based on impermissible stereotyping.

> Congressional policy does not assume that, in every case, minority ownership and management will lead to more minority-oriented programming or to the

[129] See Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

> expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming," or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case, but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on average, "to the 'robust exchange of ideas.'" To be sure, there is no iron-clad guarantee that each minority owner will contribute to diversity. But neither was there an assurance in *Bakke* that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints. (pp. 579-580)

Brennan conceded the possibility that the affirmative action policies may not actually increase the amount of diverse programming, and for him, no such assurance was necessary. The value of the affirmative action measures lay in their ability to increase the probability that diverse programming would increase.

Finally, Brennan commented on the disadvantage to non-minorities competing for broadcast licenses.

> We do not believe that the minority ownership policies at issue impose impermissible burdens on nonminorities. Although the nonminority challengers in these cases concede that they have not suffered the loss of an already-awarded broadcast license, they claim that they have been handicapped in their ability to obtain one in the first instance. But just as we have determined that, as part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy, *Wygant*, 476 U.S., at 280 - 281 (opinion of Powell, J.), we similarly find that a congressionally mandated, benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities. (pp. 596-597)

Brennan's analysis of *reverse discrimination* is in line with his philosophy of protecting the human dignity of all citizens. He believed that because racial minorities have suffered more injustice, the majority racial group should be willing to suffer minor inconveniences to achieve racial equality. To some, this approach may present a contradiction in Brennan's reasoning. On the one hand, he advocates that individuals be treated fairly and be considered on their own merit. On the other hand, he is willing to place the group interest of those who have suffered historically above the individual interest he also values. When considering Brennan's philosophy of human dignity and when looking at his jurisprudence regarding affirmative action, one can argue that no contradiction is present. In order to afford human dignity to the individual, Brennan finds it necessary to first address how those individuals have been disadvantaged by official government policies specifically detrimental to racial groups. In order to move toward individual equality, the effects of those policies first must be identified and corrected. For Brennan, affirmative action was an effective method of correction.

Justice Stevens wrote a brief concurring opinion. In it, he affirmed his solidarity with the majority and pointed out two aspects of the majority opinion that he found especially pleasing. First, he liked the conclusion that the value in affirmative action policies was not limited to remediation for past discrimination. Second, he agreed that the FCC's policies were narrowly written so that they were not stigmatizing to any racial group.

Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy dissented. O'Connor's opinion was founded on the principle of colorblindness. She began by explicitly stating that the Constitution requires the government take no account of factors

such as race, religion, sex, or nationality in its decision making. She maintained that individuals should be assessed on their own merit as opposed to their group identification. The first part of her opinion discussed the standard of review applied to the case. She was disturbed by Brennan's application of intermediate scrutiny. She noted that the Court traditionally applied strict scrutiny to cases of race-based classifications.

> As we recognized last Term, the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications such as those contained in the challenged FCC distress sale and comparative licensing policies. "Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. Yet the Government's different treatment of citizens according to race is no routine concern. This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications and its conclusion that different equal protection principles apply to these federal actions. (p. 603)

O'Connor hence disagreed with Brennan that affirmative action should be subject to a lower standard of review than other forms of racial discrimination. She wrote that the Fourteenth Amendment bound the federal government and the states from engaging in any form of discriminatory action based on racial classification except under the strictest scrutiny wherein the government was required to show a compelling interest and also present a narrowly tailored policy.[130]

Next, O'Connor took issue with Brennan's use of the term *benign racial classification* to describe affirmative action policies.

> The Court's reliance on "benign racial classifications" is particularly troubling. "Benign racial classification" is a contradiction in terms. Governmental

[130] Ultimately, O'Connor prevailed. In 1995, she wrote the majority opinion in *Adarand Constructors Inc. v. Peña,*[130] a case in which the majority ruled that all race-based policies, including affirmative action, must be subject to strict scrutiny.

> distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, see *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group. The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. (pp. 609-610)

For O'Connor, benign discrimination is still discrimination that interferes with the individual rights of citizens.

In the second part of her opinion, Justice O'Connor conceded the history of discrimination against African American and other racial minorities and deemed it unfortunate. She also conceded that minority representation in the broadcast industry was exceptionally low. In her view, when the direct effects of past discrimination are identified, government has a compelling interest in remedying those effects. But those efforts too must be subject to strict judicial scrutiny to ensure that they do not create additional discrimination not supported by the Fifth and Fourteenth Amendments. She concluded the policies in question were not remedial and were not narrowly tailored to address past discrimination. The only compelling interest permissible is remediation of past discrimination; she disagreed with Brennan that creating diversity qualifies as a compelling government interest. She noted that not even remedying societal discrimination can qualify as a compelling interest. The remedy must be targeted solely at past discrimination, and that discrimination must be "specific and verifiable" (p. 613).

O'Connor concluded that the FCC's policies were not narrowly tailored to fit any remedy for past discrimination and therefore did not pass the strict scrutiny test. She also states that the policies do not even pass intermediate scrutiny.

> Moreover, the FCC's programs cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available. The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity. The interest the FCC asserts is in programming diversity, yet, in adopting the challenged policies, the FCC expressly disclaimed having attempted any direct efforts to achieve its asserted goal. (p. 622)

O'Connor believed that there were more direct and likely effective methods of achieving diverse broadcasting, and these methods would meet with no Constitutional challenges. Because the FCC's policies did not pass strict scrutiny, they must be ruled in violation of the Fifth Amendment's due process clause.

## CONCLUSION

Brennan believed that the equal protection clause was designed primarily to safeguard the rights of persons who were members of a traditionally oppressed group. He devised the three-tier analysis that the courts use today to determine whether an equal protection violation has occurred. Brennan's jurisprudence in the area of equal protection provides an alternative view to the individualistic approach taken by many Justices. While Brennan strongly advocated the idea of individual rights, he also believed that group rights exist constitutionally, especially when history indicated that the group has been disadvantaged by unfavorable interpretations of the Constitution. He never forgot the context of the Fourteenth Amendment, nor did he forget why the Amendment was necessary in the first place. It was a Civil War Amendment designed to bring to African Americans the rights and liberties already enjoyed by the White majority. While he believed progress had been made toward the realization of that goal, he also believed there was still work to be done. His jurisprudence on sex and race discrimination may significantly influence how public administrators consider public values of equality,

diversity, and individualism. Table 7 summarizes the themes in Brennan's jurisprudence in regard to sex and race classifications in administrative decision making. The next chapter provides more detail regarding the value of individual rights in the administrative state.

**Table 7: Themes and Values in Brennan's Civil Rights Jurisprudence**

| Regime Value | Theme | Case Law |
|---|---|---|
| Equity and Equality | Affirmative action programs should not be subject to strict scrutiny, only intermediate scrutiny. | *Metro Broadcasting v. FCC* |
| | Affirmative action is an acceptable means of correcting past discrimination. | *Metro Broadcasting v. FCC* |
| | Diversity is an important state interest that can justify race-conscious policies. | *Metro Broadcasting v. FCC* |
| | Protection from sex and race discrimination is not subject to the majority's approval. | *Schlesinger v. Ballard*<br>*Green v. County School Board*<br>*Metro Broadcasting v. FCC* |
| | Administrative convenience and efficiency are legitimate government interests, but they do not outweigh the interest in eliminating sex discrimination. | *Frontiero v. Richardson*<br>*Craig v. Boren*<br>*Schlesinger v. Ballard* |
| | Empirical data alone do not justify making sweeping generalizations that adversely affect individual rights. | *Craig v. Boren* |
| Social Justice | Administrative actions should promote human rights and value the human dignity of the individual. | *Schlesinger v. Ballard*<br>*Green v. County School Board*<br>*Metro Broadcasting v. FCC*<br>*Frontiero v. Richardson*<br>*Craig v. Boren* |

# CHAPTER FIVE
# WITH LIBERTY AND JUSTICE FOR ALL

*Justice or righteousness is the source, the substance, and the ultimate end of the law.*
-Justice William J. Brennan

## CONSTITUTIONAL RIGHT TO FATHERHOOD

Carole and Gerald married in 1976. Two years later, Carole began an adulterous relationship with Michael. Three years into the affair, Carole gave birth to baby Victoria. On Victoria's birth certificate, Gerald was listed as the father, and he was raising Victoria as his daughter. After Victoria was born, Carole and Gerald separated several times but never divorced. During the periods of separation, Carole and Victoria at times lived with Michael and at other times with a third male whom Carole dated. Carole told Michael that she believed he was Victoria's father. Michael had always claimed Victoria as his daughter, but no paternity test was done until November, 1982, when Michael filed a petition in a California state court for visitation rights. The paternity test showed there was more than 98% likelihood that Michael was Victoria's father. A court-appointed psychologist recommended that Michael be allowed to visit Victoria. Meanwhile, Carole and Gerald reconciled, and Gerald petitioned the court to deny Michael visitation rights. He argued that "under California law, a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage" (p. 113).[131] The court agreed with Gerald and denied Michael's visitation rights; a state court of appeals affirmed. The U.S. Supreme Court heard the case, and it too denied Michael's visitation rights, alleging Michael had suffered no deprivation of liberty and that California had an interest in protecting marital unions. To be successful in his suit,

[131] *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)

Michael would have had to show not only that he was Victoria's biological father (the Court accepted that he was) but also that common law parental rights extended to "adulterous fathers."

Brennan dissented. He believed the Court took too narrow of a view on family and parental rights. Brennan wrote that society was changing, and the Court was obligated to recognize Michael's legal rights as Victoria's biological father. To deny Michael an opportunity to be a father to his biological daughter was a tragedy for Brennan and also went against the Constitutional foundations of liberty.

Often, the U.S. Supreme Court hears cases in which an individual challenges a government action as being an unconstitutional infringement on civil liberties. Brennan is known for his adamant protection of individual liberties against government infringement, most notably in the areas of religion and speech. I have already stated that Justice William Brennan's Supreme Court opinions reflected his dedication to the protection of individual rights. This ideology is especially evident in his decisions on religion and on speech. Before Justice Brennan served on the Supreme Court, few cases provided guidance in regard to the protection of religious freedom for citizens in public institutions. The Court had not yet solidified its position about which Amendments were incorporated in the Fourteenth Amendment and hence applied to the states. Brennan significantly influenced the Court's direction in analyzing the religious rights of individuals as well as free speech rights of individuals. He stated:

> The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. Recognition of these rights of expression and conscience also frees up the private

> space for both intellectual and spiritual development free of government dominance either blatant or subtle.[132]

This chapter defines and explains the First Amendment's liberty guarantees. Next, Justice Brennan's reasoning regarding freedom of religion and freedom of speech is explained by analyzing cases that involve administrative decision making. Although the First Amendment contains five liberty guarantees: religion, speech, press, assembly, and petition, I focus only on religion and speech primarily because these two have the most significant implications for the public sector. We see in these selected cases why many classify Brennan as "the prime architect of the Bill of Rights."[133]

**CIVIL LIBERTIES**

The First Amendment to the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [134]

This Amendment is the basis of what we commonly refer to as our civil liberties. According to John Domino:

> Liberty can be understood simply as the absence of constraints or restriction upon what a person wants to do….*Civil liberties* are the most basic fundamental freedoms protected by the U.S. Constitution: the freedom to speak one's mind or practice a belief system without fear of coercion or punishment, the right to move about freely, the freedom to associate with others, and the right to privacy in personal or intimate matters….civil liberties protect individuals from governmental intrusions on fundamental freedoms.[135]

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[132] Brennan, William J. "The Constitution of the United States: Contemporary Ratification" in O'Brien, David M. (1997). *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House, p. 208.
[133] Strossen, Nadine (1991). "Justice Brennan and the Religion Clauses." *Pace Law Review*. Vol. 11: pp. 491-508.
[134] http://www.law.cornell.edu/constitution/first_amendment
[135] Domino, John C. (2010). *Civil Rights and Liberties in the 21st Century*. 3rd edition. New York, NY: Pearson, p.1-2.

Civil liberties generally allow citizens to be left alone in regard to their opinions, beliefs, and sometimes actions. But government may restrict civil liberties when it believes a substantial harm may arise from the exercise of those liberties. In such cases, the courts may review those restrictions to determine whether they are reasonable given the importance of the liberty in question.

The First Amendment's civil liberties are sometimes referred to as fundamental rights—rights so critical to human existence that it is difficult to imagine their absence. Any government interference with the exercise of fundamental rights may be subject to a *compelling government interest* standard.[136] It may seem odd to think of constitutional rights and liberties as a hierarchy, but the courts have consistently determined that some rights and liberties are so fundamental to a free and democratic society that they must be protected at all costs. For Justice Brennan, the religious liberties and speech liberties were examples of these types of fundamental rights.

The idea of limited government interference with the exercise of civil liberties is not new; it has been a hotly debated subject for quite some time. In 1938, Justice Harlan Stone put forth the concept of *preferred freedoms*.[137] Ordinarily, the courts assume the constitutionality of most laws. The challenger then must show that the law is unconstitutional. This burden shifts to the government, however, in cases where it regulates preferred freedoms—a set of civil rights and liberties fundamental to a democratic political process. When a preferred freedom is at stake, the government may not regulate it without a compelling interest, and the regulation must be narrowly tailored to be the least restrictive acceptable means of achieving that interest. Preferred freedoms,

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[136] Konvitz, Milton (2001). *Fundamental Rights: History of a Constitutional Doctrine.* New Brunswick, NJ: Transaction.
[137] *U.S. v. Carolene Products*, 304 U.S. 144 (1938), p. 155.

according to Justice Stone, deserve a high level of judicial protection.

When the regulation of liberties does not come from legislative action but rather from administrative action, the dynamics are different because the limitation has not been subject to a representative vote either by Congress or by a state legislature. Because of their significance for both administrators and citizens and also because of their classification as fundamental rights, two civil liberties are discussed: (1) religious liberty and (2) speech liberty.

**RELIGIOUS LIBERTY**

The two religion clauses contained in the first amendment are the Free Exercise Clause and the Establishment Clause. Under the Free Exercise Clause, Congress cannot make a law that prohibits an individual from freely exercising his or her religion. Courts have recognized that this right is not absolute. The Establishment Clause prohibits government from establishing a religion and generally mandates that government take a position of religious neutrality or non-preferential treatment among the various religions.

Administrative decision making that affects religious practices has raised important Constitutional questions. Some of the questions that the courts have considered are:

1. *Engel v. Vitale*, 370 U.S. 421 (1962): Did the recitation of a non-denominational prayer in public schools violate the Establishment Clause of the First Amendment?

2. *Wisconsin v. Yoder,* 406 U.S. 205 (1972): Did a state compulsory school attendance law violate Amish respondents' free exercise right?

3. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990): Did the Department of Human Resources violate the respondents' right to practice their religion by denying them unemployment benefits when they were fired for using peyote?

4. *Goldman v. Weinberger*, 575 U.S. 503 (1986): Did an Air Force regulation that prohibited a Jewish Rabbi from wearing his yarmulke while in uniform violate his free exercise right?

These questions, among others, directly affect how public organizations function.

According to Brennan, one of the most important tasks of the religion clauses is to protect religious practices of the minority from condemnation by the majority who may not understand them.[138] He also explained that the Establishment Clause exists for four reasons: (1) to remind the state that the individual has a right of conscience, (2) to preserve autonomy of religious life, (3) to prevent trivialization of religion, and (4) to make sure that religious issues do not become part of politics.[139] His jurisprudence in *Lynch v. Donnelly,*[140] *Grand Rapids School District v. Ball,*[141] and *Sherbert v. Verner*[142] help to illustrate Brennan's philosophy of religious liberty.

**ESTABLISHMENT CLAUSE**

The first two cases to be analyzed, *Lynch v. Donnelly* and *Grand Rapids School District v. Ball,* concern the Establishment Clause of the First Amendment. While the Free Exercise Clause prohibits government from interfering with an individual's religious practice, the Establishment Clause prohibits government from officially or unofficially creating a state religion. Approaches to Establishment Clause interpretation have varied among members of the Court. For example, Justice Black believed the Establishment Clause prohibited nearly all government support for any religion.[143] This position

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[138] *Goldman v. Weinberger*, 475 U.S. 503 (1986)
[139] Ariens, Michael (1991). *On the Road of Good Intentions: Justice Brennan and the Religion Clauses*. 27 *Cal. W. L. Rev*.: 311-338
[140] 465 U.S. 668 (1984)
[141] 473 U.S. 373 (1985)
[142] 374 U.S. 398 (1963)
[143] See his opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947) and *McCollum v. Board of Education*, 333 U.S. 203 (1948).

imagines a "wall of separation" between church and state in which the government is not involved in religious matters and religious institutions are not involved in secular matters. In contrast, Justices O'Connor, Kennedy, and Souter believed the Establishment Clause only prohibited the government from favoring one religion over another. The Constitutional mandate is not separation but non-discrimination or neutrality.[144] Another approach is accommodationist. Justices who follow this approach believe the only government action expressly prohibited by the Establishment Clause is establishing an official national religion. Justices Scalia, Thomas, Alito, and Roberts follow this doctrine, as did Justice Rehnquist.[145] Brennan's approach to the Establishment Clause effectively fits none of the three approaches but is closer to the separatist approach.

This clause has been the subject of much controversy, and the courts have consistently struggled to answer the question of what constitutes an establishment of religion. The early 1970s through the mid-1980s saw the Court progressively narrow its options for dealing with matters of religious establishment. In its early decisions, the Court set forth what some believed to be a definitive test for determining what government actions violated the establishment clause. In *Lemon v. Kurtzman,*[146] the Court ruled that in order to avoid establishing religion, all government policies must (1) have a secular purpose, (2) be religiously neutral—meaning the policies can neither foster nor inhibit religious activity, and (3) not foster an excessive entanglement between

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[144] See O'Connor's opinions in *Lynch v. Donnelly*, 465 U.S. 668 (1984), *Lee v. Weisman*, 505 U.S. 577 (1992), and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). See Kennedy's opinions in *Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) and *Lee v. Weisman*, 505 U.S. 577 (1992). See Souter's opinions in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) and *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005).

[145] See Scalia's opinion in *Lamb's Chapel v. Center Moriches Union Free School Dist*rict, 508 U.S. 384 (1993), Thomas's opinion in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), Alito's and Roberts's opinion in *Salazar v. Buono*, No. 08-472, and Rehnquist's opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985).

[146] 403 U.S. 602 (1971)

church and state—meaning the implementation of the policies should not cause too much government interaction between government and religious institutions. Note here that the entanglement refers to administrative action since administrators implement policy.

After announcing the *Lemon* test, the confusion over what constituted an establishment of religion did not subside. States were still unclear about what types of activities would not pass the constitutional test. For example, could states provide public school bus transportation to children attending religiously affiliated schools? Could nativity scenes be erected at municipal buildings? More often than not, Justice Brennan found himself at odds with the Court's direction regarding the Establishment Clause. Although he agreed with the Court's *Lemon* test, most of his Establishment Clause opinions were dissenting opinions in which he disagreed with the Court's application of that test.

In *Lynch v. Donnelly*, the Court had to determine whether the establishment clause prohibited Pawtucket, Rhode Island, from including a Nativity Scene in a seasonal display. Each year, the city of Pawtucket used a park owned by a nonprofit organization to present a Christmas Season display which included a message banner, a Santa Claus house, reindeer pulling Santa's sleigh, candy cane poles, a Christmas tree, toy cutouts such as a teddy bears, elephants, and clowns, lots of lights, and a Nativity scene. In this Nativity scene, there were figures representing a baby Jesus, Mary and Joseph, angels, shepherds, kings, and some animals. The Nativity scene had been part of the seasonal display for 40 years. Although the city did not own the property on which these items were displayed, the city did own the items themselves. Several residents brought suit against the city alleging that the inclusion of the Nativity scene in the seasonal display

violated the establishment clause. Applying the *Lemon* test, Chief Justice Warren Burger concluded that the Establishment Clause had not been violated.

Burger reviewed the purpose of the Establishment Clause as the courts had viewed it at the time of *Lemon*. He said the purpose was to prevent in as much as possible the intrusion of government into religious affairs and vice versa. He also mentioned that there was no wall of separation per se that prohibited all government interaction with religion and all religious interaction with the government. Burger gave several examples of how the country has supported the idea of religious faith. He noted that executive orders have proclaimed Christmas and Thanksgiving as national holidays with religious significance. He also mentioned that Congress directed the president to proclaim a National Day of Prayer. These examples among others signaled to Burger that there was no absolute wall of separation between church and state and that not all interaction between government and religion was impermissible.

> In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible. The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, see, e. g., *Everson v. Board of Education*. The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." (pp. 672-673)

Hence, Burger made the argument for an accommodationist approach to the Establishment Clause as opposed to a separatist approach. He wrote, "The real object of

the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government" (p. 678).

To answer the questions posed by the *Lemon* test, Burger first concluded that the city had a valid secular purpose in making the Nativity scene part of the seasonal display. Including the Nativity scene helped accurately depict the history of the Christmas holiday, and Burger determined that to be a valid secular purpose. Second, Burger said that including the Nativity scene neither advanced nor inhibited religion. To reach this conclusion, he compared the Court's decisions in related cases and determined that the Nativity scene was not an advancement of religion. He conceded that on some occasions, government interaction would indirectly advance religion, but he did not think that the Nativity scene directly advanced religion because of the context in which it was displayed.

> We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in Marsh, supra, at 792, and implied about the Sunday Closing Laws in McGowan is true of the city's inclusion of the creche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." (p. 682)

Finally, he denied that there was an excessive entanglement between government and religion. He referred to the district court's finding that there was no such entanglement. In his discussion, we get a glimpse of the types of administrative activity that create excessive entanglement. He explained:

> There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche. No expenditures for maintenance of the creche have been necessary; and since the city owns the creche, now valued at $200, the tangible material it contributes is *de*

> *minimis*. In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here, of course, like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon*…. (p. 684).

After Burger determined that the *Lemon* test was satisfied, he directly addressed Justice Brennan's concern that the Nativity scene is deeply rooted in Christian theology. He said that just because the Nativity scene had religious significance, it did not mean that there had been a religious establishment. Because Burger is satisfied that Pawtucket has passed the *Lemon* test, he upheld the inclusion of the Nativity Scene.

Justice O'Connor's concurring opinion echoed some of the main points of Burger's opinion but also differed in one very important way. O'Connor asserted that the *Lemon* test was analytically confusing because it was difficult to determine how its parts related to the concept of establishment.

> Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman* as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the Lemon test as an analytical device. (pp. 688-689)

O'Connor proposed an endorsement test to simplify the analysis.

> The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the creche and what message the city's display actually conveyed. The purpose and effect prongs of the Lemon test represent these two aspects of the meaning of the city's action. (p. 690)

Two questions were asked in her test. First, did the government intend to convey a message of endorsement or disapproval of religion? Second, did the government's action communicate a message of government endorsement or disapproval of religion?

O'Connor concluded that the purpose of including the Nativity Scene was not to endorse religion but to promote celebration of the holiday season by relying on its traditional symbolism. Celebration of holidays was a legitimate secular purpose. The Nativity Scene also did not communicate a government endorsement of religion. Pawtucket's actions passed the endorsement test and therefore did not violate the Establishment Clause.

Justice Brennan wrote a dissent in which Justices Marshall, Blackmun, and Stevens joined. This dissent focused on what they thought was a misapplication of the *Lemon* test. Brennan first noted that the Court's narrow application of the *Lemon* test was the result of wanting not to disturb the commonly accepted and agreeable position that the Christmas holiday held for most citizens.

> After reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a crèche simply cannot be squared with our prior cases. And is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the city's annual display reflects nothing more than a "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. (pp. 696-697)

For Brennan, then, the inclusion of a nativity scene indicated a religious, not secular, government purpose. He said the Court admitted that the nativity scene was inherently a religious symbol but then justified its inclusion under the guise of historical context. If Pawtucket wanted to promote the holiday season, it could do so with symbols of Santa Claus, reindeer, and candy canes. No distinctly religious symbols need be included.

Also, in relying on the mayor's trial testimony, he noted that the decision makers understood that including the nativity scene would serve a religious purpose. For Brennan, admitting that the nativity scene was inherently religious meant that Pawtucket failed part one of the *Lemon* test. He stated, "we have consistently acknowledged that an otherwise secular setting alone does not suffice to justify a governmental practice that has the effect of aiding religion" (p. 707). So, for Brennan, the Court's reliance on context to justify the inclusion of the nativity scene was not consistent with prior precedent.

> And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the city's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. (p. 697)

He further asserted that the primary effect of the inclusion of the nativity scene was to promote the Christian faith, and he also noted that an excessive entanglement would likely occur between government and religion because other religious faiths may now press the city to include symbols of their belief system in the display. For example, Jews may now approach the city to include a menorah in the annual display.

In his application of the *Lemon* test, Brennan believed he embodied the value intended by the establishment clause—government neutrality in matters of religion.

> Should government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion. Thus, in a series of decision concerned with such acknowledgments, we have repeatedly held that any active form of public acknowledgment of religion indicating sponsorship or endorsement is forbidden. (p. 714)

Brennan's analysis of the city's actions in light of the country's religious history differed from than that of the Court's majority. He said that the Court's reliance on the

significance of the country's religious history is improperly connected. The printing of "In God We Trust" on the country's currency, the inclusion of prayer at the opening of Congressional sessions, and the references to God in the pledge of allegiance do not signify a deeply rooted religious heritage according to Brennan. In fact, he said these formalities amount to *ceremonial deism.* He used this term to refer to the repetition of religious symbolism to the point where the symbol itself becomes religiously insignificant. Brennan acknowledged that no wall of separation between government and religion existed or was intended to exist. He said that the value of religious neutrality could not be overstated. It required government to tread lightly in religious activity and avoid the appearance of any preference for one specific religion over another or any preference of religion over non-religion. Brennan believed the Court's opinion violated this principle of neutrality as shown by his application of the *Lemon* test.

Finally, Brennan attacked Burger's use of history to justify his accomodationist approach.

> The American historical experience concerning the public celebration of Christmas, if carefully examined, provides no support for the Court's decision. The opening sections of the Court's opinion, while seeking to rely on historical evidence, do no more than recognize the obvious: because of the strong religious currents that run through our history, an inflexible or absolutistic enforcement of the Establishment Clause would be both imprudent and impossible. See ante, at 673-678. This observation is at once uncontroversial and unilluminating. Simply enumerating the various ways in which the Federal Government has recognized the vital role religion plays in our society does nothing to help decide the question presented in this case. (p. 718)

In keeping with his philosophy that Justices cannot accurately discern the intent of the Framers, Brennan stated, "The intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread

celebration of Christmas did not emerge in its present form until well into the 19th century" (p. 718).

Based on his application of the *Lemon* test, Brennan concluded that Pawtucket violated the Establishment Clause, and the Nativity Scene should not be included in the city's seasonal display.

Just one year after *Lynch*, Justice Brennan wrote the majority opinion in *Grand Rapids School District v. Ball*. In this case, the Court struck down a Detroit program in which public school teachers went into private religious schools to teach remedial programs during regular school hours. The decision also held unconstitutional a community program offering classes in the private, religious schools after regular school day hours. Once again, the *Lemon* test was applied, but this time Brennan garnered a majority of the Court's support for his interpretation of the Establishment Clause and his application of the test. Justices Marshall, Blackmun, Powell, and Stevens joined his opinion. Justices O'Connor and Burger concurred in part and dissented in part. Justices White and Rehnquist dissented.

In this case, two Grand Rapids, Michigan, education programs were being challenged: (1) the Community Education program and (2) the Shared Time program. The Community Education program was offered throughout the Grand Rapids School District and included participation from both children and adults. The program offered after-school classes in arts and crafts, home economics, Spanish, gymnastics, drama, humanities, chess, and nature appreciation. These classes were publicly funded by the school district but were often held at private, religious schools. Similarly, the Shared Time Program allowed full-time public school teachers to go into non-public schools to

teach remedial classes during the school day. Citing the lower court's finding of fact, Brennan summarized the program to make the controversy clearer:

> The Shared Time program offers classes during the regular schoolday that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music, and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." (p. 375)

The Court had to determine whether the two programs violated the Establishment Clause. In Brennan's application of the *Lemon* test, he noted the importance of the establishment clause restrictions.

> The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion…. It is also more than a mere injunction that governmental programs discriminating among religions are unconstitutional…. The Establishment Clause instead primarily proscribes "sponsorship, financial support, and active involvement of the sovereign in religious activity…." As Justice Black, writing for the Court in *Everson v. Board of Education*, supra, at 15-16, stated: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (p. 381)

Given this establishment clause philosophy, Brennan must determine whether the two programs in question violate these principles and are therefore unconstitutional.

As to part one of the *Lemon* test, Brennan did see a secular purpose in the programs. He agreed with the school district that their programs, though conferring some non-secular benefits, primarily offered remedial education to a non-secular public. Next, Brennan considered part two of the test to determine whether the programs advanced religion or inhibited religion in any way. To that end, Brennan concluded the following:

> Given that 40 of the 41 schools in this case are thus "pervasively sectarian," the challenged public school programs operating in the religious schools may impermissibly advance religion in three different ways. First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting - at least in the eyes of impressionable youngsters - the powers of government to the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected. (p. 385)

The programs failed the second part of the *Lemon* test because the Establishment Clause prohibited more than just direct efforts to religiously indoctrinate students. Brennan said that the Establishment Clause also prohibited a close identification of the state's power with religious affiliation. Because this type of affiliation was present in this case, the city of Grand Rapids was advancing religion through its programs. Nearly all of the teachers in the Community Education Program were from the religious schools and served as representatives of the faith. Further, the Community Education Program classes were not monitored for religious content. There was significant risk of teaching religious content. The Shared Time Program had a similar risk of religious indoctrination. More important, for Brennan, was the perception of the two programs. Could individuals perceive the programs to be religiously affiliated?

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any - or all - religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. (p. 389)

He continued:

> It follows that an important concern of the effects test is whether the symbolic

> union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices. The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. (p. 390)

Brennan concluded that the programs advanced religion in three ways: (1) the public school teachers in the Shared Time Program may be influenced by the religious atmosphere in which they worked, (2) the perception of a union between church and state is fostered by state-provided instruction in the religious schools, and (3) the programs provide secular instruction in the religious schools that those schools would otherwise be responsible for providing themselves.

The third part of the *Lemon* test was also unsatisfied. Brennan saw an overwhelming entanglement between the government and religion. The excessive entanglement was caused by the closely knit co-decision making role of the public and the non-public institutions:

> Both programs are administered similarly. The Director of the program, a public school employee, sends packets of course listings to the participating nonpublic schools before the school year begins. The nonpublic school administrators then decide which courses they want to offer. The Director works out an academic schedule for each school, taking into account, inter alia, the varying religious holidays celebrated by the schools of different denominations. Nonpublic school administrators decide which classrooms will be used for the programs, and the Director then inspects the facilities and consults with Shared Time teachers to make sure the facilities are satisfactory. The public school system pays the nonpublic schools for the use of the necessary classroom space by entering into "leases" at the rate of $6 per classroom per week. (p. 377)

The administrative problem of entanglement presented a distinct problem for Brennan, and he said it amounted to subsidizing the religious functions of the non-public schools.

In concluding that the programs violated the establishment clause, Brennan once

again stated that the Constitution required no strict separation of church and state, but the state must be very careful not to violate principles of neutrality.

Justice O'Connor concurred in part and dissented in part. In her opinion, she once again highlighted her opposition to the *Lemon* test. She concluded that neither program unconstitutionally endorsed religion. She found no evidence that the Shared Time teachers attempted to indoctrinate the students. In fact, she believed the Shared Time program violated no part of the *Lemon* test. She did agree with Brennan's conclusion about the Community Education Program.

> The record indicates that Community Education courses in the parochial schools are overwhelmingly taught by instructors who are current full-time employees of the parochial school. The teachers offer secular subjects to the same parochial school students who attend their regular parochial school classes. In addition, the supervisors of the Community Education program in the parochial schools are by and large the principals of the very schools where the classes are offered. (p. 399).

Justice White dissented by noting he has long disagreed with the Court's philosophy on the Establishment Clause and this case was no exception. Likewise, Justice Rehnquist briefly noted that he too disagreed with the Court's Establishment Clause philosophy.

**FREE EXERCISE CLAUSE**

In *Sherbert v. Verner*, a case involving the Free Exercise Clause, Justice Brennan affirmed the value of autonomy in religious life by concluding that government cannot excessively burden an individual's right to select his or her day of worship. Adell Sherbert was a member of the Seventh-Day Adventist Church, and Saturday was her day of worship. Because she refused to work on Saturdays, her employer fired her. Similarly, other employment opportunities did not work out because of the Saturday Sabbath commitment. Under the South Carolina Unemployment Compensation Act,

Sherbert filed an unemployment claim for compensation. Like many unemployment compensation laws, South Carolina's law declared an applicant ineligible for compensation if he or she failed to accept suitable work without just cause. The Unemployment Commission denied Sherbert's claim because she would not accept employment opportunities that required her to work on Saturdays.

Writing for the Court's 7-2 majority, Brennan held that the administrative decision to deny Sherbert's unemployment compensation violated her constitutional right to freely exercise her religion. Brennan concluded that the state's statute excessively burdened her First Amendment right because it forced a decision between practicing her religion and receiving unemployment benefits. While Brennan acknowledged that the free exercise clause does not prevent all government interference with an individual's religious practice decisions, he did note that in order for the state to interfere with an individual's religious practice, it would need a compelling interest.

In his opinion, the first question Brennan addressed was whether denying Sherbert unemployment benefits imposed any burden on the free exercise of her religion. In concluding that it did, Brennan reflected on the consequences of having to choose between keeping her Sabbath and obtaining government financial assistance. No Sunday worshipper was forced to make that choice. Quoting from the Court's decision in *Braunfeld v. Brown,*[147] Brennan stated, "For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect" (p. 404).

Brennan continued:

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[147] 366 U.S. 599 (1961)

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. (p. 404)

The state argued that no burden was imposed because Sherbert had no right to unemployment benefits; rather, the benefits were a privilege extended by the state. Brennan rejected this argument, stating that whether the benefits were a right or a privilege was immaterial; the benefits cannot be conditioned on the violation of Sherbert's religious practice. This concept of *unconstitutional conditions* is explained further in Chapter 6. In sum, it means that no government benefit may be given or taken away based on whether the recipient agrees to forfeit her Constitutional rights. To deny Sherbert unemployment benefits that she would be eligible to receive were she not a Seventh Day Adventist imposes a burden on her ability to practice her religion. Because the state imposed a burden on the free exercise of her religion, the Court must then determine whether the state has a compelling interest in imposing such a burden on Sherbert's constitutional right.

How would the Court determine whether the state's regulation was permissible? Brennan proposed the state be subject to the *compelling state interest test*, also known as strict scrutiny. He emphatically rejected the rational basis test as an appropriate method of analysis. He stated that the government needs more than a rational basis to sustain its infringement; it must have a compelling interest, and the means of achieving that interest must be narrowly tailored to be the least restrictive acceptable means of achieving the

interest. The state asserted its interest as one of preventing fraudulent claims by citizens who may simply desire not to work on Saturday. What would prevent such an unscrupulous person from claiming the Seventh Day Adventist faith as his or her reason for not wanting to work on Saturday? Brennan acknowledged that such deceitful behavior was possible; however, that alone was not compelling enough to impose an excessive burden on the First Amendment's free exercise clause, especially since there may be other ways to prevent that type of fraudulent activity.

> The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States v. Ballard*, 322 U.S. 78 - a question as to which we intimate no view since it is not before us - it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. (p. 407)

So, under the standard of strict judicial scrutiny, the state failed to convince Brennan that it was necessary to deny Sherbert unemployment benefits based solely on her refusal to work on Saturdays. In light of this failure, he did not consider part two of the test which would determine whether the policy was narrowly tailored.

In the conclusion of his opinion, Brennan was sure to note that requiring the state to accommodate Sherbert's religious beliefs did not amount to establishing religion.

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of

> religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. (p. 409)

Perhaps the most significant lesson that Brennan taught in his opinion was the value that is to be placed on the free exercise clause. By imposing the strict scrutiny test, Brennan indicated that religious liberty was a fundamental right that citizens were to enjoy without government interference unless there was a compelling reason for the interference and also unless no other acceptable means of achieving that interest existed. This is an important lesson because not all constitutional liberties enjoy this special status. Brennan considered autonomy of religious conscience inherent to human existence.

Justice Douglas concurred with the decision. In his opinion, Douglas was concerned that the state might use its general police power to ensure the health, safety, and welfare of its citizens as an excuse to promote the majority religions to the detriment of the minority religions. State action cannot be used to force the minority religions to comply with the majority religion's tenets. Douglas asserted that government may not "exact from me a surrender of one iota of my religious scruples" (p. 412).

Justice Stewart also concurred in result, raising what he called a "double-barreled dilemma" that ought to be resolved. Stewart saw a contradiction between the Court's prior decisions on the Establishment Clause and the current case on the Free Exercise Clause. He reasoned that under Establishment Clause jurisprudence, Sherbert would lose the case because the state was prohibited from offering her assistance based on her religious acceptance. At the same time, the state is also prohibited from discriminating against her based on her religious practice, according to Free Exercise jurisprudence.

Thus, the Court's interpretation of the two clauses appears to be diametrically opposed to each other.

> With all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by the Court. It is a duty, I submit, which we owe to the people, the States, and the Nation, and a duty which we owe to ourselves. For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case, or to be undiscriminatingly invoked as in the *Schempp* case, ante, p. 203, so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure. (pp. 416-417)

Stewart agreed with the outcome of Sherbert but wanted to go further to overturn *Braunfeld v. Brown*,[148] which he believed would reconcile any contradictions present in the interpretation of the religion clauses.

Justices Harlan and White were disappointed by Brennan's opinion and even wrote that the opinion was disturbing. Their point of contention provides a wonderful juxtaposition of values. For Harlan and White, Sherbert had simply refused to accept work for "personal reasons." It mattered not to them what these personal reasons were; they noted that the statutory scheme is designed to assist residents who are out of work involuntarily. In other words, the unemployment applicant must be available to work and willing to work but cannot find employment for which he or she is qualified to accept. In describing the purpose of the legislation, Justice Harlan wrote:

> Thus the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when work was unavailable. <u>But at the same time there was clearly no intent to provide relief for those who for purely personal reasons were or became unavailable for work.</u> In accordance with this design, the legislature provided in 68-113 that "an unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds

[148] 366 U.S. 599 (1961)

that…he is able to work and is available for work….” (p. 419)

In the quote above, I have underlined a very important statement. This statement shows the dissent’s perspective that Sherbert is voluntarily choosing not to accept available employment for personal reasons. The fact that the reason is a matter of religious conscience did not appease Justices Harlan and White. As they see it, the statutory design offered unemployment compensation only to those who could not find employment solely because of a lack of industry availability. When the industry provides the job, the employee is bound to accept it; otherwise, no compensation would be offered. Justice Harlan concluded: “Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was ‘unavailable for work’ and thus ineligible for benefits, when personal considerations prevented her from accepting employment on a fulltime basis in the industry and locality in which she had worked” (pp. 419-420).

One could conclude from Justices Harlan’s and White’s dissent that they see no difference between being unavailable to work because of a religious Sabbath commitment and being unavailable to work because of, for example, a commitment to attend Saturday soccer game practices. For them, both would qualify as personal reasons that disqualify an applicant for unemployment compensation within the South Carolina statutory scheme. The two Justices went further to state that under Brennan’s decision, if South Carolina chooses to provide unemployment compensation only for those who are available to work, then they must make an exception to those who are unavailable to work for religious reasons. Of course, this was completely unacceptable to the two Justices. Making such an exception for religious practices actually creates a preference for religious activity over non-religious activity and hence violates the principle of

government neutrality in matters of religion.

This dialogue between Brennan and Harlan and White provides very good insight into how values can be perceived both by the citizens and by the courts. Their differing conclusions also shed light on how Brennan determined which values were more important in the given context. Is it true that Brennan did not value government neutrality in matters of religion? It would be difficult to reach that conclusion from his opinion in the case. It is clear, though, that the dominant value for him was respect for the individual's right to practice his or her religion free from unnecessary government interference. He did not want Adell Sherbert (and those similarly situated) to be disadvantaged solely because of her choice of religion. One might even conclude that Brennan's decision actually advocated government neutrality in matters of religion because it required the state not to condition the receipt of otherwise available benefits on the choice of whether or not to practice a particular religion.

**SPEECH LIBERTY**

The liberty of free speech found in the First Amendment is also a fundamental right that the courts have held in highest regard. Conceptually, it guarantees that citizens are able to speak freely without fear of government-imposed consequences and repercussions. This freedom is especially significant when the speech is about public policy matters. The courts have long supported the ability of citizens to comment on matters of public concern and generally frowns upon government interference with this type of speech. For Brennan, speech should be both uninhibited and encouraged. He announced in his Tobriner Lecture:

> None of us, lawyer or layman, teacher or student in our society must ever feel that to express a conviction, honestly and sincerely maintained, is to violate some

> unwritten law of manners or decorum. We are a free and vital people because we not only allow, we encourage debate, and because we do not shut down communication as soon as a decision is reached. As law-abiders, we accept the conclusions of our decision-making bodies as binding, but we also know that our right to continue to challenge the wisdom of that result must be accepted by those who disagree with us. So we debate and discuss and contend and always we argue. If we are right, we generally prevail. The process enriches all of us, and it is available to, and employed by, individuals and groups representing all viewpoints and perspectives.[149]

Brennan's philosophy was that in a representative democracy, the right to express ideas must be protected even when many people do not agree with them. His support for this philosophy in administrative law cases can be seen in *Speiser v. Randall*[150] and *Greer v. Spock.*[151]

The courts allow some restrictions on speech depending on the time, place, and manner of the speech. The courts call this forum analysis.[152] Speech in public places receives more protection than speech in nonpublic or quasi-public places. Table 8 provides an example of how the courts use forum analysis.

**Table 8: Forum Analysis**

| Forum Classification | Examples | Regulation Standard |
|---|---|---|
| Public | Municipal meeting halls and auditoriums, public streets, sidewalks, parks, state fairgrounds | Receives the highest level of protection<br><br>Government usually must have a compelling interest in regulating the speech, and the restriction must be narrowly tailored to that interest. With some forums, the courts have required |

[149] Brennan, William J. (1986). "In Defense of Dissents." 37 *Hastings L.J.* 427, p. 437.
[150] 357 U.S. 513 (1958)
[151] 424 U.S. 828 (1976)
[152] See the Court's opinions in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939), *Schneider v. New Jersey*, 308 U.S. 147 (1939), *U.S. v. Kokinda*, 497 U.S. 720 (1990)

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|---|---|---|
| | | only an important interest and a substantially related means of achieving that interest. |
| Non-Public | Government office buildings, military bases, prisons, airports | Government must be neutral in its application of regulations, and the regulations must be reasonable given the purpose of the facility. |
| Quasi-Public | Privately owned homes or land, commercial properties and stores, shopping malls | The private owner has sole authority to determine what speech may or may not take place in these forums. |

*Speiser v. Randall* was one of Brennan's first opinions on the U.S. Supreme Court. The 1958 case outlined Brennan's approach to free speech, and it was an approach from which he never departed. The controversy in this case surrounded a citizen's refusal to take a loyalty oath in order to receive a tax exemption in the state of California.

Speiser was an honorably discharged World War II veteran living in the state of California. He claimed a tax exemption as set forth in the California constitution, Article 13. Pursuant to this provision, any applicant for the exemption was required to complete an application. In 1954, the application was revised to include a loyalty oath. Specifically, the applicant had to certify the following: "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities" (p. 515). Such oaths were widespread after World War II and were designed to minimize the influence of communism in the United States. When completing the application, Speiser and others refused to certify the oath. In fact,

they simply drew a line through that part of the application. As a result, the tax assessor denied them the tax exemption solely for their refusal to certify the oath. Article 20 of the California constitution allowed a public administrator (a tax assessor) to make a decision regarding whether the tax exemption would be granted or denied. Speiser sued the county tax assessor, and the Court had to determine whether denial of a tax exemption based on an applicant's refusal to certify a loyalty oath violates the Free Speech Clause of the First Amendment.

Brennan began his majority opinion by stating that the California constitution's provisions place a limitation on Speiser's right to speak freely. The Justice noted that the California Supreme Court also recognized this limitation but concluded that the burden on free speech was not significant because it denied the tax exemption only to those whose speech was criminally punishable under the California Criminal Syndicalism Act, which forbade the advocacy of violent overthrow of government. Brennan disagreed.

Brennan stated that "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society" (p. 521). It was necessary, then, to take a closer look at how California was limiting the freedom of speech and to determine whether the limitation was permissible. In his analysis, Brennan immediately noticed a problem with California's limitation on free speech. He said that it required the speaker to provide affirmative proof that he or she did not illegally advocate the overthrow of government. This burden of proof, according to Brennan, should be on the government and not on the citizen. In its constitutional provisions, the state of California set up a

class of speech that was not only unprotected but also lead to the denial of benefits that were available to other citizens who did not engage in the unprotected speech. Brennan noted that whenever such distinctions are drawn, the courts must heavily scrutinize the government's action.

> Not only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayer, but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption. The declaration required by 32 is but a part of the probative process by which the State seeks to determine which taxpayers fall into the proscribed category. Thus the declaration cannot be regarded as having such independent significance that failure to sign it precludes review of the validity of the procedure of which it is a part. Cf. *Staub v. City of Baxley*, supra, at 318-319. The question for decision, therefore, is whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process. (p. 522)

The requirements of due process did not allow the government to place the burden of proving innocence onto the citizen, and Brennan concluded that it was the state's responsibility to show that Speiser engaged in criminally unprotected speech.

Brennan's second point concerned the type of speech that the California constitution targeted. As previously mentioned, speech on matters of public concern, or political speech as it is sometimes called, is afforded the highest protection by the courts. In this opinion, Brennan recognized this value. In describing the state's loyalty oath, Brennan said that the state "purports to deal directly with speech and the expression of political ideas" (p. 527). For Brennan, this was impermissible. He concluded: "We hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition" (pp. 528-529). In reaching this decision, Brennan could find no compelling interest in prohibiting free speech,

especially since the state had not been able to meet its obligation of proving that Speiser engaged in any criminally punishable speech.

Justice Black wrote a concurring opinion, and Justice Douglas joined. In the opinion, we see their absolutist approach to the First Amendment.

> California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know such a thing has never even been attempted before. I believe that it constitutes a palpable violation of the First Amendment, which of course is applicable in all its particulars to the States…. The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment. We should never forget that the freedoms secured by that Amendment - Speech, Press, Religion, Petition and Assembly - are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities. (pp. 529-530)

Black went on to explain that the concept of a loyalty oath has a chilling effect on free and open public debate, and that type of debate forms the very foundation of the country. Therefore, no tax exemption can be conditioned on a loyalty oath certification.

Justice Douglas wrote a concurrence; Justice Black also joined it. Douglas stated:

> The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was denounced in an early period of our history. (pp. 532-533)

Not only does the loyalty oath unsuspectingly place the burden of proof on the individual, but also the requirement encroaches upon the individual's privacy. Douglas can find no precedent that allows the government to intrude on an individual's belief in this manner. In effect, he noted, the loyalty oath amounted to government monitoring an individual's thoughts. To do so violated the First Amendment.

Justice Clark was the sole dissenter. He concluded that the Court's opinion unnecessarily assumed that once an individual certified the loyalty oath, he would automatically receive the tax exemption. Clark did not believe this to be accurate. He said the oath of was just one step in the process. The tax assessor could then make a determination of whether the certification was supported by any evidence. Because Speiser would not certify the oath, the assessor had no foundation upon which to make a decision. Next, Clark disagreed with the Court regarding the burden of proof. Since the administrative proceeding was not a criminal proceeding, the burden of proof did not rest solely with the government.

> I cannot agree that due process requires California to bear the burden of proof under the circumstances of this case. This is not a criminal proceeding. Neither fine nor imprisonment is involved. So far as Art. XX, 19, of the California Constitution and 32 of the California Tax Code are concerned, appellants are free to speak as they wish, to advocate what they will. If they advocate the violent and forceful overthrow of the California Government, California will take no action against them under the tax provisions here in question. But it will refuse to take any action for them, in the sense of extending to them the legislative largesse that is inherent in the granting of any tax exemption or deduction. (pp. 540-541)

Clark concluded by asserting the state had a compelling interest in requiring the loyalty oath. The tax exemption was designed in part to reward those who are loyal to the state. He commented, "The interest of the State, as before pointed out, is dual in nature, but its primary thrust is summed up in an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it" (p. 543). For those reasons, he did not join the Court's majority.

In *Greer v. Spock*, Brennan was among the dissenters. This case involved public speech demonstrations at Fort Dix Military Reservation. Certain parts of the military base were accessible by civilians; however, speeches, demonstrations, and literature

distribution were prohibited unless a permit was secured from the post headquarters. In 1972, Benjamin Spock and Julius Hobson were candidates in the People's Party for the offices of president and vice president of the United States, respectively. Linda Jenness and Andrew Pulley were Socialist Worker Party candidates for the same offices. All four persons petitioned Commander Greer for permission to distribute campaign literature on the base. They also asked to hold a meeting to discuss the campaign issues with interested military personnel. The Commander rejected the request under Fort Dix Regulations 210-26 and 210-27. These regulations provided:

> Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation. As well, the distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited on the Fort Dix Military Reservation without prior written approval of the Adjutant General, this headquarters. (p. 831)

No political campaign speech had ever taken place at Fort Dix, so the Commander's decision was not unprecedented. Spock and others filed suit in a New Jersey District Court and sought to enjoin Fort Dix from enforcing policies 210-26 and 210-27. By the time the case reached the U.S. Supreme Court, Spock had already distributed his literature as well as held a campaign rally in a publicly accessible parking lot at Fort Dix because an appellate court had granted him the injunction. The Court must determine whether the policies 210-26 and 210-27 violate the First Amendment's Free Speech Clause.

In the majority decision, Justice Stewart reversed the Court of Appeals and ruled that the military could prevent political campaign speeches and literature distribution on the base. Stewart noted that the Preamble to the U.S. Constitution stated explicitly that

one of the reasons why the Constitution exists is to provide for the common defense and also that the courts had consistently held that the role of the military in national life created a special circumstance that must be considered whenever its policies were challenged. He further noted that the purpose of the Fort Dix military base was to train soldiers who were ready to fight should the occasion arise, not to provide a public forum for speech. Historically, the courts had granted unquestioned power to the base commander to determine under what circumstances civilians would be allowed access to the base. Stewart saw no reason why the Court should move in any different direction because Spock had no generalized constitutional right to distribute campaign literature specifically at Fort Dix. In examining the record, Stewart found that Fort Dix had been consistent and non-biased in its application of the policies, and so Spock and the other respondents did not suffer any discrimination; nor were they been treated inconsistently with how other candidates had been treated on the base.

Stewart referenced the Court's use of forum analysis to determine the appropriate regulation of speech. In particular, he made a distinction between public places traditionally used to support free speech and public places that may restrict speech.

> The Court of Appeals was mistaken, therefore, in thinking that the Flower case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please…." "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (p. 836)

Stewart concluded that the military's regulations were supported by the Court's historical interpretation of First Amendment cases.

> Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history. And it is a policy that the military authorities at Fort Dix were constitutionally free to pursue. (p. 839)

Chief Justice Burger concurred. In his opinion, Stewart was correct not to disturb the history of deference given to military regulations to control speech and other activities on base. He said that allowing political literature to be distributed or campaign rallies to be held on a military base poses a danger to the proper functioning of the military. He stated that it would also be dangerous to convey to political candidates that commanders are able to deliver the votes of military personnel to them. For Burger, the military environment should be one of political neutrality.

Justice Powell's concurring opinion went further to explain that the military system does not operate in the same manner as the civilian system.

> In this case we deal with civilian expression in the domain of the military. Fort Dix is not only an area of property owned by the Government and dedicated to a public purpose. It is also the enclave of a system that stands apart from and outside of many of the rules that govern ordinary civilian life in our country:
> "A military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures. Military institutions are necessarily far more authoritarian; military decisions cannot be made by vote of the interested participants. . . . [T]he existence of the two systems [military and civilian does not] mean that constitutional safeguards, including the First Amendment, have no application at all within the military sphere. It only means that the rules must be somewhat different." T. Emerson, The System of Freedom of Expression 57 (1970). (pp. 843-844)

The military had a legitimate interest in preventing political activity at Fort Dix. The public perception of military neutrality must not be disturbed, according to Powell. A politicized military could destabilize the country.

> Questions also could arise as to whether pressures, direct or indirect, to support one candidate or rally more generously than another were being exerted by commanders over enlisted personnel. And partisan political organizing and soliciting by soldiers within the base may follow. The public interest in preserving the separation of the military from partisan politics places campaign activities on bases in a unique position. Unlike the normal civilian pedestrian and vehicular traffic that is permitted freely in Fort Dix, person-to-person campaigning may seriously impinge upon the separate and neutral status of the Armed Services in our society. (pp. 846-847)

Powell believed the harm to political candidates' First Amendment rights were minimal. After all, military personnel still had access to television, radio and newspapers and could also discuss political matters with those among them. When weighing the First Amendment burden against the military's interest, Powell concluded the military's policies were not unconstitutional.

Brennan's dissent is lengthier than the Court's opinion, and Justice Marshall joined his opinion. He wrote from the perspective of First Amendment values versus administrative convenience. He began by linking the case to *Flower v. United States*,[153] which the Court decided four years prior to *Spock*. In that case, it was the Court's opinion that some speech cannot be prohibited on a military base that allows civilian access. Stewart argued in *Greer* that the lower courts misapplied *Flower*, but Brennan disagreed. Brennan also disagreed with Stewart's assessment of the Preamble to the Constitution.

> With similar unenlightening generality, the Court observes: "One of the very purposes for which the Constitution was ordained and established was to provide

[153] 407 U.S. 197 (1972)

> for the common defence," and this Court, over the years has on countless occasions, recognized the special constitutional function of the military in our national life, a function both explicit and indispensable. But the Court overlooks the equally, if not more, compelling generalization that -- to paraphrase the Court -- one of the very purposes for which the First Amendment was adopted was to "secure the Blessings of Liberty to ourselves and our Posterity," and this Court over the years has on countless occasions recognized the special constitutional function of the First Amendment in our national life, a function both explicit and indispensable. Despite the Court's oversight, if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. Those interests "cannot be invoked as a talismanic incantation to support any exercise of . . . power." (pp. 852-853)

In this part of the opinion, Justice Brennan noted that the bigger value at issue is that of free speech. Brennan went on to quote other Court decisions that showed the value placed on freedom of speech. Considering the Court's history concerning this value, Brennan thought that more weight should have been given to the right of free speech versus the convenience of having a depoliticized military base environment. In fact, he pointed out that Spock's request letter to the base commander specifically respected administrative convenience by stating that the literature distribution and campaigning would be confined to an area the Commander deemed reasonable.

Next, Brennan refuted the Court's understanding of public forum guidelines. Brennan noted that allowing Spock and others to distribute literature and/or campaign on specific parts of the military base would not automatically turn the military base into a public forum for unrestricted speech. He stated that, "the determination that a locale is a 'public forum' has never been erected as an absolute prerequisite to all forms of demonstrative First Amendment activity" (p. 858). However, the literature distribution and campaign activities Spock proposed should be permitted in the streets and lots that are not restricted to civilian traffic. For Brennan, those unrestricted places were no

different from city streets and lots where this type of political activity almost would certainly be allowed to occur. Finally, Brennan attacked Stewart's conclusion that no First Amendment violation had occurred because the base commander had applied the policies to all requests and had hence not singled out Spock for specialized treatment.

> Similarly, it is no answer to say that the proposed activities in this case may be excluded because similar forms of expression have been evenhandedly excluded. An evenhanded exclusion of all public expression would no more pass constitutional muster than an evenhanded exclusion of all Roman Catholics. In any event, there can be no assertion that evenhanded exclusion here has, in fact, been the case because, as the Court implicitly concedes, *ante* at 839, there have been no other instances where the privilege of engaging in public expression on the Fort was advanced. (p. 863)

For Brennan, the issue was not whether the policy was applied indiscriminately but whether the policy posed an unnecessary and undue burden on the respondents' First Amendment freedom of speech liberty. He concluded that the military policies were not justified in light of the First Amendment's constitutional requirements and should therefore be eliminated. Brennan did not believe Spock's request was unreasonable given the fact that military personnel may vote, and he also believed the commander could have accommodated the request with little to no disruption. Freedom of speech, for Brennan, required the military to justify its policies with more than a legitimate interest—it had to be compelling. Absent such an interest, the regulations were unconstitutional.

## CONCLUSION

As shown through an analysis of First Amendment freedoms, Justice Brennan placed great value on citizens' right to exercise their civil liberties in a democratic society free from undue government interference. The ability to exercise Constitutional liberties is part of the freedom that administrative actions cannot limit unjustifiably. As well,

government must have more than just legitimate interests when a fundamental right is at stake. The value placed on these rights makes any government infringement suspect. Administrators guided by Brennan's jurisprudence will respect the diversity of beliefs and ideas that are prevalent in society and will not act arbitrarily to reduce the individual's autonomy. Public organizations exist to implement the public's goals, and at times individual rights may succumb to organizational agendas. Administrators must keep in mind that not all individuals are part of the majority on policy issues; implementation must not diminish unfairly the human dignity of those in the minority.

Table 9 summarizes the themes in Brennan's jurisprudence in regard to civil liberties in administrative decision making.

**Table 9: Themes and Values in Brennan's Civil Liberties Jurisprudence**

| Regime Value | Theme | Case Law |
|---|---|---|
| Doctrine of Unconstitutional Conditions | Government benefits may not be conditioned on the recipient's forfeiture of constitutional rights | *Sherbert v. Verner*<br>*Speiser v. Randall* |
| Freedom | Government may not interfere with the free exercise of religion or freedom of speech without a compelling interest and narrowly tailored means | *Sherbert v. Verner*<br>*Greer v. Spock* |
| | Administrative convenience, even in a non-civilian context, does not automatically outweigh an individual's free speech rights | *Greer v. Spock* |
| | Government may not establish a religion by giving the perception that it favors religion over no religion or by endorsing a particular religious doctrine | *Lynch v. Donnelly*<br>*Grand Rapids School District v. Ball* |
| | Government may not police thoughts and beliefs by compelling an individual to certify loyalty before receiving a benefit | *Speiser v. Randall* |

| | | |
|---|---|---|
| Neutrality | Government must be neutral in its application of religion practice regulations | *Sherbert v. Verner* |

The next chapter discusses human resource management in the public sector.

# CHAPTER SIX
# COPS AND ROBBERS

*We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.*

-Justice William J. Brennan

## CONDUCT UNBECOMING?

Who better to demonstrate the boundaries of administrative discretion than public employees themselves? In many ways, it is public employees who provide the best opportunity for us to investigate values. It is in human resource management that we often see a conflict between the needs of government and the rights of the individual. Certain basic principles in the law of public employment apply to anyone who works for government at almost every level in the United States. Does a government employee surrender his or her rights of free speech and free religion by virtue of working for government?

On March 30, 1981, John Hinckley, Jr. fired six gunshots outside the Washington Hilton Hotel in an assassination attempt on President Ronald Reagan. 1,500 miles away, Ardith McPherson listened to the radio with her colleagues on a lunch break as news of the attempt rapidly spread. McPherson was a deputy sheriff in Harris County, Texas. Upon hearing about the assassination attempt, McPherson said to Lawrence Jackson, her colleague and boyfriend, "If they go for him again, I hope they get him." Another deputy constable overheard her remarks and reported them to Constable Walter Rankin, her boss. Rankin promptly called McPherson into his office and asked her whether she had made the comments. She replied, "Yes, but I didn't mean anything by it." The two had a brief

discussion, and Rankin fired McPherson. McPherson filed suit against him, stating that he violated her First Amendment free speech rights when he fired her. Six years later, the case was before the U.S. Supreme Court.[154] Was McPherson entitled to make those comments with no repercussions? Why had Rankin fired her? Would her comments have been protected had she not been a deputy sheriff? The Court had much to consider.

Justice Marshall wrote the Court's majority opinion, and Brennan joined. In it, he stated that the situation called for a balance of interests. The Court had to weigh McPherson's First Amendment right to comment on matters of public concern against Rankin's interest in maintaining an efficient and effective workplace. In this case, the balance fell in McPherson's favor, and the Court ruled her firing was unconstitutional. According to Marshall, McPherson's expression came only after she also mentioned how harmful Reagan's policies had been toward African Americans. However brief that discussion, as an African American woman, McPherson was commenting on matters of public policy that directly affected her.

In a scathing dissent, Justice Scalia agreed with Constable Rankin that, "no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers'" (p. 394). He concluded that McPherson's words were violent and unacceptable. The potential for office disruption was high, as was the potential to lower workplace morale. Rankin should be able to make personnel decisions in the best interest of his office. In short, the Court should butt out.

For supervisors, the real and perceived constraints on their ability to engage, manage, discipline, and terminate employees is a major and continuing frustration. Since the early 1950s, we have seen diminishing application of the Doctrine of Privilege. As it

[154] *Rankin v. McPherson*, 483 U.S. 378 (1989)

relates to public employees, this doctrine holds that while citizens enjoy rights of free speech, religion, and due process, there is no right to public employment. Public employment is a privilege, and employees should expect to make concessions (e.g., having limited fundamental rights) in order to maintain that employment. In other words, public employees should be willing to give up certain freedoms in order to be a part of the public service.

During the 1950s, the cornerstone of constitutional protection for public employees was the Doctrine of Unconstitutional Conditions. This doctrine, unlike the Doctrine of Privilege, holds that although there may be no constitutional right to hold a public job or to receive a government benefit, government may not condition a job or a benefit on an agreement to forfeit constitutional rights. Therefore, public employees may challenge administrative actions that interfere with their fundamental rights. The prevailing view was that government actions that infringe on these rights must cease unless the government can demonstrate both a "compelling state interest," an interest so vital that it justifies the interference with the employee's freedom, and that the means chosen to achieve those ends are narrowly tailored so as to produce no greater infringement on protected freedoms than is truly necessary.[155] From the 1970s through the early 1990s, a reemergence of the Doctrine of Privilege seemed to place public employees' rights in jeopardy once again. Even if it is clear from court decisions at both the state and federal levels that public employment is not simply a privilege to which any conditions an employer chooses may be attached, it is still somewhat unclear under what

[155] Iron, Peter (1994). *Brennan v. Rehnquist: The Battle for the Constitution*. New York, NY: Alfred A. Knopf.

conditions (if any) government may compel someone to surrender his or her constitutional rights and liberties in order to obtain a government job.

What framework does Brennan use to decide these issues? What lessons can one learn from his approach? This chapter summarizes Justice William Brennan's jurisprudence on such matters. Particularly, I focus on freedom of speech in public employment as well as managerial issues of liability and immunity. The cases I discuss are *Bivens v. Six Unknown Federal Narcotics Agents*,[156] *Elrod v. Burns*,[157] *Owen v. City of Independence*,[158] *Connick v. Myers*,[159] and *Rutan v. Republican Party of Illinois*.[160] These cases provide insight into several types of managerial problems that public administrators encounter. I conclude by mentioning the values present in Brennan's jurisprudence on public employee management.

**LIABILITY AND IMMUNITY**

At times public employees may violate an individual's rights in the course of daily decision making. In doing so, he or she commits a tort—a civil wrong in which a person intentionally or unintentionally harms another. Some federal statutes hold an employee's agency liable for damages when a tort is committed.[161] Others allow individuals to seek a non-monetary remedy in tort claims.[162] States may also have statutes that address liability and immunity for its employees.

42 U.S.C. 1983 states:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

[156] 403 U.S. 388 (1971)
[157] 427 U.S. 347 (1976)
[158] 445 U.S. 622 (1980)
[159] 461 U.S. 138 (1983)
[160] 497 U.S. 62 (1990)
[161] See the Federal Tort Claims Act.
[162] See the Federal Administrative Procedure Act, Section 702.

> be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[163]

This federal statute allows state employees to be sued in their official capacities when they commit torts. Part of the Civil Rights Act of 1871, this statute was intended to deter local police officers and other government employees from violating the civil rights of recently freed slaves after the Civil War.[164] Its modern application provides a remedy for individuals who have suffered a tangible harm at the hands of government officials. This statute does not cover torts committed by federal employees, and the question of what type of remedy is available for individuals injured by federal employees was raised in *Bivens v. Six Unknown Federal Narcotics Agents.*

The Federal Tort Claims Act absolves individual federal employees of liability and instead holds their agency responsible when an employee violates a citizen's constitutional rights. In *Bivens*, the Court had to determine whether federal narcotics agents were immune from suit when they made a warrantless entry into Webster Bivens's apartment, searched the apartment, and arrested him for possession of narcotics. While in the apartment, the federal agents also threatened Bivens's wife and children with arrest if they did not cooperate. The agents found no narcotics in the apartment. Still, Bivens was

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[163] 42 U.S.C. 1983 is part of the Civil Rights Act of 1871 and this provision allows state and local government employees acting in their official capacity to be sued individually for committing torts against individuals. The employee may be entitled to absolute immunity, qualified immunity, or no immunity.
[164] Clayborne, Carson et al. (1991). *The Eyes on the Prize Civil Rights Reader*. New York NY: Penguin.

taken to a federal courthouse where he was interrogated, strip searched, and released. Bivens filed suit against each of the agents who participated in the search. He alleged that they entered his apartment without a search warrant, used excessive force against him, and caused him humiliation and mental anguish. He sought $15,000 from each agent as a remedy for his injuries.

Justices Marshall, Douglas, Stewart, and White joined Brennan's majority opinion. He began his analysis with the text of the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment protects citizens against government intrusion onto their private property when there is no probable cause. In this case, the government admitted that the actions taken against Bivens were in error. The issue at hand was whether Bivens was entitled to the specific remedy he seeks, a $15,000 compensatory payment from each of the agents who violated his Constitutional rights. The problem in the case is that unlike similar torts at the state level, there was no specific federal statute that provided a remedy for the unconstitutional actions. Hence, the government argued that there was no *cause of action*.[165] Brennan noted:

> In respondents' view, however, the rights that petitioner asserts - primarily rights of privacy - are creations of state and not of federal law. Accordingly, they argue, petitioner may obtain money damages to redress invasion of these rights only by an action in tort, under state law, in the state courts. In this scheme the Fourth Amendment would serve merely to limit the extent to which the agents could

[165] A cause of action is a set of legal facts that provides the basis for an individual to sue for monetary compensation, property compensation, or an injunction. It can arise from an individual's actions, a failure to execute a legal obligation, a breach of duty, or the violation of a legal right. This definition comes from Black, Henry (2004). *Black's Law Dictionary*. 8th edition. Thomson West.

> defend the state law tort suit by asserting that their actions were a valid exercise of federal power: if the agents were shown to have violated the Fourth Amendment, such a defense would be lost to them and they would stand before the state law merely as private individuals. (pp. 490-491)

Brennan thought this was an unnecessarily narrow construction of the Fourth Amendment. At the time of this case, the privacy rights protected by the Fourth Amendment were primarily a matter of state law, and state law also provided the cause of action for a remedy for damages. However, Brennan concluded the federal government was not free from liability when it violated Bivens's rights. Brennan wrote that the Fourth Amendment clearly applied to the federal government, and that alone created the cause of action against federal employees who violated privacy rights, even if no federal statute prescribed a specific remedy for damages. Brennan also stated, "Accordingly, as our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen" (p. 392).

Brennan made three main points in his opinion. First, he stated that the Court long ago rejected the idea that the Fourth Amendment prohibits only what would be condemned by state law if engaged in by private persons. Brennan quickly refuted this position by citing several cases in which the Court had determined that argument to have no merit. Hence, he concluded: "In light of these cases, respondents' argument that the Fourth Amendment serves only as a limitation on federal defenses to a state law claim, and not as an independent limitation upon the exercise of federal power, must be rejected" (p. 394).

Then, he moved to his second point, which was that when a federal law

enforcement officer seeks entry into the home of an individual, the individual will likely feel compelled to allow entry. If the citizen resists, he or she may face criminal charges. Once the entry is granted, the citizen has absolutely no protection for his or her rights except through the courts. To bar suits for damages because no federal statute expressly permits them denies the citizen any recourse if his or her civil liberties have been violated.

> The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well. See Weeks v. United States; Amos v. United States, supra. 7 "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name…." (pp. 394-395)

Third, Brennan stated that it should come as no surprise that federal employees may be held liable for damages, especially since monetary compensation for damages had been a traditional method of remedy for violating a person's liberty interests. Brennan stated, "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done" (p. 396). The fact that the Fourth Amendment itself did not state that federal employees who violated this civil liberty could be held liable for monetary damages did not deter Brennan from drawing the conclusion himself. Hence, Brennan's decision cleared the way for these employees to be held liable individually as opposed to just holding their agencies liable. As previously mentioned, it was already the case at the state level under 42 U.S.C.1983; Brennan extended that principle to federal government employees.

> Finally, we cannot accept respondents' formulation of the question as whether the

> availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts. (p. 397)

Brennan's reasoning is significant because it signals an important shift in the Court's willingness to hold federal employees to a different standard of liability based on whether the claimed right is traditionally a matter of state law.

Justice Harlan's concurring opinion echoed Brennan's main points. He too believed that the Fourth Amendment permitted suits for damages when federal employees violated an individual's rights. He wrote, "I am of the opinion that federal courts do have the power to award damages for violation of 'constitutionally protected interests' and I agree with the Court that a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the Fourth Amendment" (p. 399). He observed that Bivens's claim for relief falls under a federally protected interest, and the courts may impose a monetary reward as a remedy. No explicit Congressional grant of authority is necessary. He finally added that suits for damages serve as more than a deterrent to wreckless actions; instead, they should compensate the individual who suffered at the hands of a government employee.

Chief Justice Burger dissented. He made two points. First, he believed neither Congress nor the Constitution authorized Bivens's suit. Therefore, the Court's involvement would violate the principle of separation of powers. He believed Brennan created a new type of damage remedy that had never before been prescribed by the Court.

He said, "I do not question the need for some remedy to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials. Without some effective sanction, these protections would constitute little more than rhetoric" (p. 415). Still, Burger questioned whether the courts were exercising too much oversight of police behavior. For example, he mentioned the Court's jurisprudence on the Exclusionary Rule—a principle that encourages judges to declare inadmissible any evidence that law enforcement officers illegally obtain. When the Court announced the Exclusionary Rule, it had hoped its intervention would discourage overzealous law enforcement behavior. Burger cited studies that concluded this rule did not deter law enforcement officers' unlawful behavior and also punished inadvertent mistakes the same as willful misconduct. Likewise, Burger believed the Court's decision to open federal law enforcement officers to suits individually would not curb their negligent behavior.

Justice Black briefly dissented. Like Burger, he believed the Court infringed on Congress's legislative power by making federal employees individually liable for torts that violated an individual's Constitutional rights.

In the Court's opinions, there was clearly a division among those who believed Congress would have explicitly waived immunity for federal employees had they intended to do so and those who believed the courts could offer an appropriate remedy by allowing federal employees to be sued for monetary damages when they violated an individual's Constitutional rights.

On the topic of liability and immunity, the decision in *Owen v. City of Independence* reaffirmed Brennan's commitment to holding administrators liable for violating the Constitutional rights of citizens. This time, the City of Independence,

Missouri, claimed it was not liable as a government entity when the city manager violated the constitutional rights of an employee. In 1978,[166] the Court determined that municipalities qualified as persons within the meaning of 42 U.S.C. 1983. What was left undecided in the case, though, was whether municipalities could claim either absolute immunity or qualified immunity as a defense against suit. In *Owen v. City of Independence*, the Court determined that municipalities could not claim any form of immunity for 42 U.S.C. 1983 lawsuits.

In 1967, George Owen was appointed as police chief for Independence, Missouri. Five years later, he was asked to resign from that position and accept another position within the Department. The resignation request was the result of an investigation into the Police Department's management of its property room. The investigation was conducted by the City's Legal Department, and the findings indicated that while insufficient records were being kept, there was no evidence of any criminal activity or violation of the city or state laws governing property rooms. Unsatisfied, the city manager asked Owen to resign, accept reassignment, or be terminated. Owen refused to resign or to accept reassignment. Meanwhile, a member of the city council, Paul Roberts, requested a copy of the investigation report. Based on his reading of the report, Roberts publicly alleged at a city council meeting that Police Chief Owen had used police department funds for his own personal use, that money seemed to have vanished from the office, that traffic tickets had been manipulated, that police officials had tampered with the police court process, and that felons had been released under unusual circumstances. Roberts then asked that the report be released to the public and to the local prosecutor. He also asked the city

[166] See *Monell v. City of New York Department of Social Services*, 436 U.S. 658 (1978). Brennan wrote the majority opinion.

manager to take appropriate action against all persons involved in illegal, wrongful, or inefficient activities in the Police Department. The city manager then fired George Owen. Owen sued the City of Independence, the city manager and the city council members in their official capacities, noting that he had been fired without being given any reasons for the firing and also without a hearing to refute the charges against him.

Brennan's opinion begins with a history of the purpose of immunity under 42 U.S.C. 1983.

> Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract. And although, as we discuss below, a municipality was not subject to suit for all manner of tortious conduct, it is clear that at the time 1983 was enacted, local governmental bodies did not enjoy the sort of "good-faith" qualified immunity extended to them by the Court of Appeals. (p. 639)

In citing the purpose of the statute itself, Brennan noted that the very purpose was to protect citizens from an abuse of power:

> Our rejection of a construction of 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." (pp. 650-651)

Brennan examined the language of the statute thoroughly and then investigated its history. He could not find in the language or the legislative history any indication that municipalities were to enjoy immunity from lawsuit to any degree, so he rejected the City's contention that it was entitled to qualified immunity.

> By its terms, 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And Monell held that these words were intended to encompass municipal corporations as well as natural "persons." (p. 635)

Brennan mentioned, however, that the concept of immunity was heavily ingrained in common law tradition. On occasion, the Court determined that even though Congress did not expressly grant immunity in the statute, it would have been reasonable to assume they intended for immunity to apply.

> Noting that "few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson v. Ray*, supra, at 553-554, held that the absolute immunity traditionally accorded judges was preserved under 1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to 1983 suits similar to that which existed in false arrest actions at common law….In each of these cases, our finding of 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." (pp. 637-638)

Brennan stated that there was no tradition of immunity for municipalities, and none will be extended in the present case. The city was not allowed to claim qualified immunity or assert a "good faith" defense against liability. Like private corporations, municipal corporations are open to liability when they commit a tort.

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the Law of Negligence 120, p. 139 (1869) (hereinafter Shearman & Redfield). (p. 640)

> Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the Civil Rights Act. The absence of any allusion to a municipal immunity assumes added significance in light of the objections raised by the opponents of 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers. Had there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the specter of its destruction, as well. (pp. 643-644)

Brennan stated that the decision to deny the municipality qualified immunity was based on the legislative purpose of 42 U.S.C. 1983 and also on public policy. Perhaps the most practical statement Brennan made in his reasoning is as follows:

> Moreover, 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. (pp. 651-652)

In this statement, Brennan suggested that not allowing municipalities to have immunity would help deter abuse of administrative discretion. Perhaps, he stated, policymakers would encourage more rules and programs that would minimize unconstitutional infringements on citizens' rights. He said that sometimes abuses do not just come from a single individual but from the interaction of several officials, however well intentioned, who are operating under a culture that may be too negligent when it comes to decision making.

> In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct. (p. 657)

Justice Powell wrote the dissenting opinion, and Chief Justice Burger and Justices Stewart and Rehnquist joined. Powell first determined that the Court should look more closely to see whether Owen suffered any injury at all within the meaning of the statute. Owen, of course, alleged that his firing deprived him of a liberty interest under the Fourteenth Amendment. Powell saw no such liberty interest since it was not proven that he suffered damage to his reputation or an inability to obtain other employment. If there is no injury, then there is no liability, Powell concluded.

Powell next addressed the majority's opinion regarding municipal immunity. He noted that the decision may have a chilling effect on administrative action. Powell explained that the very purpose for a government official having immunity is so that he or she can act, within reason, without fear of being sued for making routine decisions. In other words, administrative discretion is vital in decision making.

> Because today's decision will inject constant consideration of 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under 1983 "is to forestall an atmosphere of intimidation that would conflict with officials' resolve to perform their designated functions in a principled fashion." The Court now argues that local officials might modify their actions unduly if they face personal liability under 1983, but that they are unlikely to do so when the locality itself will be held liable. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for

> subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by fear of personal liability. (pp. 668-669)

Here we see Powell's emphasis on administrative effectiveness, and he believed it should have been given stronger consideration. He believed administrators would be too afraid to make discretionary decisions if they fear their local governments will be sued. On the other hand, Brennan and the majority believed accountability was more important. Administrators must understand that their actions will have consequences when they intentionally or unintentionally violate citizens' rights, or, in this case, an employee's rights.

Powell did not agree with Brennan that the history of immunity for government officials did not extend to municipalities and noted that public policies support the conclusion that local governments should have qualified immunity. He believed the Court's opinion unfairly penalized administrators who may make mistakes unintentionally. To be held liable in all such instances could render the municipalities financially bankrupt.

> The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. Ante, at 655. The Court neglects, however, the fact that many local governments lack the resources to withstand substantial unanticipated liability under 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. (p. 670)

Both positions raise important questions for public administrators. If a city understands that it will be held liable for its administrators' decisions, will it scrutinize more closely the selection of its personnel? Will managers increase in quantity or quality

of the training programs available to administrators within their organizations? Will administrators fear lawsuits so much that they are unable to make routine decisions? What about the use of discretion? How will it change? To be sure, Brennan's opinion would have far reaching implications for municipalities. At the time of the case, 44 states extended qualified immunity to municipalities. After this decision, all of that immunity was removed for 1983 lawsuits. The dissenters mentioned that (1) liability suits against municipalities could potentially bankrupt them or at the very least hinder the services they provide to meet community needs, and (2) "for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts" (p. 680). Brennan emphasized value of accountability for public administrators.

**PATRONAGE POLICIES IN CIVIL SERVICE**

In another controversial decision, *Elrod v. Burns*, Brennan's majority opinion took an even greater step in defining the rights and liberties protection of public employees by placing limitations on political patronage. Richard Elrod was a Democrat who replaced a Republican, Joseph Woods, as Cook County Sherriff. Most sherriff's department employees were considered to be merit employees and therefore protected from discharge without cause. As was customary, when Elrod took office, he fired several employees who were classified as non-civil service employees. Non-civil service employees were not protected from arbitrary discharge, meaning under Illinois law, they could be dismissed at any time and for any reason. He replaced them with employees who were fellow Democrats. The discharged employees brought suit in a federal district court under 42 U.S.C. 1983 alleging that their dismissals were unconstitutional and

violated their First Amendment rights to free speech and association as applied to the states through the Fourteenth Amendment.

In his decision, Brennan determined that patronage dismissals of non-policymaking public employees did violate First Amendment freedoms of speech and association, and the petitioners were entitled to a remedy. This decision was significant because patronage dismissals had been so widely accepted in American history. In fact, Brennan knew that many would object to the Court even hearing such a case.

> At the outset, we are met with objections to our consideration of this case based on the political-question doctrine and the principle of separation of powers. These objections need not long detain us. A question presented to this Court for decision is properly deemed political when its resolution is committed by the Constitution to a branch of the Federal Government other than this Court. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Thus, 'it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" Id., at 210. That matters related to a State's, or even the Federal Government's, elective process are implicated by this Court's resolution of a question is not sufficient to justify our withholding decision of the question. In particular, in this case, we are asked only to determine whether the politically motivated discharge of employees of the Cook County Sheriff's Office comports with the limitations of the First and Fourteenth Amendments. This involves solely a question of constitutional interpretation, a function ultimately the responsibility of this Court. (pp. 351-352)

Brennan noted that the Court is not automatically barred from hearing cases that present political questions; it is only barred from breaching the formal system of separation of powers that is the framework of the Constitution. Brennan recognized the political significance of this case but also understood that the Court is required to determine whether a Constitutional violation had occurred.

After he decided it was appropriate for the Court to make a decision of the case's merits, Brennan discussed how deeply entrenched patronage practices were in the

American republic. Although the practices were widespread, Brennan also noticed a steady decline in its popularity.

> Patronage practice is not new to American politics. It has existed at the federal level at least since the Presidency of Thomas Jefferson, although its popularization and legitimation primarily occurred later, in the Presidency of Andrew Jackson. The practice is not unique to American politics. It has been used in many European countries, and in darker times, it played a significant role in the Nazi rise to power in Germany and other totalitarian states. More recent times have witnessed a strong decline in its use, particularly with respect to public employment. Indeed, only a few decades after Andrew Jackson's administration, strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act, the foundation of modern civil service. And on the state and local levels, merit systems have increasingly displaced the practice. (pp. 353-354)

Discussing the move away from patronage systems, Brennan affirmed his philosophy that each individual must be considered on his or her own merit in public employment decisions. He noted that the practice of political patronage unfairly disadvantaged individuals because of their party affiliation. It was this disadvantage that interfered with the guarantees of the First Amendment. Brennan mentioned the extent to which the patronage system operated in the Cook County Sherriff's Department. In order to keep their jobs, the employees had to pledge allegiance to a political party, assist party candidates with re-election efforts, and pay a portion of their wages to the party. All of these activities meant that the employee was being deprived of his or her First Amendment rights to believe as they choose and also associate as they choose. The right to hold one's own partisan beliefs and to associate freely with others without fear of consequences was fundamental to the precepts of the First Amendment.

> Patronage, therefore, to the extent it compels or restrains belief and association, is inimical to the process which undergirds our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment." *Illinois State Employees Union v. Lewis*, 473 F.2d, at 576. As such, the practice

> unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith. (p. 357)

Brennan also noticed that this unfair practice interfered with the electoral process itself by conditioning public employment on partisan support. It diminished competitiveness in the marketplace of ideas. He said, "as government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise" (p. 356).

After finding that the Cook County patronage practices infringed on the First Amendment rights of the employees, Brennan then turned to a discussion of the rights-privilege dichotomy to determine what would be the appropriate standard of review. The standard of review that the Court applied is important because First Amendment rights are not absolute. As the Court determined in many of its previous cases, government may encroach on an individual's rights; the matter to be determined is under what circumstances it may do so. This dichotomy had been the subject of debate among the Court's justices in several cases.[167] Some Justices concluded that there was no Constitutional right to public employment; therefore, the employment may be subject to conditions. Other Justices, Brennan among them, concluded that whether public employment was a right or a privilege was insignificant. What mattered was that the employment could not be conditioned on whether the employee agreed to forego a Constitutional right. In re-emphasizing the latter position, Brennan quoted the Court's opinion in *Sugarman v. Dougall*: "This Court now has rejected the concept that

[167] For examples, see *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Sugarman v. Dougall*, 413 U.S. 634 (1973).

constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege'" (p. 389).

How, then, would the Court determine whether patronage was a constitutionally acceptable infringement on employee rights? For Brennan, the answer was the strict scrutiny test.

> "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct…." *Buckley v. Valeo*, supra, at 65. Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S., at 58.The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley v. Valeo,* supra, at 94. (p. 362)

Strict scrutiny is one of the most difficult standards for a government to meet because the burden of proof lies with it to show that there is a compelling interest at stake that cannot be achieved using any less restrictive feasible means. Could the Cook County Sherriff's Department have such a compelling interest? It offered two:

1. Patronage ensured effective government because it secures the efficiency of public employees.
2. By demanding party loyalty, patronage ensured that incumbents who wished to sabotage the incoming administration would not undermine representative government.

Brennan dismissed the first alleged interest as improbable. He said that it was more inefficient to replace a large number of employees just because they did not belong to the political party of the incoming elected official. He saw more merit in the second alleged interest but still rejected it. He said that representative government was critical, but replacing employees in non-policymaking positions did not ensure it. It was better to

subject policymaking positions to patronage. He admitted, though, that often the line between policymaking and non-policymaking positions is not very clear.

Because there was no compelling government interest to justify the denial of the employees' First Amendment rights, the patronage practice could not continue. Brennan's constitutional values prevailed in a 5-3 decision. Justice Stewart wrote a concurring opinion in which Justice Blackmun joined. Stewart commented that the case was far simpler than the majority opinion suggested. For Stewart, the question was whether a non-policymaking government employee can be fired from a job that he is performing satisfactorily solely because of his political beliefs. He answered no.

The dissent, on the other hand, attempted to minimize the First Amendment infringement by making two arguments. Justice Powell wrote an opinion in which Justices Burger and Rehnquist joined. First, Powell observed that the patronage system was as old as the republic itself and had contributed significantly to American democracy. He mentioned that patronage had increased political activity and strengthened party identification. Citing the history of the patronage system, Justice Powell argued that the system did not deny the employees the right to freely express themselves politically through the vote. This was an important point for the dissenters because they believed this to be the measure of whether or not patronage practices violated constitutional standards. It also signaled for the dissent the improbability that patronage practices interfered with the electoral process itself. Second, Powell asserted that Brennan's opinion was an unnecessary and unwarranted interference with the legislative process. Since not all of the public employment positions were political

patronage ones, there remained other opportunities for career civil servants in the Cook County Sheriff's Department.

> But patronage hiring practices have been consistent historically with vigorous ideological competition in the political "marketplace." And even after one becomes a beneficiary, the system leaves significant room for individual political expression. Employees, regardless of affiliation, may vote freely and express themselves on some political issues. See *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Board of Education*, 391 U.S. 563 (1968). The principal intrusion of patronage hiring practices on First Amendment interests thus arises from the coercion on associational choices that may be created by one's desire initially to obtain employment. This intrusion, while not insignificant, must be measured in light of the limited role of patronage hiring in most government employment. The pressure to abandon one's beliefs and associations to obtain government employment - especially employment of such uncertain duration - does not seem to me to assume impermissible proportions in light of the interests to be served. (p. 388)

Given the history of the patronage system and the important electoral function it served, Powell contended that this sufficiently justified the continuation of the practice.

Justice Burger also wrote a separate dissenting opinion, and in it he criticized the Court for legislating. He preferred to leave the matter to the legislative branch.

> The Illinois Legislature has pointedly decided that roughly half of the Sheriff's staff shall be made up of tenured career personnel and the balance left exclusively to the choice of the elected head of the department. The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution commands something it has not been thought to require for 185 years. For all that time our system has wisely left these matters to the States and, on the federal level, to the Congress. (p. 375)

Fourteen years later, in 1990, Brennan faced another patronage decision. *Rutan v. Republican Party of Illinois* extended the patronage ruling in *Elrod* to include not only dismissals but also hiring, promotion, tenure decisions, transfers, and recalls. The opening line of Brennan's opinion stated his position succinctly: "To the victor belong only those spoils that may be constitutionally obtained" (p. 64).

In 1980, through executive order, the Governor of Illinois placed a hiring freeze on all civil service positions under his control. This order prohibited hiring, promotion, filling vacancies, creating new positions, and recalling laid off employees and affected roughly 60,000 positions. None of these activities could take place without the explicit permission of the Governor's Office. An agency could request an exemption to the executive order, and the Governor's Office of Personnel was created to field agency exemption requests as well as to screen applicants for whom the exemption was sought. In reviewing the requests, the Office considered applicants based on whether they had shown some kind of support for the Republican Party (e.g., whether they were registered Republicans, voted in Republican primaries, or pledged future support). Several employees brought suit against the state of Illinois as well as members of the Republican Party who worked for the state, alleging that their First Amendment rights had been violated. Among the petitioners was Cynthia Rutan; she alleged she had been repeatedly denied a promotion because she did not support the Republican Party. The Court must determine whether the holding in *Elrod* applied only to patronage dismissals or if it also applied to hiring, promotions, transfers, and recalls. Brennan wrote that the holding in *Elrod* applied to all patronage decisions for non-policymaking positions.

The respondents argued that there had been no First Amendment deprivation because (1) the petitioners had no legal right to a promotion or transfer or recall and (2) the patronage decisions were not punitive and did not adversely affect the terms of the petitioners' employment. Brennan reasoned that neither of these arguments is sufficient. First, while the petitioners may have no right to a promotion, transfer, or recall, the denial of these employment opportunities may not be conditioned on their support for a political

party. To base the decision on that factor violated the petitioners' First Amendment rights to freely practice their beliefs and to associate freely. Again, he emphasized the Doctrine of Unconstitutional Conditions over the Doctrine of Privilege.

> "For at least a quarter-century, this Court has made clear that, even though a person has no `right' to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited…." (p. 72)

Second, he said that employees who do not support the political party may end up in dead-end jobs and therefore feel pressure to support or identify with the political party that has the ability to change their employment circumstances.

> Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience. (p. 73)

Because Brennan could discern no substantial difference between *Elrod* and *Rutan*, he held once again that the First Amendment is violated by the use of patronage hiring, firing, promotion, transfers, and recalls. He also re-emphasized that the proper standard of review is strict scrutiny. Brennan's decision in *Rutan* showed that he intended for the values he asserted in his decisions to be as broadly construed as possible;

he wanted them to be far-reaching. The dissent, on the other hand, preferred *Elrod* to be construed as narrowly as possible first and foremost because the dissenters believed it had been improperly decided.

In his dissenting opinion, Justice Scalia was joined by Justices Rehnquist, Kennedy, and in part by O'Connor. He made three points. First, he said that the Doctrine of Privilege should be preferred over the Doctrine of Unconstitutional Conditions. He believed there was no constitutional right to a government job; hence, hiring, firing, promotion, tenure, transfer, and recall decisions could be conditional. He gave several examples of how being a private citizen is different from being a public employee. He noted that private citizens could not be forced to wear short hair but police officers could be forced to do so or risk losing their jobs. Private citizens cannot have their property searched without probable cause but government employees could under some circumstances. For Scalia, these differences meant that public employment could be conditional. Second, he argued that the long history of political patronage was enough to allow the practice to continue. He wrote:

> The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil-service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:
>
> "I ain't up on sillygisms, but I can give you some arguments that nobody can answer. First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, Plunkitt of Tammany Hall 13 (1963).
>
> It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects

> increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups. (p. 93)

This is the same position that Justice Burger took in *Elrod.* Scalia seems not to have considered that just because political or administrative practices have been in place for a long time, it does not justify their continuation, especially if the practices violated the constitutional rights of public employees. He saw the Court's decision as imposing a civil service system on Illinois rather than letting it decide whether it would have a civil service or a patronage system. Just because a merit system had now come into favor, wrote Scalia, did not mean that an end to patronage must be mandated. Whether the state had a civil service or a patronage system should be determined through the legislative process, not the courts. For this reason, he wanted to overturn *Elrod*.

> The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation - both of which are results in which States have a strong governmental interest. (p. 104)

Third, he stated that the decision in *Elrod* was not consistent with the Court's prior precedent, especially in regard to the standard of review.

> The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. Ante, [497 U.S. 62, 98] at 68-72. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests." Ante, at 74. That strict-scrutiny standard finds no support in our cases. Although our decisions establish that

> government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio[ns]. . . .When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served…." (pp. 97-98)

Instead of strict scrutiny, Scalia applied a balancing test in which the First Amendment interests of the petitioners were weighed against the administrative interests of the respondent. Applying this test, Scalia noted, would suffice to give the respondents more flexibility in their administrative decision making.

Justice Stevens wrote a concurring opinion for the sole purpose of addressing Scalia's dissent. He began by aligning himself with the Doctrine of Unconstitutional Conditions. He said the Court had long ago determined that when public employment decisions are conditioned on the forfeiture of a Constitutional right, federal judicial review was necessary.

> "Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State." (p. 81)

First, Stevens did not believe that public employment should be subject to unconstitutional conditions. Second, Stevens attacked Scalia's comments regarding the history of patronage in the country. Stevens noted that a history of patronage did not justify continuing the practice if it infringed on Constitutional rights.

> To avoid the force of the line of authority described in the foregoing passage, Justice Scalia would weigh the supposed general state interest in patronage hiring

> against the aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest. It assumes that governmental power and public resources - in this case employment opportunities - may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service. (pp. 87-88)

Stevens concluded his opinion by mentioning that the Court did due diligence in *Elrod* and correctly applied that precedent to *Rutan*. He disagreed with Scalia that a balancing test was the correct standard of review and instead supported Brennan's use of strict scrutiny.

Both *Elrod* and *Rutan* might remind us of the politics-administration dichotomy as first discussed by Woodrow Wilson in his 1886 essay.[168] In both of these cases, Brennan supports the dichotomy, while the Court's dissenting opinions promote the benefits of having the two intertwined, at least in regard to patronage practices in employment.

**FREEDOM OF SPEECH**

According to Hemmingway,[169] government has over the years engaged in a variety of activities that have been held to violate employees' First Amendment freedoms. The U.S. Supreme Court has struck down a number of loyalty oaths for employees as a condition of employment. These oaths required an employee to swear that he or she was not associated with any organization deemed subversive. Generally, public employees may not be fired merely for exercising freedom of speech, and this is true whether or not the employee is tenured.

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[168] Wilson, Woodrow (June 1887). "The Study of Administration." *Political Science Quarterly*. 2.
[169] Hemmingway, Charles W. (1995). "A Closer Look at *Waters v. Churchill* and *United States v. National Treasury Employees Union*: Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee." 44 *American University Law Review* 2231.

Beginning in 1968 with *Pickering v. Board of Education,*[170] the Court decided a succession of cases that determined when employees could be dismissed for speech-related activities. In *Pickering*, the Court held that there must be a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and the interests of the state, as employer, in promoting the efficiency of the public services it performs through its employees. In that case, an Illinois Board of Education fired Marvin Pickering, a teacher, for writing a newspaper editorial criticizing the Board's allocation of school funds to educational and athletic programs as well as the Board's and superintendent's methods of informing the school district's taxpayers of the actual reasons why additional tax funds were being sought for the schools. At a hearing, the Board claimed that numerous statements in the letter were false and that the publication of the statements reflected badly on the Board and on the school administration. The Board also concluded that the letter was detrimental to the efficient operation and administration of the schools of the district. The Illinois courts, reviewing the proceedings solely to determine whether the Board's findings were supported by "substantial evidence" and whether the Board could reasonably conclude that the publication was detrimental to the best interests of the schools, upheld the dismissal, rejecting appellant's claim that the letter was protected by the First and Fourteenth Amendments, on the ground that as a teacher he had to refrain from making statements about the schools' operation that in the absence of his public employment position he would have had every right to do.

On appeal, the U.S. Supreme Court overruled the lower court. Writing for the majority, Justice Marshall concluded:

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[170] 391 U.S. 563 (1968)

1. The theory (Doctrine of Privilege) that public employment may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. Instead, the teacher's interest as a citizen in exercising his freedom of speech must be balanced against the State's interest in promoting the efficiency and effectiveness of the workplace.

2. Many of the statements that Pickering made were in regard to matters of public concern and were not disruptive; therefore, the Board had no basis for firing him based on those statements.

3. Even the statements that Pickering made that were false were still regarding issues of public concern, and they cannot be presumed to have interfered with his teaching responsibilities. They are entitled to the same protection as they would be had they been made by a member of the general public.

4. Absent proof that those false statements were knowingly or recklessly made, the Board cannot justify firing him.

Marshall relied substantially on Brennan's decision in *New York Times v. Sullivan*[171] to draw his conclusions. In *New York Times v. Sullivan*, Brennan reasoned that speech on matters of public concern should receive more protection than other forms of speech. Brennan recognized that the country had a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Brennan reasoned that public officials could not win a libel suit unless they prove that statements (even false ones) were made with actual malice and with a wreckless disregard for truth.

[171] 376 U.S. 254 (1964)

Based on these beliefs, in *Connick v. Myers*, Brennan reinforced the idea of how important freedom of speech on matters of public concern is in our constitutional scheme. In a dissenting opinion, Brennan held that the majority gave too much weight to administrative efficiency and not enough weight to the First Amendment.

Sheila Myers, a deputy district attorney in New Orleans, Louisiana, had a disagreement with her supervisor regarding a job transfer. Dennis Waldron, her supervisor, offered her an internal transfer and promotion, but she resisted because it would have required her to prosecute cases in the court of a judge with whom she had been working on an offender diversion program. She saw the transfer as an unethical conflict of interest. She expressed her concerns in a meeting with Waldron and criticized him for his transfer decision and also brought up other matters for which she was dissatisfied such as his asking employees to work on political campaigns and finding out about major decisions through rumor as opposed to direct communication. Waldron told her that no other staff members shared her concerns. Myers circulated a survey in the office and asked employees to provide their views on such matters. Harry Connick, Sr., District Attorney and supervisor for both Myers and Waldron, fired her for doing so. Myers sued, alleging that she had been dismissed for exercising her freedom of speech. She won at both the district court and the appellate court levels. The U.S. Supreme Court, however, ruled against her, finding that Myers had not adequately demonstrated the public significance of her speech.

In his majority opinion, Justice White joined by Justices Burger, Powell, Rehnquist, and O'Connor, applied the balancing test that the Court had established in *Pickering*. The Pickering Test weighed the interest of the employee, as a citizen, in

commenting on matters of public concern against the interest of the state, as employer, in maintaining an efficient and effective workplace. In the application of the test, White concluded:

1. Myers's speech was largely regarding matters of private, internal policy that would not be of any concern to the public. This alone did not mean that the speech was unprotected, but more weight was given to speech on matters of public concern.

2. The survey could have potentially disrupted the cohesiveness and effectiveness of the District Attorney's office. And, the burden of proof was not on the manager to show that the speech was in fact disruptive; it sufficed that the manager believed there was the potential for disruption.

In assessing whether Myers' speech was on matters of public concern, White determined that the content, the form, and the context must be considered. He examined the survey that Myers distributed and found the questions focused on internal office policy and her disappointment with the transfer decision. These, for White, were not matters of public concern. She did not try to inform the public about any potential or actual wrongdoing that would have violated the public's trust.

> The District Court got off on the wrong foot in this case by initially finding that, "[t]aken as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." 507 F. Supp., at 758. Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in *Pickering*. Although we do not agree that Myers" communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. (p. 143)

He conceded that one of the questions regarding the pressure to work on political campaigns is of public concern. Because that question may have contributed to her

termination, White next considered the interests of the state. The state alleged the questionnaire Myers distributed interfered with close working relations within the office, and the supervisor described it as both a "mini-insurrection" and "an act of insubordination." White noted that employees in the office had to take time away from their duties to complete the questionnaire. And, the questionnaire, according to White, could have potentially disrupted the office operations. He did not hold the respondent responsible for accurately predicting whether in fact the questionnaire would be disruptive; the fear of disruption sufficed in this case.

White concluded then, that there has been no First Amendment violation, and Myers lost the case.

Brennan wrote the dissenting opinion and was joined by Justices Marshall, Blackmun, and Stevens. Brennan argued that Myers had indeed demonstrated that she was commenting on matters of public concern. As he began his opinion, his first contention is that the Court's majority has misapplied the Pickering Balancing Test.

> The Court's decision today is flawed in three respects. First, the Court distorts the balancing analysis required under Pickering by suggesting that one factor, the context in which a statement is made, is to be weighed twice - first in determining whether an employee's speech addresses a matter of public concern and then in deciding whether the statement adversely affected the government's interest as an employer. See ante, at 147-148, 152-153. Second, in concluding that the effect of respondent's personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. See ante, at 148-149. Third, the Court misapplies the Pickering balancing test in holding that Myers could constitutionally be dismissed for circulating a questionnaire addressed to at least one subject that was "a matter of interest to the community," ante, at 149, in the absence of evidence that her conduct disrupted the efficient functioning of the District Attorney's Office. (pp. 157-158)

Often, the subject of how to apply a test that the Court has devised in a previous case can cause the Justices to disagree. This certainly was the case here. Brennan thought the Court had applied the Pickering Balancing Test too narrowly.

Next, Brennan opposed how the Court defined issues of public concern. Once again, he believed the Court had construed the term too narrowly. If even one of the items on Myers's questionnaire addressed a matter of public concern, then her speech as a whole must be protected. He said the District Court correctly concluded that the questionnaire, when taken as a whole, related to the effective functioning of the District Attorney's office and is therefore a matter of public concern. Brennan defined matters of public concern as "information on the basis of which members of our society may make reasoned decisions about the government." This is in contrast to speech of private concern—speech that deals with individual personnel disputes and grievances and speech that is of no relevance to the public's evaluation of a government agency. Brennan reasoned that Myers's speech concerning ethical conflicts of interest and coercion in regard to political campaign work was a matter of public concern. He noted:

> In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why. The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed - regardless of whether it actually becomes the subject of a public controversy. (p. 160)

For Brennan, it did not matter whether the public is actually moved by the issue; what mattered was whether the speech at least opens the opportunity for public discussion about the issue of governance. The very purpose of the First Amendment, for Brennan, was to protect the discussion of public affairs, and he noted that the amendment would be meaningless if it did not extend to the criticism of public officials. In his view, the

majority feared Brennan's construction of public concern would mean that most, if not all, speech by a public employee would be protected. Brennan disagreed.

> Obviously, not every remark directed at a public official by a public employee is protected by the First Amendment. But deciding whether a particular matter is of public concern is an inquiry that, by its very nature, is a sensitive one for judges charged with interpreting a constitutional provision intended to put "the decision as to what views shall be voiced largely into the hands of each of us …." (pp. 163-164)

He conceded that the determining whether there had been speech of public concern was would be a sensitive one to be made by the judges.

Finally, Brennan disagreed with the Court that there need not be any actual disruption in the workplace in order for Myers to be terminated. The supervisor's belief that a disruption could occur was enough to justify the termination, according to the Court. Brennan argued:

> To this the Court responds that an employer need not wait until the destruction of working relationships is manifest before taking action. In the face of the District Court's finding that the circulation of the questionnaire had no disruptive effect, the Court holds that respondent may be dismissed because petitioner "reasonably believed [the action] would disrupt the office, undermine his authority, and destroy close working relationships." Even though the District Court found that the distribution of the questionnaire did not impair Myers' working relationship with her supervisors, the Court bows to petitioner's judgment because "when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." (p. 168)

According to Brennan, this view is extreme. He admitted that the employer's concerns must be carefully weighed but denied that the presumption of correctness should automatically be given to the employer. For these reasons, Brennan would rule in favor of Myers and protect her First Amendment right to free speech.

## CONCLUSION

Brennan's framework for analyzing human resource problems relies heavily upon his civil libertarian views regarding fundamental rights. He believed it is wise to err on the side of protecting rights and liberties even when there may be administrative consequences. He does not devalue administrative efficiency and effectiveness, but he does believe that the explicit principles of the Constitution must come first. Any infringement on these rights must be subject to strict judicial scrutiny. The government must have a compelling reason for obstructing the liberties of public employees, and the means used must be narrowly tailored. He also believed that speech on matters of public concern should be given special protection, and that what constitutes a matter of public concern must be broadly construed. Brennan also thought that this type of speech contributes to debate of public issues and that openness is one way to ensure a sound government. Further, the Doctrine of Privilege must be rejected. Brennan promotes instead the Doctrine of Unconstitutional Conditions.

In *Bivens*, Brennan saw an opportunity in this case to solidify a Fourth Amendment constitutional protection for citizens and provide them with a remedy where one had not yet existed. Once again, Brennan affirmed his philosophy of maximizing civil rights and liberties for citizens who suffer adversely because of administrative decision making. Brennan's decision should serve as a warning to federal employees who can, either knowingly or unknowingly, violate a citizen's rights.

There is evidence that Brennan's jurisprudence on public employment was enduring. He wrote the majority opinion in *Keyishian v. Board of Regents,*[172] a case in which a public university professor at the State University of New York at Buffalo was

[172] 385 U.S. 589 (1967)

fired for refusing to sign a certificate stating that he was not a communist. When Keyishian challenged the Board of Regents's decision to fire him, both a federal district court and a federal appellate court ruled against him. Brennan's majority opinion overturned the lower courts. Hunter Clarke points out:

> The important of the Court's ruling in *Keyishian* "lay in its rejection of a state's power to make public employment conditional on surrendering constitutional rights that could not otherwise be abridged by direct state action as well as in its emphasis on academic freedom." But because the vote was so close, with Clark, Harlan, Stewart, and Byron White dissenting, Harry Keyishian worried that Brennan's ruling might not stand the test of time, that it would be overturned as the composition of the Court grew increasingly conservative. By 1990, however, the decision remained the law of the land, and Keyishian told an interviewer that Brennan's opinions "have apparently been so well drawn and so well crafted that they've held up in very hostile environments in that Court, and I hope they'll continue to do so."[173]

As of 2012, *Keyishian* has not been overturned.

Table 10 summarizes the themes in Brennan's jurisprudence in regard to human resource management in administrative decision making.

**Table 10: Themes and Values in Brennan's Human Resource Management Jurisprudence**

| Regime Value | Theme | Case Law |
|---|---|---|
| Doctrine of Unconstitutional Conditions | Government employment may not be conditioned on the recipient's forfeiture of constitutional rights. | *Elrod v. Burns*<br>*Rutan v. Republican Party of Illinois*<br>*Connick v. Myers* |
| Freedom | Government must have a compelling interest and narrowly tailored means to interfere with a public employee's fundamental rights. | *Connick v. Myers*<br>*Elrod v. Burns*<br>*Rutan v. Republican Party of Illinois* |
| | Government may not penalize non-policymaking employees for their party identification. | *Elrod v. Burns*<br>*Rutan v. Republican Party of Illinois* |

[173] Clark, Hunter R. (1995). *Justice Brennan: The Great Conciliator*. New York, NY: Birch Lane, p. 239-240.

| | | |
|---|---|---|
| Accountability | Government officials are liable individually when they violate citizens' Constitutional rights. | *Bivens v. Six Unknown Agents* |
| | Municipalities are liable when they violate citizens' Constitutional rights, and they may not claim a "good faith" defense. | *Owen v. City of Independence* |
| | Administrative convenience does not justify negligent government action. | *Owen v. City of Independence* |

The next chapter discusses due process of law in the public sector.

# CHAPTER SEVEN
# CAN YOU HEAR ME NOW?

*We have come to recognize that forces not within the control of the poor contribute to their poverty….Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.*

-Justice William J. Brennan

## BEST OF LUCK IN YOUR FUTURE ENDEAVORS

Dr. Robert Sindermann taught for ten years (1959-1969) in the Texas state university system. He taught at three different universities during that time. He did not have tenure; rather, he held his positions through a series of one-year contracts. In 1965, he accepted a position at Odessa Junior College, and he was elected president of the Texas Junior College Teachers Association for the 1968-1969 school year. He had public disagreements with the college's Board of Regents. Specifically, Sindermann supported a plan to elevate the junior college to a four-year college, but the Board opposed the plan. When his contract expired, the Board voted not to renew it and also issued a press release explaining that Sindermann had been insubordinate. The Board did not give Sindermann an official reason for the nonrenewal, and he was not given a hearing to contest the decision.

Sindermann sued the Board's members individually under 42 U.S.C. 1983, alleging they violated his right to due process by not affording him a hearing to refute their accusations of insubordination. He also believed the nonrenewal violated his First Amendment free speech rights. The Board argued that since Sindermann was not formally tenured through a written agreement, he had no reasonable expectation of continued employment. The Court disagreed and remanded the case to the district court

for further fact finding.[174] Justice Stewart argued that a provision in the faculty guidelines may have in fact created a property interest in his employment and, at the very least, the district court was obligated to determine precisely what was intended by the policy. Justice Brennan believed Sindermann was entitled to a hearing and that the Board was obligated to state their reasons for firing Sindermann.

According to Robert McKeever, the Fourteenth Amendment's due process clause is the most litigated provision of the Constitution.[175] Due process of law is a constitutional mandate that applies not just to citizens but also to public employees in their official capacities. Under the Fifth and Fourteenth Amendments to the Constitution, both are guaranteed not to be deprived of life, liberty, or property without due process of law. The Fifth Amendment reads (the due process clause is underlined):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, <u>nor be deprived of life, liberty, or property, without due process of law</u>; nor shall private property be taken for public use, without just compensation.[176]

Section 1 of the Fourteenth Amendment reads again:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; <u>nor shall any state deprive any person of life, liberty, or property, without due process of law</u>; nor deny to any person within its jurisdiction the equal protection of the laws.[177]

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[174] *Perry v. Sindermann*, 408 U.S. 593 (1972)
[175] McKeever, Robert (1997). *The United States Supreme Court: A Political and Legal Analysis*. New York, NY: St. Martin's Press.
[176] http://www.law.cornell.edu/wex/fifth_amendment
[177] http://www.law.cornell.edu/constitution/amendmentxiv

While due process is a constitutional guarantee, the term has been difficult to operationalize. For example, public employees who believe they have been wrongfully terminated can sue under the Fifth or Fourteenth Amendments if they did not receive a hearing. But, what type of hearing is necessary? Must it take place before the termination, or would afterward suffice? Who may attend? May witnesses be questioned and by whom? Citizens who have had government benefits taken away also may sue under the Fifth or Fourteenth Amendments if they did not receive a hearing. But, once more, what type of hearing is necessary? Must it take place before the termination, or would afterward suffice?

The concept of due process has become an important one in administrative law. Underlying it is the general principle that at minimum, citizens are entitled to a fair procedural process when interacting with government. According to Cooper, due process claims concern the fairness of administrative adjudications.

> Due process rights are protected by the Constitution, statutes, regulations, contracts, and judicial interpretations. The requirements of administrative adjudication may be understood through consideration of questions that have to do with a fair hearing. One can ask: (1) Is a hearing required in a particular situation? (2) If so, at what point in an administrative action is the hearing required? (3) What kind of hearing is required? (4) What are the essential elements of an administrative hearing?[178]

The questions that Cooper poses are questions that Justice Brennan answered in his due process jurisprudence. As with all of Brennan's jurisprudence, he interpreted the Fourteenth Amendment as a guarantee of human dignity and protection when interacting with government. In this manner, Brennan was concerned not only with procedural due process but also with substantive due process. For him, these forms of due process were

[178] Cooper, Philip J. (2007). *Public Law and Public Administration*. 4th ed. Belmont, CA: Thomson Wadsworth, p. 188.

intertwined. In contrast, when discussing due process, most scholars distinguish between procedural due process and substantive due process. Cooper also provides a good discussion of the difference between the two.

> Procedural due process permits government to take action that may have grave consequences for a person (or a group) as long as it follows fair procedures. Thus, the Fifth Amendment requires that one may not be deprived of life, liberty, or property without due process. But if all the procedures needed to ensure a fair decision process are followed, the government may take property, it may sentence citizens to jail, and it may even mandate execution. Procedural due process does not mean that a person before a government organization is entitled to win a dispute, but only that the government must deal with the case fairly and in accordance with all the requirements of law. The idea that due process prevents government from taking some action against an individual regardless of the procedural protections provided is frequently referred to as substantive due process.[179]

In studying constitutional law, *Lochner v. New York*[180] typically is used as an example of how to think about substantive due process, which is more difficult to define than is procedural due process. In *Lochner*, the Court had to determine whether a New York state statute (the Bakeshop Act) that limited the number of hours a baker could work during a week-long period was an unconstitutional violation of the Fourteenth Amendment's due process clause. Joseph Lochner, who owned a bakery and asked employees to work more than the 60-hour statute-imposed weekly limitation, was fined $50.00 for violating the Bakeshop Act. In his lawsuit, he alleged no procedural due process violations. Instead, he alleged that the statute interfered with his liberty to contract with employees as he wished. The state, however, argued that limiting the number of hours that bakeshop employees could work was simply an exercise of the state's police powers—the ability to pass legislation to protect the health, safety, and welfare of the citizens. In its decision, the Court determined that substantive due process

[179] Cooper 2007, p. 195-196.
[180] 198. U.S. 45 (1905)

allows citizens to attend to their own contract affairs without unreasonable and unnecessary government intervention. The Court ruled that New York's statute was a violation of this type of due process because bakers are able to determine for themselves how many hours they wish to work. They do not need the protective arm of the state to interfere with their private contract affairs. The Court did not see bakers as a class of persons in need of special protection in the contract process. Therefore, the state's law was arbitrary.

In public administration, more often than not, the emphasis is on procedural due process. This is true because the discretionary function of administrators makes it far more difficult to guarantee substantive than procedural due process. In order for the due process clause to apply, one must have been deprived of *life, liberty, or property*. Rarely are administrative due process challenges ones that involve *life* within the meaning of the Fourteenth Amendment; however, liberty and property disputes arise frequently. First, an individual may claim a property interest if he or she has a reasonable expectation of continued employment or receipt of some other benefit (social security disability payments, for example). This expectation is not created by the Constitution. Rather, federal or state statutes create it. Once conferred, the property may not be taken without due process, meaning some kind of hearing that includes a notification that the benefit will be terminated or altered (and the reasons for the termination or change) and an opportunity for the recipient to respond. Similarly, a liberty interest may be invoked when (1) an individual has suffered damage to his or her reputation that inhibits his or her ability to secure a future benefit such as employment or (2) when he or she can show that the benefit was terminated primarily because he or she engaged in Constitutionally

protected behavior. Normally this damage to reputation occurs when the administrator has publicly discussed the reason for the termination.[181]

In this chapter, I examine Brennan's approach to due process for both citizens and public employees. For Brennan, there were special classes of persons who did need the protective arm of the state because of their vulnerable positions in society. For example, I analyze Brennan's majority opinion in *Goldberg v. Kelly*[182] to show how and why he concluded that welfare recipients are entitled to a full evidentiary hearing before the state may take away their benefits. I also analyze *Bell v. Burson*[183] as another example of procedural due process challenges. I then discuss Brennan's dissent in *DeShaney v. Winnebago County Department of Social Services*[184] to show how his concept of due process places an affirmative obligation on state departments of social services to protect abused children. I discuss *Bishop v. Wood*[185] and *Cleveland Board of Education v. Loudermill*[186] as examples of due process challenges in public employment and conclude with a presentation of the values in Brennan's due process opinions. For each of these cases, I contemplate the four questions that Cooper poses for consideration in each administrative due process decision:

1. Is a hearing required in a particular situation?
2. If so, at what point in an administrative action is the hearing required?
3. What kind of hearing is required?
4. What are the essential elements of an administrative hearing?

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[181] Cann, Steven J. (2006) *Administrative Law*. Thousand Oaks, CA: Sage.
[182] 397 U.S. 254 (1970)
[183] 402 U.S. 535 (1971)
[184] 489 U.S. 189 (1989)
[185] 426 U.S. 341 (1976)
[186] 471 U.S. 532 (1985)

Cooper's analysis is a helpful addition to this chapter because his questions highlight the administrative context of each decision.

**INDIVIDUALS' DUE PROCESS GUARANTEE**

Public administrators sometimes deprive individuals of their constitutional due process rights, and this deprivation can have severe consequences. This was true in *Goldberg v. Kelly*, one of the most frequently cited administrative law cases. Justice Brennan wrote the opinion of the Court.

The question that the Court must decide is whether New York violated the due process clause of the Fourteenth Amendment by terminating public assistance payments to its citizens without allowing them to have a full evidentiary hearing prior to termination. The State Commissioner of Social Services revised the State Department of Social Services's rules to require local social services departments proposing to terminate a recipient's benefits to follow one of two procedures. First, the local department had to notify the recipient of the reasons for a proposed termination at least seven days prior to its effective date. The department also had to provide notice to the recipient that he or she could choose to have the case reviewed by a local welfare official who was superior in position to the person making the initial decision to terminate the benefits. The recipient could also submit a written statement to provide evidence of why the benefits should not be terminated. Then, the recipient had to be notified in writing of the final agency decision. The benefits could not be terminated prior to the date of the final decision notice or the originally proposed effective date of termination, whichever occurred later. In a second process option, a caseworker who doubted whether a recipient was still eligible to receive benefits was required to discuss the concerns with the

recipient. If the caseworker concluded that the recipient was no longer eligible, then he or she could recommend termination to a supervisor. The supervisor would then send the recipient a letter stating the reasons why the benefits were going to be terminated, and then also him or her that he or she could request a review by another department official. The recipient also could submit a written statement to explain why the benefits should not be terminated. If the reviewing official agreed with the termination, then the benefits ceased immediately. The supervisor would then send a letter to the recipient stating the reasons for the termination.

Kelly and those similarly situated sued the state of New York, alleging that neither of the two procedures described above provided the opportunity to appear before the agency for oral presentation of evidence or to challenge evidence against the recipient. According to the regulations, though, the recipient could appear before the agency after the termination had occurred. If the recipient was successful at the oral hearing, he or she would be given the benefits to which he or she had been deprived. Was this full evidentiary oral hearing required before the benefits were terminated? The state contended that allowing a full evidentiary hearing prior to the termination of benefits would excessively burden the state administratively and reduce the effectiveness and efficiency of the local social services departments.

In writing his opinion, Justice Brennan focused on the procedural aspect of the due process clause, but he did so within the context of what is at stake for the citizen. He first conceded that some government benefits may be terminated without a full evidentiary hearing. But was this such a case? Brennan concluded that it was not. He described the nature of welfare benefits: "But we agree with the District Court that when

welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care" (p. 264). In this context, the very nature of welfare benefits requires the utmost care and consideration before the payments are terminated. Otherwise, the citizen would be deprived of his or her very means of living. In this manner, welfare benefits must be considered property within the meaning of the Fourteenth Amendment. And, this property could not be taken without adequate procedures.

Once Brennan noted this fact, he then mentioned that the Constitution protects the human dignity of each citizen.

> Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end. (pp. 264-265).

Here, Brennan recognized the value of public assistance not only to the individual but also to the broader community.

The state argued that its interests in efficiency, effectiveness, and minimizing costs outweigh the citizens' interest in a pre-termination hearing. Brennan disagreed, but he also offered the state a prescription:

> But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. (p. 266)

For Brennan, Kelly's Fourteenth Amendment interest outweighed the state's interest in cost-effectiveness. Therefore, a pre-termination hearing was required before the welfare benefits can be terminated. The Justice then discussed what type of pre-termination hearing should be held. He said that the purpose of a pre-termination hearing was to determine whether there are sufficient grounds on which to terminate the benefits. Therefore, it need not be a quasi-judicial hearing that mimics a trial-type proceeding. Brennan stated that a complete record and a comprehensive opinion did not need to be provided at the pre-termination hearing. In outlining these minimal procedures, Brennan still acknowledged efficiency and effectiveness as important values. He went on to write that the Court did not wish to impose any constraints on the agency beyond those that are absolutely necessary to meet Constitutional standards of procedural due process.

However, Brennan brought to light another interest that until this point had not been discussed in due process cases. He wrote that the state had an interest in making sure that it was not erroneously terminating citizens' benefits. The state certainly had not listed this interest among its arguments, but Brennan found it must be placed on the balancing scale. How likely was the agency to make a mistake in determining whether an

individual's benefits should be terminated? In welfare cases, the result of a mistake could mean the end of all options for the individual. So, a pre-termination oral hearing must be provided to reduce the risk of an erroneous decision. The opportunity to appear before the agency and orally present evidence could not be matched by submitting a written statement. In assessing this value of an oral presentation, Brennan noted:

> Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The secondhand presentation to the decisionmaker by the caseworker has its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. (p. 269)

These problems associated with written hearings did not allow welfare recipients a sufficient opportunity to present themselves as credible or veracious. An oral hearing provided the recipient with the best chance for procedural fairness. After the oral hearing, the impartial decision makers must provide the reasons for their determination and also explain the evidentiary basis for the determination. This statement need not be a full opinion, nor need it include formal findings of fact and conclusions of law as would be necessary in a quasi-judicial adjudication.

Justices Burger, Stewart, and Black dissented in the case. In his opinion, Justice Black first considers the state's interest. He mentioned the large number of cases that New York must assess daily in determining who was eligible for welfare benefits. He noted that many citizens may be erroneously classified as eligible who were in fact ineligible for the benefits. The state, according to Black, was simply trying to correct its

errors by eliminating from the payment rolls those who should not have been there initially. The Fourteenth Amendment's due process clause need not be construed so broadly as to deprive the state of this ability. He stressed administrative efficiency.

> Today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today. (p. 272)

Black reasoned that the state's interest in eliminating ineligible welfare recipients was a powerful one:

> Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full "evidentiary hearing…" (p. 274)

Black also took issue with Brennan's classification of welfare benefits as property. He could find no precedent for this conclusion. Indeed, Brennan created a property interest in welfare benefits because of their significance to the individual's sustenance. For Black, the benefits were simply a charitable effort from the government that may be taken away with minimal procedures since there was no entitlement to them anyway. He opposed Brennan's attempt to constitutionalize humanism. The two Justices appealed to separate doctrines, unconstitutional conditions for Brennan and privilege for Black. For

these reasons, Justice Black dissented, and in doing so provided an excellent contrast to Brennan's public values.

If we return to Cooper's four questions, we find the answers in Brennan's opinion. First, is a hearing required in this situation? Brennan answers yes. A hearing is required to determine whether welfare recipients are still eligible for benefits. Second, if so, then at what point in an administrative action is the hearing required? Brennan determines that a hearing is required before benefits may be terminated. Third, what kind of hearing is required? Brennan noted that the hearing in this case should be a full, evidentiary administrative adjudication. The citizen must be allowed to appear in person to present evidence in support of his or her case. Fourth, what are the essential elements of an administrative hearing? Here, Brennan determined that several elements are necessary. First, the recipient must receive notice of the proposed termination of benefits. Second, he or she must receive an opportunity to respond to the proposed termination by appearing in person with the assistance of counsel and evidence to support his or her case. Third, the recipient must have an opportunity to see and refute the evidence against him. Fourth, he or she has a right to an impartial decision maker who must render a decision based on the evidence on the record.

In *Goldberg*, an identifiable right to life and property were seen in welfare payments—a government-provided benefit that was also being taken away by government actors. One year later, in *Bell v. Burson*, Brennan provided even more insight into procedural due process requirements by determining that a state cannot suspend a driver's license without first allowing the affected party to present evidence for why the license should not be suspended. Under the Georgia Motor Vehicle Safety

Responsibility Act, citizens who were involved in a vehicle accident and did not have liability insurance would have their driver's licenses suspended if they did not agree to pay a security equivalent to the amount of damages claimed by an aggrieved party in the accident. The citizen was responsible for paying the security regardless of whether he or she actually was at fault in the accident. The pre-suspension hearing afforded the citizen was only for the purpose of determining (1) whether the individual in his/her vehicle actually was involved in the accident, (2) whether he or she was covered by liability insurance at the time of the accident, and (3) whether the citizen qualifies for an exemption from the liability insurance requirement. If the citizen was involved in the accident, had no liability insurance and did not qualify for an insurance exemption, then the citizen had to pay the security or the license would be suspended.

Bell was involved in an accident when a five-year-old girl rode her bike into the side of his vehicle. He did not have liability insurance. The child's mother claimed $5,000 for the injuries her child suffered. Pursuant to statutory requirements, Mr. Bell was afforded a hearing to determine whether he was exempt from the insurance requirement. He was not. He testified that he was not at fault for the accident, but the testimony was ignored since a determination of fault was not part of the hearing process. He was told that if he did not pay the $5,000 security, his license would be suspended.

Bell then appealed the administrative decision in a Georgia District Court as permitted by statute. The court determined that he was not at fault for the accident and ordered that his license not be suspended. The Georgia Court of Appeals overturned the decision. The U.S. Supreme Court had to determine whether the Georgia statute violated

the Fourteenth Amendment's due process clause. Writing for the majority, Justice Brennan determined that it did.

Brennan first explained that the type of hearing required in administrative cases would vary significantly based on the deprivation involved. For example, the Court had already determined the previous year that cases involving the termination of welfare benefits required an opportunity for the affected party to appear in person at an oral hearing to present evidence as to why the benefits should not be terminated. Brennan stated that the pre-termination hearing involved in Bell's case need not be a full adjudication to determine who was at fault in the accident. In fact, the Justice said that the answer to that question could come only through the litigation process. The hearing must include a determination of whether there is a "reasonable possibility" that the person being asked to pay the security would face an actual judgment for that amount should the case be litigated.

To reach the decision about what type of hearing is required, the Court must weigh the interests of the state against the interest of the citizen. Here, the state argued it had two interests. First, it reasoned that it had an interest in protecting citizens against unrecoverable judgments. Hence, the security was necessary to ensure that a claimant actually received the damages for which he or she may be entitled. Second, the state maintained that the extended hearing that would be required to determine who was actually at fault would be too costly. Third, the state contended that a hearing to determine reasonable responsibility is unnecessary because it was not consistent with the statutory purpose. Brennan saw none of the arguments as sufficient to deny a citizen procedural due process rights. On the other hand, he found Bell's interest in maintaining

a driver's license to be quite significant. Once a state issued a license, the citizens had a reasonable expectation that it would not be taken away arbitrarily.

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. (p. 539)

Were Georgia to deny to all citizens the ability to obtain a license if they did not have liability insurance or did not pay a security, then there would be no due process contention. However, once the license is issued, citizens have a right to keep it. Unless Georgia afforded the citizen an opportunity to show they were not likely to be at fault for the accident, then the state could not suspend the license.

Returning to Cooper's four questions, we can see how Brennan provides the answers in this case. First, is a hearing required in this situation? Brennan answers yes. A hearing is required to determine whether the person whose license may be suspended will be reasonably found to be at fault for the accident. Second, if so, then at what point in an administrative action is the hearing required? Brennan determines that a hearing is required before the license may be suspended. Third, what kind of hearing is required? Brennan says that that the answer to this question will be left to the states since there may be many different ways to meet the requirement. Based on the reasoning in his opinion, it is not likely that a trial-type adjudication would be necessary. Fourth, what are the essential elements of an administrative hearing? Brennan notes that there must be a notice of the intent to suspend the license and that the hearing must be "meaningful" and "appropriate to the nature of the case." He states that the courts have consistently made that determination in regard to administrative hearings. Beyond those requirements, he

gives no further guidance in this case. Because Brennan does not prescribe the exact type of hearing that should take place (stating only the objective of the hearing), he allows administrators the flexibility to meet the requirements of due process. However, he is clear that the requirements can be met only if there is an opportunity to determine the likelihood of responsibility.

One additional significant aspect of *Bell* is that Brennan once again makes no distinction between a right and a privilege. The state contended that obtaining a driver's license is a privilege and not a right. Therefore, its issuance is subject to the state's conditions. Brennan rejects this perspective and solidifies his position that whether a right or a privilege, once the state provides a license, the recipient is entitled to keep it except where it has been revoked after he or she has been afforded adequate due process. No Justices dissented in this case; three concurred but submitted no opinion.

Both *Goldberg v. Kelly* and *Bell v. Burson* rely on individuals having a property interest in welfare benefits and in driver's licenses respectively. At times it may be difficult to determine when a property interest exists. Basically, a property interest exists when there is a reasonable expectation of continuation. The U.S. Constitution does not create this expectation. Instead, state law creates it. Welfare benefits, driver's licenses, and even public employment are all part of what many scholars refer to as *new property.*[187] Brennan's opinion in Goldberg determined that although different from how we traditionally conceive of property as houses, land, or vehicles, government entitlements too are a form of property. Once an individual has a property interest in

[187] See for example Cooper, Philip J. (2007). *Public Law and Public Administration*. 4th ed. Belmont, CA: Thomson Wadsworth and Rohr, John A. (1989). *Ethics for Bureaucrats: An Essay on Law and Values*. New York, NY: Marcel Dekker.

those things, they may not be taken away without adequate procedures in accordance with the Fourteenth Amendment.

Several years passed with the courts being favorable to individuals claiming due process rights in cases of government deprivation of property. The tide changed in 1976 with the Court's rulings in *Mathews v. Eldridge*[188] and *Bishop v. Wood.*[189] In these two cases, the Court narrowed *Goldberg's* ruling, which lessened the likelihood that individuals would be entitled to pre-termination oral hearings when government property rights were at stake. Cooper argues that this shift in the Court's application of *Goldberg* was a political decision designed to decrease the court's dockets, which were inundated with due process cases after the *Goldberg* decision.[190] Brennan dissented in both cases, voting to maintain a broad application of *Goldberg* in order to protect citizens from a potentially erroneous agency decision.

In the next case to be discussed, *DeShaney v. Winnebago County Social Services Department*, the Court had a more difficult time discerning whether there had in fact been any government action that led to the denial of due process rights. The Court determined there was not, but Brennan disagreed. This case differs from the prior two due process cases I have analyzed in that it focuses on *substantive* due process as opposed to procedural due process.

The facts of *DeShaney* are heart-wrenching. Joshua DeShaney was a toddler residing with his father in Winnebago County, Wisconsin. The first sign of trouble came in 1982 when Joshua's father, Randy DeShaney, was interviewed by the Winnebago County Social Services Department (DSS). Randy's ex-wife (Joshua's step-mother) had

[188] 424 U.S. 319 (1976)
[189] 426 U.S. 341 (1976)
[190] Cooper 2007.

revealed that he was physically abusing Joshua who was then three years old. Randy denied the allegations, and the Department did not pursue the matter any further. One year later, Joshua was admitted to a hospital where the staff noted "bruises and abrasions" on the child. DSS was notified of possible abuse, and it was granted a court order for temporary custody of Joshua. DSS assembled a child protection team to consider the abusive situation, but the team determined there was insufficient evidence to support the child abuse allegations. However, the team recommended that Randy receive counseling, enroll Joshua in pre-school, and have his live-in girlfriend move out of the home. Randy voluntarily agreed that he would do these things. One month later, Joshua came to the emergency room with bruises and abrasions. The hospital notified DSS a second time of possible child abuse, but for a third time, DSS caseworkers could not find sufficient evidence of child abuse.

Over the next six months, a caseworker visited the DeShaney household monthly. She made notes in her file that Joshua had unexplained injuries, that he had not been enrolled in pre-school, and that Randy's girlfriend still had not moved out of the house. No further actions were taken. In November 1983, for a third time, Joshua was taken to the emergency room where physicians reported to DSS that they suspected abuse. As a follow-up, a DSS caseworker visited Joshua's home on two occasions and was told that Joshua was too ill to see her. She took no action. Four months later, Randy DeShaney beat Joshua so severely that he required emergency brain surgery. His injuries rendered him mentally ill, and it was expected that he would spend the rest of his life in an institution for the mentally handicapped. Randy DeShaney was tried and convicted of child abuse.

Joshua's mother brought suit against the Winnebago County Social Services Department. She alleged that its failure to remove Joshua from his father's custody denied him of his due process within the meaning of the Fourteenth Amendment. The suit was brought under 42 U.S.C. 1983, so individual employees also were named as defendants in the case. Rehnquist wrote the majority opinion, and he first noted that this case involved an alleged violation of substantive rather than procedural due process. The complaint suggested that the state had an affirmative obligation to protect Joshua from his father's abuse. Next, he provided an analysis of the Due Process Clause within the context of this case. He concluded that the clause does not protect the life, liberty, and property of citizens against private action; it was intended to protect the life, liberty, and property of citizens against government action. In examining the history of the Due Process Clause as interpreted by the Court, Rehnquist wrote:

> Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression…to secure the individual from the arbitrary exercise of the powers of government… and to prevent governmental power from being `used for purposes of oppression. Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual….As we said in Harris v. McRae: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference…, it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." (p. 196)

Hence, Rehnquist concluded that no state action deprived Joshua DeShaney of his Fourteenth Amendment rights.

Joshua's mother argued that a "special relationship" existed between Joshua and the Department of Social Services, and this relationship created the affirmative obligation to protect Joshua. But, what was the source of this relationship, and when did it begin? According to Joshua's mother, the relationship began the moment DSS discovered Joshua was in danger of being abused and took measures to secure his protection. For example, when Randy's ex-wife told DSS that Joshua was being abused, DSS interviewed Randy. When the hospital notified DSS of suspected abuse, DSS responded by entering into a voluntary agreement with Randy. DSS also investigated the case, made home visits, and noted in official files that abuse was likely taking place. These behaviors, then, created a special relationship between Joshua and the Department. Rehnquist rejected this argument. He said that in prior decisions, an affirmative obligation to protect only existed "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being" (p. 199-200). He also stated:

> The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. (p. 200)

Joshua DeShaney was never taken into DSS custody in this manner, and therefore DSS did not deprive him of substantive due process. The harm that Joshua suffered from his father did not take place while Joshua was in a custodial relationship with DSS. It is of no significance to Rehnquist that Joshua was once in the temporary custody of DSS.

> That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not

> become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua. (p. 201)

Finally, Rehnquist noted that through the legislative process, a state may impose affirmative obligations for protection on DSS. Those obligations would have to be achieved through state law, not through the Fourteenth Amendment. Because there was no affirmative obligation for the state to protect against private action and because the state itself did not cause the harm to Joshua, Rehnquist held that the Department of Social Services did not violate Joshua's Constitutional right to due process.

Brennan wrote a dissent in which Justices Blackmun and Marshall joined. Brennan began by noting that the way that the Court's majority framed the issue is misleading. By framing the issue as whether Wisconsin had an affirmative obligation to protect Joshua DeShaney from private action, the Court is able to conclude that no such positive Constitutional right exists in the first place. And, because that right does not exist, the Court cannot simply invent it. Brennan wrote it is better to consider first the actions that Wisconsin did take as opposed to the ones it did not take. For Brennan, it is the state's initial action that determines the significance of its subsequent inaction. He cites prior cases in which the Court determined that because the state had taken some action that limited the availability of a citizen to seek assistance outside of the state's rendering of it, the state then gained the affirmative obligation to protect the due process rights of that citizen. For example, in *Youngberg v. Romeo,*[191] the Court determined that since Pennsylvania involuntarily committed Romeo to a mental health institution, it effectively took away any ability he had to seek help from any entity outside of the

[191] 457 U.S. 307 (1982)

government, and in taking away that ability, the state gained an affirmative obligation to adequately care for Romeo, to satisfy his needs, and to protect him from harm.

In addition, Brennan noted that this principle should not be so narrowly construed as to suggest the state must have full and direct physical control over the individual in order to invoke this affirmative obligation. For Brennan, this principle governed the decision in *DeShaney*.

> I would recognize, as the Court apparently cannot, that "the State's knowledge of an individual's predicament and its expressions of intent to help him" can amount to a "limitation . . . on his freedom to act on his own behalf" or to obtain help from others. Thus, I would read Youngberg and Estelle to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction. (p. 207)

Brennan provided other examples of when a state had been held liable for injuries even when it had not created the circumstances that lead to the injuries.

According to Brennan, Wisconsin was not required to establish a child welfare system. However, by choosing to do so, local departments of social services were bound by state statute to investigate complains of child abuse. When Joshua's step-mother reported that Randy DeShaney was abusing Joshua, DSS was obligated to investigate, and it did so. When the emergency room doctors suspected child abuse, they too contacted the DSS for further action. Under the Wisconsin statutory scheme, private individuals and government institutions alike are required to depend on DSS for the protection of children who are suspected of being abused. The social worker compiled evidence of abuse through home visits and observations. It was DSS that had the ultimate decision making authority to determine whether Joshua should be removed from his father's custody.

Brennan's final point was that any private citizen or anyone acting on behalf of another government agency outside of DSS would have believed his or her responsibilities were complete once abuse suspicions were reported to DSS. Joshua was then cut off from any assistance outside of DSS. He had no additional recourse. In this manner, the state had placed itself into Joshua's life and now had an affirmative obligation to protect him. For Brennan, the state's failure was unacceptable.

> As the Court today reminds us, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government `from abusing [its] power, or employing it as an instrument of oppression.'" My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent. (pp. 211-212)

This difference in perspective between Rehnquist and Brennan extends beyond the topic of substantive due process. In actuality, the two also disagree over how to decide cases of perceived bureaucratic foot dragging. "Foot dragging" is a popular term used to describe an agency's reluctance to act or make a decision in a timely manner. In 1985, Rehnquist wrote the majority opinion in *Heckler v. Chaney*,[192] and in it he determined that the courts should give agencies the benefit of the doubt when reviewing bureaucratic inaction. Hence, the courts generally give significant deference to agency expertise in matters of implementation. Rehnquist noted in that opinion that agencies may have many variables to consider when making a decision about whether or not to act. These variables include the availability of agency resources, legislative mandates, and the likelihood of a desired outcome. Within this realm of discretion, agency

[192] 470 U.S. 821 (1985)

decisions are best left to the expertise of the decision maker except where legislation orders a specific course of action. Ironically, Brennan joined the Court's majority in *Heckler*. But, he concluded in *DeShaney*:

> Youngberg's deference to a decisionmaker's professional judgment ensures that once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child, or even that no special protection is required, she will not be found liable for the harm that follows. (p. 211)

Did Brennan simply have a change of heart in *DeShaney*? One is not likely to draw this conclusion if he or she reads Brennan's precise words in DeShaney. Brennan is not criticizing DSS for its inaction. To the contrary, Brennan is saying that the agency did in fact act. The state intervened in Joshua's life by requiring all private citizens and other government agencies to report to DSS any suspicion of child abuse. Once the agency received these complaints, it investigated and took some action. It entered into an agreement with Randy DeShaney, social workers made home visits to check on Joshua's condition. The social worker noted in her files that the child was likely being abused. These actions placed on the state an affirmative obligation to protect Joshua because it had effectively taken away his recourse with anyone else except DSS. What Brennan is requiring, then, is that the state be held liable for its actions, not its inaction. Brennan concluded:

> Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs. …It simply belies reality,

> therefore, to contend that the State "stood by and did nothing" with respect to Joshua. Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. (p. 210)

Brennan's conclusions in *DeShaney* are insightful for public administrators who often are torn between the consequences of acting too quickly and those of acting too slowly. Undoubtedly, DSS knew that removing Joshua from his father's custody without sufficient evidence of abuse could jeopardize its credibility. Perhaps it could also be seen as a violation of the father's substantive due process rights. On the other hand, the slow-to-act decision making process of the social worker ensured Joshua would continue to suffer the abuse that she was nearly certain he was suffering. Why did she not take a chance in favor of Joshua's safety and well-being? We may never have a satisfactory answer to this question, but I suspect it may be related in part to the culture of the DSS. A reflection on the regime values present in both Rehnquist's majority opinion and Brennan's dissent should at least cause public administrators to consider at what point inaction becomes action and whether there is an affirmative obligation for the state to protect those who are not capable of protecting themselves.

**PUBLIC EMPLOYEES' DUE PROCESS RIGHTS**

*Bishop* highlights the difference in reasoning between Justice Stevens, who wrote the majority opinion, and Brennan, who wrote the dissent. The case presents two aspects of due process for consideration: Bishop's property interest in continued public employment and his liberty interest in his reputation.

The city manager of Marion, North Carolina, fired Carl Bishop, a police officer who was classified as "permanent" by city ordinance. Bishop was given no official

reason for the termination but was told unofficially that he was fired because of "failure to follow certain orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer" (p. 343). He was not provided a hearing prior to or after his firing to present any evidence to the contrary. He filed suit claiming that as a permanent employee, he has tenure in his position and is therefore entitled to a pre-termination hearing. He also claimed that the reasons that the city manager gave for firing him were false. Because they were false, they deprived him of his liberty interest within the meaning of the Fourteenth Amendment's due process clause since his reputation has been damaged. The Court must determine both whether Bishop has a property interest in his job and whether he has suffered a deprivation of liberty.

Bishop worked for the city of Marion for approximately two years and seven months. According to city ordinance, he became a permanent employee after six months of employment. The ordinance also stated that a permanent employee could be fired if he or she failed to meet job performance standards, was negligent in performing his or her duties, was inefficient, or was not fit to perform his or her duties. The ordinance did not state explicitly that those were the only possible reasons that a discharge could occur. Was this ordinance enough to imply that Bishop had a state-created property right in his employment? Justice Stevens said that on the surface, the answer may appear to be yes. The ordinance conferred the title of "permanent" on an employee who had worked for six months, and Bishop met that standard. Yet, did the language of the ordinance guarantee that employment would continue after one was classified as permanent? Justice Stevens answered in the negative. Although the ordinance did list some conditions under which the employee may be terminated, it did not state that an employee could be terminated

only for those reasons. In fact, Stevens referenced a U.S. district court judge who interpreted the ordinance to mean that employees, even permanent ones, held their positions at the will of the employer. The Fourth Circuit Court of Appeals upheld that interpretation, and Stevens saw no reason to overturn that interpretation even though he conceded that the ordinance could be interpreted in a different manner. The interpretation of the ordinance itself was a matter for the state to decide, and given the state's interpretation, Bishop did not have a property interest in his employment.

> In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case. The District Court's reading of the ordinance is tenable; it derives some support from a decision of the North Carolina Supreme Court, Still v. Lance, supra; and it was accepted by the Court of Appeals for the Fourth Circuit. These reasons are sufficient to foreclose our independent examination of the state-law issue. (p. 347)

After determining that Bishop had no property interest in his employment, Stevens then moved to a discussion of Bishop's alleged liberty interest. Bishop claimed his reputation had been damaged because the city manager's reasons for firing him would lead a future employer to conclude Bishop was unreliable, insubordinate, and of questionable moral character. Bishop denied that the reasons were factually correct. Stevens deferred to the district court's finding of fact, and that finding was favorable to Bishop.

> In our appraisal of petitioner's claim we must accept his version of the facts since the District Court granted summary judgment against him. His evidence established that he was a competent police officer; that he was respected by his peers; that he made more arrests than any other officer on the force; that although he had been criticized for engaging in high-speed pursuits, he had promptly heeded such criticism; and that he had a reasonable explanation for his imperfect attendance at police training sessions. We must therefore assume that his discharge was a mistake and based on incorrect information. (pp. 347-348)

Although the finding of fact was favorable to Bishop, that was not the end of the matter. The Court then had to determine whether the false reasons for termination damaged Bishop's reputation to the point of depriving him of his liberty to find another job. Would other potential employers refuse to hire Bishop if they became privy to the reasons the City Manager gave for his firing? On this question, Stevens reasoned:

> In *Board of Regents v. Roth*, we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far "to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.
>
> In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his "good name, reputation, honor, or integrity" was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. (pp. 348-349)

Hence, Stevens concluded that although Bishop was fired based on false information and although he may have suffered some damage to his reputation because of those false accusations, he still had no liberty interest because the accusations were not made publicly. In the first instance, the accusations were made orally with no written record of them in a private conversation between Bishop and the City Manager. In the second instance, the accusations were made in writing as part of a district court proceeding, and Stevens did not consider that to be a public forum. According to Stevens, just because

the City Manager may have made an incorrect personnel decision, it did not necessarily follow that Bishop's reputation had been harmed because of it.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions. (pp. 349-350)

The City Manager's decision may have been in error, but that did not automatically raise constitutional issues. Stevens was giving flexibility and deference to the administrative process, understanding that mistakes would be made and that not all decisions would be the result of careful analysis and due diligence.

On the other hand, Brennan saw both Bishop's deprivation of property and his deprivation of liberty as serious violations of the Fourteenth Amendment. He began his dissenting opinion by stating that the reasons the City Manager gave for firing Bishop harmed his reputation as a police officer. A police officer who had been branded as insubordinate, bad for morale, and engaging in conduct unsuited for an officer would not likely be appealing to other police departments. Brennan noted that while the Court's majority had been chipping away at due process protection after *Goldberg*, there still remained the general principle that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Paul v. Davis,*[193] which was decided just three months before *Bishop*, Brennan noted that the Court had effectively destroyed this

[193] 424 U.S. 693 (1976)

general principle but had left open a small door that would allow a public employee to seek liberty damages when the employer's stated reasons for a firing caused significant damage to the reputation, honor, and integrity of the employee. Brennan said that now even that small opening has been closed.

> Today the Court effectively destroys even that last vestige of protection for "liberty" by holding that a State may tell an employee that he is being fired for some nonderogatory reason, and then turn around and inform prospective employers that the employee was in fact discharged for a stigmatizing reason that will effectively preclude future employment. (pp. 351-352)

Brennan continued:

> Even under *Paul v. Davis*, respondents should be required to accord petitioner a due process hearing in which he can attempt to vindicate his name; this further expansion of those personal interests that the Court simply writes out of the "life, liberty, or property" Clauses of the Fifth and Fourteenth Amendments is simply another curtailment of precious constitutional safeguards that marks too many recent decisions of the Court. (p. 353)

Brennan maintained that even if the hearing after rather than before termination, Bishop should have had some kind of opportunity to clear his record and his reputation. Otherwise, he was quite likely to be denied future employment opportunities in his field. Anything less, for Brennan, was a denial of liberty within the meaning of the Fourteenth Amendment's due process clause.

Next, Brennan discussed the property interest. Again, he disagreed with the Court's majority that there is no property interest present because the state has not interpreted the Marion city ordinance to include one. Brennan said that state law was certainly one source that an individual can use to establish a property interest. He agreed with Justices White's and Blackmun's dissenting opinion that asserted that the ordinance did confer a property interest. Brennan also went further to conclude that state law was

not the only source of property interests. He wrote that the federal Constitution itself could be used to determine whether a property interest exists:

> There is certainly a federal dimension to the definition of "property" in the Federal Constitution; cases such as *Board of Regents v. Roth*, supra, held merely that "property" interests encompass those to which a person has "a legitimate claim of entitlement," and can arise from "existing rules or understandings" that derive from "an independent source such as state law." But certainly, at least before a state law is definitively construed as not securing a "property" interest, the relevant inquiry is whether it was objectively reasonable for the employee to believe he could rely on continued employment. (p. 353)

An analysis of whether a property interest existed should include a discussion of whether Bishop could have reasonably believed he would have continued employment because of his "permanent" status under the City's ordinance. By Stevens's own admission, the ordinance could have been interpreted that way.

Recall that Stevens conceded that the nature of the administrative process almost guaranteed that mistakes would be made but that the courts were not the place to hash out whether routine employment decisions were correct or incorrect. Brennan disagreed.

> These observations do not, of course, suggest that a "federal court is . . . the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." However, the federal courts are the appropriate forum for ensuring that the constitutional mandates of due process are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the "harsh fact" of "incorrect or ill-advised personnel decisions." (p. 354)

Brennan did not deny that mistakes would occur. He did emphasize, however, that such mistakes may be avoided if appropriate due process procedures are followed. That, for Brennan, was the value of having such Constitutional requirements. Perhaps if Bishop had simply been given the opportunity to respond to the accusations against him, the City Manager would not have made an erroneous decision.

For a third time, we return to Cooper's four questions, but this time we will see how Brennan's answers differ from the answers provided by the Court's majority. First, is a hearing required in this situation? The Court says no. Brennan answers yes. The Court believes no hearing is required because Bishop does not have a property interest in his job. Brennan said a hearing is required, first, because Bishop does have a property interest in his job, second, because Bishop has a liberty interest in his reputation. Second, if so, then at what point in an administrative action is the hearing required? The answer to this question and the answers to the remaining questions do not apply to the Court's majority because it has determined there is no property interest. However, Brennan states that at bare minimum a hearing is required to determine whether the City Manager's reasons for firing him are credible. Third, what kind of hearing is required? Brennan says that a post-termination hearing to clear his reputation would protect Bishop's liberty interest. A pre-termination hearing to respond to the accusations against him would have protected his property interest. Fourth, what are the essential elements of an administrative hearing? Brennan implies that notice of the intent to terminate his employment and an opportunity to respond to the accusations would suffice. It is not clear whether this opportunity would need to be oral or whether a written opportunity would be sufficient.

In *Cleveland Board of Education v. Loudermill,* the Court revisited due process requirements. This time, the dispute was not only over whether a pre-termination hearing rather than a post-termination hearing is required. Also raised is the issue of timeliness. Is there a discernable timeframe for guaranteeing a hearing? Is the meaningfulness of a hearing lost if there is too much of a delay in its being held?

The facts of the case arose from information James Loudermill provided on an employment application for a security guard position in the Cleveland, Ohio school system. He was hired. One of the questions on the application asked whether the applicant had ever been convicted of a felony. Loudermill answered in the negative. When conducting a background check on Loudermill, approximately 11 months into his employment, the Cleveland Board of Education discovered that he had a felony conviction for grand larceny. Following this discovery, Loudermill was fired for being dishonest on his application. He was given no opportunity to dispute either the dishonesty accusation or the firing itself.

Under Ohio law, Loudermill was classified as a civil servant and could only be fired for cause. After such firing, the employee is entitled to an administrative review of the decision. Pursuant to this statute, Loudermill requested an administrative hearing from the Cleveland Civil Service Commission after he was fired. The Commission appointed a referee who heard Loudermill's side of the accusation two months later. He argued that he thought his conviction was for a misdemeanor, not a felony, so he had not been dishonest on his application. The referee recommended reinstatement. Six months after the referee submitted the full Commission heard oral arguments in the case and decided to uphold the Board of Education's decision to fire Loudermill. One month later, Loudermill was notified of the Commission's final decision. The total time between Loudermill's request for an administrative hearing and a final decision from the Commission was nine months.

Loudermill filed an appeal in federal court. He alleged first that his Fourteenth Amendment due process rights had been violated because he should have been given a

pre-termination hearing, not just a post-termination hearing. Second, he alleged that the nine months to receive a final decision from the Commission was too much of a lapse between the state's actions against him and his opportunity to receive redress.

The first question that White addressed in his majority opinion was whether Loudermill had a property right in his employment. White concluded that he does:

> The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," Ohio Rev. Code Ann. 124.11 (1984), entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office," 124.34. The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. (pp. 538-539).

Once it was established that a property right in the employment exists, the Court then had to decide whether this right, given its nature and context, afforded Loudermill a pre-termination hearing or whether a post-termination hearing suffices. The state argued that a post-termination hearing sufficed because the statute says that it does. Since it was state law that provided the property right, then state law should also be allowed to prescribe the manner in which the right may be terminated. Justice White disagreed, and in doing so, he solidified the Court's ruling in prior cases that once conferred by the state, a property right may not be taken away without adequate due process procedures. The state had no say in that fact; it stemmed from a Constitutional guarantee.

> If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the

> deprivation of such an interest, once conferred, without appropriate procedural safeguards." (p. 541)

White examined whether a post-termination hearing is adequate given this property right and its context. He decided that it is not. In looking to precedent, he concluded that the Court had consistently ruled that some type of pre-termination hearing was required before property could be taken away from a citizen. A post-termination hearing would not suffice once a property interest had been established.

The type of pre-termination hearing (whether formal or informal, written or oral) was to be determined by a balance of interests between the citizen and the state. This balance included a consideration of the effect the deprivation is likely to have on the recipient and the likelihood of error in the administrative decision making process. It included as well a consideration of the administrative burden in terms of staff and time and the financial costs of providing the hearing. In applying a balancing test to the case, White noted that Loudermill's interest in retaining his means of livelihood weighed heavily. He acknowledged that, while Loudermill may seek other employment once fired, it would take time to secure it. Also, his interest in being able to present facts that may affect the decision of whether to fire him weighed heavily. Often, dismissals involve disputes over relevant facts, and both parties should have the opportunity to present their sides. The state argued it had an interest in being able to make expedient personnel decisions. White did not think this interest weighed more heavily than Loudermill's interests. Further, since the hearing afforded Loudermill did not need to be a formal, trial-type proceeding, it would not unreasonably delay a decision. White added

that if an employee was intolerable yet had not had an opportunity for a hearing, the state had the option of suspending the employee with pay.

After determining that a pre-termination hearing was required, Justice White then briefly addressed the question of whether Loudermill's post-termination hearing process took too long. He concluded that it did not. He concluded that at some point, administrative hearing delays may violate the due process clauses. In this case, however, he found no reason to determine that the delay was unconstitutional. He deferred to the appellate court's finding that the nine months it took to reach a decision was mostly due to the thoroughness of the investigation and not to any deliberate delay in action.

Brennan joined the majority's opinion in result for all but the last question. He agreed with White's conclusions regarding both whether a property interest was present in the case and the type of hearing that was necessary to satisfy due process requirements. Brennan wrote a separate concurring opinion to explain his own reasoning in the case and also to dissent from the Court's judgment on the question of whether the timeliness of Loudermill's hearing was significant.

To begin, Brennan praised the Court for re-affirming the rights guaranteed to individuals under the Fourteenth Amendment's due process clause. He agreed with the Court that the importance of a pre-termination hearing when a property or liberty interest was at stake could not be overstated. He described the significance of a pre-termination hearing:

> The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary

> records or testimony, or even to confront an accuser in front of the decisionmaker. Such an opportunity might not necessitate "elaborate" procedures, but the fact remains that in some cases only such an opportunity to challenge the source or produce contrary evidence will suffice to support a finding that there are "reasonable grounds" to believe accusations are "true." (pp. 552-553)

Brennan used this opportunity to point out that in some instances only a direct, elaborate, adversarial trial-type proceeding could produce evidence sufficient to draw conclusions as to the actual facts surrounding a termination decision. He said such a proceeding would not be justified in the present case because Loudermill was not disputing the facts of the termination; he conceded that he did actually have a felony conviction on his record. He only wanted an opportunity to explain the reason why he did not disclose that felony conviction; he was under the impression that the conviction was for a misdemeanor as opposed to a felony. Even after his explanation, the Board of Education could still choose to terminate his employment based on the felony record. In other cases, there may be such a dispute over the facts that more elaborate procedures would be necessary to reasonably determine the outcome.

From there, Brennan addressed the question of administrative hearing delays, and it was here that he dissented from the Court's majority. According to Brennan, while Loudermill awaited a final administrative decision (a total period of nine months), he was without income. An individual's hardship would increase each day that a decision lingered. White recognized that at some point a long delay would violate constitutional rights, but White concluded that Loudermill presented no evidence that such a line had been crossed. Brennan reached a different conclusion. He argued the record provided enough evidence to support the determination that the Cleveland Civil Service Commission's decision was unnecessarily delayed. It took the Commission nearly three

months to hold the hearing after it was requested, another month to render an interim decision, more than three additional months to make a final determination in the case and yet another month to finalize the decision. Brennan could not find in the record any explanation at all for this timeframe. The state statute required a hearing to take place within 30 days of request. That did not happen. Although there was no clearly defined period that could be used to determine how long was too long, Brennan said that no explanation whatsoever was given for the delay, which made it necessary at the very least to inquire into the facts surrounding it.

> Thus the constitutional analysis of delay requires some development of the relevant factual context when a plaintiff alleges, as Loudermill has, that the administrative process has taken longer than some minimal amount of time…. Yet in Part V, the Court summarily holds Loudermill's allegations insufficient, without adverting to any considered balancing of interests. Disposal of Loudermill's complaint without examining the competing interests involved marks an unexplained departure from the careful multifaceted analysis of the facts we consistently have employed in the past. I previously have stated my view that "to be meaningful, an opportunity for a full hearing and determination must be afforded at least at a time when the potentially irreparable and substantial harm caused by a suspension can still be avoided - i.e., either before or immediately after suspension." (pp. 557-558)

For this reason, Brennan dissented in Part V of the case but joined the majority on all other aspects. The *Cleveland* decision gave a nod to Brennan's view of the Due Process Clause after a roughly ten-year period of the Court's disavowal.

**CONCLUSION**

The Fourteenth Amendment is the most litigated Constitutional Amendment, surpassing even the First Amendment in the number of cases heard by the courts.[194] Courts continue to decide what procedures administrators must follow when distributing

[194] McKeever, Robert (1997). *The United States Supreme Court: A Political and Legal Analysis*. New York, NY: St. Martin's Press.

benefits among its citizens or when depriving them of those benefits and also when hiring and firing public employees.

It is ironic to note that in 1970, Brennan wrote the majority opinion in *Goldberg*, which set forth the Court's broadest interpretation of the Fourteenth Amendment's due process requirements to date in regard to the public sector. This case may have been proclaimed as a definitive victory for individuals who enjoyed government entitlements and wanted an opportunity to defend themselves before having those benefits taken away. However, the victory was short-lived. Within four years, Brennan's interpretation of the Fourteenth Amendment's due process clause fell out of favor with the Court's majority in large part because of the influx of cases it produced in the judicial system. Some have even referred to this rise of cases as the "Due Process Revolution" or "Due Process Explosion."[195] Due to a change in the Court's composition from 1970-1975, Brennan fell into a four-person minority, as the Court began to backtrack on its application of the *Goldberg* decision. Perhaps the courts were now experiencing a similar backlog in cases that administrators face daily. Perhaps the courts sympathized with the administrative strain caused by the hearing requirements set forth in *Goldberg*.

While the case itself has never been overturned and while Brennan's principle of affording a pre-termination hearing to individuals whose lives will be substantially affected by a government deprivation still stands, the courts' application of *Goldberg* may have had far less of an effect than Brennan hoped. Even though there have been periods of revival for Brennan's approach to due process, the spirit embodied in his approach has yet to be realized. On the other hand, the ability of an agency to assert its

[195] See, for example Cooper, Philip J. (2007). *Public Law and Public Administration*. 4th ed. Belmont, CA: Thomson Wadsworth and Rohr, John A. (1989). *Ethics for Bureaucrats: An Essay on Law and Values*. New York, NY: Marcel Dekker.

interest in administrative efficiency and in controlling administrative costs has been embraced. This may well be the one area of administrative law in which Brennan's values have succumbed to another set of competing values that provide administrators more flexibility and greater deference to their management expertise. Still, Brennan's influence on the way administrators and courts alike think about administrative due process is not easily forgotten. Under his guidance, the expansion of what would be considered property changed significantly as did the procedural requirements that must be in place before depriving an individual of property or liberty. Table 11 summarizes the themes in Brennan's jurisprudence in regard to due process in administrative decision making.

**Table 11: Themes and Values in Brennan's Due Process Jurisprudence**

| Regime Value | Theme | Case Law |
|---|---|---|
| Property | When benefit recipients have a reasonable expectation that benefits will continue--an expectation created by state law—the recipient has a property interest in the benefit. The same is true for a property interest in employment. | *Goldberg v. Kelly*<br>*Bell v. Burson*<br>*Bishop v. Wood*<br>*Cleveland v. Loudermill* |
| Social Justice | At minimum, citizens are entitled to a notification before benefits can be terminated and also an opportunity to be respond to the notification. | *Goldberg v. Kelly*<br>*Bishop v. Wood*<br>*Cleveland v. Loudermill* |
| | When the benefit in question can potentially deprive the recipient of his or her life, then an opportunity to present evidence orally is required before benefits may be terminated. | *Goldberg v. Kelly* |
| | When administrative decisions make it impossible for a citizen to receive redress outside the government itself, the government | *DeShaney v. Winnebago County Department of Social Services* |

| | | |
|---|---|---|
| | has an affirmative obligation to protect the substantive due process rights of the citizen. | |
| | Administrative actions should promote human rights and value the human dignity of the individual. | *Goldberg v. Kelly*<br>*DeShaney v. Winnebago County Department of Social Services* |
| Flexibility | In most cases, administrators have flexibility to determine how extensive hearing procedures must be. | *Bell v. Burson*<br>*Bishop v. Wood*<br>*Cleveland v. Loudermill* |

# CHAPTER EIGHT
# PERSONS, PAPERS, HOUSES, AND EFFECTS

*If the right to privacy means anything, it is the right of the individual…to be free from unwarranted governmental intrusion.*

-Justice William J. Brennan

## PRIVATE CHOICE OR PUBLIC POLICY?

On January 11, 1983, 25-year-old Nancy Cruzan lost control of her car while driving on a road in Missouri. She was thrown through a window and paramedics found her unconscious in a ditch near the accident site. She was not breathing. After about 15 minutes, paramedics were able to restore her breathing, but Cruzan was still unconscious. They took her to the hospital where she remained in a coma for three weeks. Doctors determined she would be in a persistent vegetative state because she was deprived of oxygen for about 15 minutes; permanent brain damage usually results after six minutes of oxygen deprivation. Over the next four years, Cruzan's husband and parents hoped for her recovery. She had active motor reflexes but no cognitive ability.

Cruzan's parents, Lester and Joyce Cruzan, asked the state-run hospital to remove their daughter's feeding tube, but the hospital refused. Her husband recently had been granted a divorce and took no part in the decision. The director of the Missouri Department of Health informed the Cruzans that they would need a court order to have the feeding tube removed. Under Missouri law, the court order could be obtained only if there was evidence that Nancy would not have wanted to have her life prolonged. Based on testimony from one of Nancy's friends, the state court judge ordered the tube removed. The Department of Health disagreed that the evidence was reliable and

appealed the decision. The state alleged an interest in supporting life while the Cruzans alleged a liberty interest under the Fourteenth Amendment.

In 1990, the case was before the U.S. Supreme Court, and it had to decide whether the Due Process Clause allowed Missouri to require patients who were in a persistent vegetative state to continue life-sustaining treatment absent convincing evidence that the patient would not wish to do so.[196] In the 5-4 decision, the Court determined (1) the right to refuse medical treatment was a liberty interest within the meaning of the Fourteenth Amendment, and (2) there was not enough reliable evidence to determine what Nancy would have wanted. Therefore, the Court deferred to the state's interest in prolonging life. Brennan disagreed.

> Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity. (p. 302)

Administration may at times be intrusive. Governments require information for regulatory purposes, and information may be obtained through administrative searches and seizures or subpoenas for persons or documentation. Although the Court has not formally defined privacy, it has on occasion described it. In *Boyd v. United States*, the Court described privacy:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public

[196] *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990)

> offence, — it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.[197]

Embodied in the description is a right that protects individuals from government intrusion into one's home, personal papers, and also one's sphere of personal liberty. But the right was closely linked to situations where the government could use the evidence for criminal prosecution. Justice Brandeis's dissenting opinion in *Olmstead v. United States*[198] moved closer to the declaration of a privacy right that went beyond the Court's traditional interpretation of the Fourth Amendment.

> But time works changes, brings into existence new conditions and purposes. Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. Moreover, in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be. The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. That places the liberty of every man in the hands of every petty officer was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed subversive of all the comforts of society. Can it be that the Constitution affords no protection against such invasions of individual security? (pp. 473-474)

The Court continued to struggle with the concept of privacy as a legal right. In 1975, Justice Douglas announced that the Constitution protected a right to privacy, and this right emanated from pre-existing Constitutional rights, including the First, Third, Fourth,

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[197] *Boyd v. United States*, 116 U.S. 616 (1886) at p. 630.
[198] 277 U.S. 438 (1928)

Fifth, and Ninth Amendments. The holding applied narrowly to marital privacy, but Brennan extended the Constitutional right to privacy to unmarried individuals in *Eisenstadt v. Baird*.[199]

The Fourth Amendment guarantees citizens will not be subject to unreasonable searches and seizures, but at times it has been unclear whether the Amendment applied only to searches and seizures that could result in criminal charges or whether it also applied to ones that could result in administrative penalties. It reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[200]

The courts have determined as a general principle that administrative searches must be accompanied by a warrant, but there are exceptions.[201] Administrative search warrants are not comparable to criminal search warrants. Criminal search warrants may not be issued without probable cause. In contrast, administrative search warrants may be issued as part of an organization's general regulatory scheme. The Supreme Court has also concluded that two factors are to be considered in deciding whether an administrative invasion of privacy was permissible. First, the Court will ask whether the individual had a reasonable expectation of privacy. Second, it will establish whether "special needs" existed within a heavily regulated industry.[202]

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[199] 405 U.S. 438 (1972)
[200] Amendment IV, http://www.law.cornell.edu/constitution/fourth_amendment
[201] See *See v. City of Seattle*, 387 U.S. 541 (1967), *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *Marshall v. Barlowe's Inc.*, 436 U.S. 307 (1978).
[202] See *Wyman v. James*, 400 U.S. 309 (1971) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

In this chapter, I analyze Brennan's privacy jurisprudence in five cases: *United States v. Miller*,[203] *New Jersey v. T.L.O.*,[204] *INS v. Delgado*,[205] *New York v. Burger*,[206] and *Public Citizen v. Department of Justice*.[207] The goal is to understand how he viewed the tension between administrative needs and individuals' privacy rights. How did he prioritize values? What can administrators learn from his opinions?

**ADMINISTRATIVE SUBPOENAS**

In *United States v. Miller*, an administrative subpoena was challenged. On January 9, 1973, a fire destroyed a warehouse Mitch Miller rented. The fire department found a distillery, related equipment, and 175 gallons of whiskey. The U.S. Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (ATF) launched an investigation. It applied for and received administrative subpoenas from the U.S. Attorney General under the authority of the Bank Secrecy Act. An administrative subpoena is an order compelling a person to appear for testimony or to send documentation, or both. The subpoenas were presented to Citizens & Southern National Bank of Warner Robins and the Bank of Byron; Miller had accounts at both banks.

> The subpoenas required the two presidents to appear on January 24, 1973, and to produce "all records of accounts, i. e., savings, checking, loan or otherwise, in the name of Mr. Mitch Miller [respondent], 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973, in the case of the Bank of Byron, and January 23, 1973, in the case of the Citizens & Southern National Bank of Warner Robins]." (p. 437)

The banks complied by photocopying the requested documents, which included checks, deposit slips, and monthly statements, and giving those documents to the ATF. The

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[203] 425 U.S. 435 (1976)
[204] 469 U.S. 425 (1985)
[205] 466 U.S. 210 (1984)
[206] 482 U.S. 691 (1987)
[207] 491 U.S. 440 (1989)

banks' presidents then were told it would not be necessary for them to testify before a grand jury. Neither bank informed Miller that it had given the information to the Bureau.

Miller was tried and convicted of possessing an unregistered still, intent to defraud the government of tax revenue, and several other charges. He alleged that the bank records should not be used as evidence because they were obtained unconstitutionally. He argued that the Attorney General instead of a court issued the subpoenas and that no return was made to a court. A federal district court rejected the argument, but the Fifth Circuit Court of Appeals reversed. The question the Supreme Court has to answer is whether the subpoenas violated Miller's privacy rights under the Fourth Amendment.

Justice Powell determined that Miller had no reasonable expectation of privacy in his bank statements because they did not qualify as his private papers. Instead, they were business documents that belonged to the banks.

> Respondent contends that the combination of the recordkeeping requirements of the Act and the issuance of a subpoena to obtain those records permits the Government to circumvent the requirements of the Fourth Amendment by allowing it to obtain a depositor's private records without complying with the legal requirements that would be applicable had it proceeded against him directly. (p. 441)

Powell argued that checks were not personal communications. Rather, they were instruments used in commercial transactions, where there was no reasonable expectation of privacy. He went on to write that the checks, monthly statements, and deposit slips contained information that Miller voluntarily shared with the bank and its employees. In other words, when one makes a deposit to a bank or writes a check to transact business, he or she is voluntarily making his/her affairs available to others.

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. (p. 443)

Because Miller had no reasonable expectation of privacy in the bank records, neither the Bureau of Alcohol, Tobacco, and Firearms nor the Attorney General took unconstitutional action.

Brennan dissented. In his opinion, the subpoenas were issued in violation of the Fourth Amendment. To determine whether a reasonable expectation of privacy existed, Brennan relied first on the language of the Fourth Amendment: "The right of the people to be secure in their person, papers, houses, and effects shall not be violated." He failed to see how one's bank statements did not qualify as his or her papers. He noted:

> Representatives of several banks testified at the suppression hearing that information in their possession regarding a customer's account is deemed by them to be confidential…A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes" (p. 449).

Brennan asserted that it would be nearly impossible to participate in modern society without having a bank account, so it was not entirely reasonable to conclude such activity was voluntary.

The Justice believed that the power of the executive branch to issue a subpoena outside the guarantees of the Fourth Amendment would lead to an abuse of administrative discretion. To support his point, Brennan quoted the Court's decision in *United States v. United States District Court*, a case where a similar issue was heard:

> Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing

> societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate (p. 453).

Because Brennan believed bank records were private papers and because he found that the bankers themselves considered the records confidential, he concluded that Miller had a reasonable expectation of privacy. This privacy right could only be infringed upon if a judge or his/her representative found, based on *probable cause*, that the records should be turned over to the ATF. Here, Brennan favored the individual's constitutional right over the administrative needs of the state.

## SEARCHES AND SEIZURES

### SEARCHES

In *New Jersey v. T.L.O.*, the Court ruled that a minor had no reasonable expectation of privacy in public schools. On March 7, 1980, a teacher at Piscataway High School found two girls smoking cigarettes in a restroom. T.L.O. was a fourteen-year-old freshman and one of the students caught with the cigarettes. Smoking in restrooms violated school policy, so the teacher took the two girls to the principal's office. Assistant Vice Principal Theodore Choplick questioned them about whether they had in fact been smoking in the restroom. One of the girls admitted she had been smoking, but T. L. O. denied doing so. Choplick asked T.L.O. for her purse. He opened it and found cigarettes. At that time, he accused T.L.O. of lying. While removing the cigarettes from her purse, he also discovered rolling papers, and he believed that if he continued to search her purse, he also would find evidence of marijuana use. He continued to search her purse and found a small amount of marijuana, a pipe, empty plastic bags, a large amount of money, and a list of names that appeared to be students

who owed T. L. O. money. He also found two letters that indicated she was dealing marijuana.

Choplick called T. L. O.'s mother and the police. The police asked her mother to accompany her to the police station where T. L. O. was questioned and confessed that she sold marijuana at the school. Police charged her with juvenile delinquency. In the court proceedings, T.L.O. contended that Choplick's search violated the Fourth Amendment. The Court must decide whether the vice principal's search violated T.L.O.'s privacy right under the Fourth Amendment.

Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined Justice White's majority opinion. He concluded no Fourth Amendment rights were violated in the search. White first determined that public school officials certainly were bound by the Fourth Amendment. Having authority over school children, even though most are minors, does not mean that the administrators may ignore the constitutional protections afforded those children. White must then determine whether T.L.O. had a reasonable expectation of privacy. "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order" (p. 337). White determined that T.L.O.'s purse was on her person and its contents were hidden from plain view. Therefore, she had a reasonable expectation of privacy. He rejected the state's argument that no such expectation existed in a public school.

> The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any

> items of personal property into the school. Both premises are severely flawed.... (p. 338)

Because a reasonable expectation of privacy existed, T.L.O.'s interests had to be balanced with the interests of the state. The state argued it had an interest in maintaining discipline on school grounds, an interest that had been difficult to protect because of the substantial increase in drug use and violence. White agreed that Fourth Amendment standards should be relaxed in the context of the public school environment.

> The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority. (p. 340)

Even though no warrant was needed, White stated that the search could not be baseless. He concluded that probable cause was unnecessary, but the search must be reasonable given the circumstances.

How would the Court determine whether the search was reasonable? First, the Court must consider whether the search itself was justified. Can the school provide a reasonable basis for conducting it? Second, the Court must determine whether the scope of the search was reasonably related to the circumstances that initially made the search necessary. This approach gave the schools flexibility to maintain order but also protected the students from arbitrary searches.

Applied to the case, White concluded that the search was reasonable. A teacher had observed T.L.O. smoking in the bathroom, and Choplick's search was based on the report that she had been seen smoking. He had reason to believe that the search would

uncover evidence that she had been smoking. T.L.O. argued that even if the search itself was justified, there was no reason for Choplick to reach into her purse to remove the cigarettes. It was only when he reached inside her purse and removed the cigarettes that he uncovered the evidence of marijuana possession. White disagreed. He found it perfectly natural that Choplick would have removed the cigarettes from her purse. Because the search was reasonable under the circumstances, White concluded no Fourth Amendment violation occurred.

Justice Stevens wrote an opinion that concurred in part with the majority's opinion and also dissented in part. Justice Marshall joined the opinion, and Justice Brennan joined it in part. Stevens concluded that the search was a serious invasion of privacy since a student's purse is entitled to the utmost privacy. He was displeased with the Court's standard of "reasonableness."

> The Court embraces the standard applied by the New Jersey Supreme Court as equivalent to its own, and then deprecates the state court's application of the standard as reflecting "a somewhat crabbed notion of reasonableness." Ante at 343. There is no mystery, however, in the state court's finding that the search in this case was unconstitutional; the decision below was not based on a manipulation of reasonable suspicion, but on the trivial character of the activity that promoted the official search. (p. 382)

Stevens argued that if the Court was going to defer to the state court's "reasonableness" test, then it also should defer to that court's findings regarding the reasonableness of the search. The state court found the search was unreasonable, and Stevens agreed. He mentioned that violation of a school's smoking policy is not so severe that it posed a threat to school order; nor did it warrant an immediate search of T.L.O.'s purse.

> The assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that would seriously interfere with school discipline or order. (p. 383)

Because Stevens found the search to be unreasonable, he dissented on that part of the Court's decision. He concurred only with the part of the Court's opinion that held students had a reasonable expectation of privacy in public schools.

Justice Powell concurred with the Court's opinion and added only that he believed students have a diminished expectation of privacy in public schools. Justice O'Connor joined his concurrence. Justice Blackmun's concurring opinion agreed also with the Court's general decision, but he did not agree with its reasoning on the balancing test.

> The Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case. The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. As Justice Powell notes, "without first establishing discipline and maintaining order, teachers cannot begin to educate their students." Ante at 469 U.S. 350. Maintaining order in the classroom can be a difficult task. A single teacher often must watch over a large number of students, and, as any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly. (p. 352)

Blackmun believed that application of the balancing test should be the exception rather than the rule.

Brennan, joined by Justice Marshall, agreed with the Court that public schools were bound by the Fourth Amendment. However, he disagreed with the rest of the opinion.

> Today's decision sanctions school officials to conduct fullscale searches on a "reasonableness" standard whose only definite content is that it is not the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor

> even by a fair application of the "balancing test" it proclaims in this very opinion. (p. 354)

Brennan began by stating three principles underlying the Court's traditional Fourth Amendment jurisprudence. First, warrantless searches are unreasonable with few exceptions. Second, full-scale searches are reasonable only when based upon probable cause that a crime has been committed and that the search will produce evidence of that crime. Third, less than full-scale searches are only justified by a balancing test in which the individual's privacy rights are given sufficient consideration. If a search does not comply with these three principles, then it must be declared unconstitutional. Brennan reasoned that the search of T.L.O.'s purse was a serious violation of her privacy because it was a full-scale search and therefore should have been subject to the *probable cause* standard.

> To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended result of the Fourth Amendment's protection of privacy; rather, it is the very purpose for which the Amendment was thought necessary. Only where the governmental interests at stake exceed those implicated in any ordinary law enforcement context — that is, only where there is some extraordinary governmental interest involved — is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary. (p. 357)

Brennan emphatically rejected the Court's dismissal of the *probable cause* standard. He noted that it was the only standard permissible under the Fourth Amendment. A balancing test is no substitute for the Fourth Amendment when substantial privacy rights are involved.

> To be sure, the Court recognizes that probable cause "ordinarily" is required to justify a full-scale search and that the existence of probable cause "bears on" the

> validity of the search. Ante at 340-341. Yet the Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause. The line of cases begun by *Terry v. Ohio*, 392 U.S. 1 (1968), provides no support, for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. (p. 360)

Brennan noted that recent Court decisions had included the application of a balancing test he believed to be impermissible. He dissented in those decisions and also dissented in the present case. He concluded:

> All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences. And it may be that the real force underlying today's decision is the belief that the Court purports to reject — the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.
>
> On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer all Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. (pp. 369-370)

Brennan could not fathom an invasion of privacy such as the one that took place in this case that was not based on *probable cause*. He wrote that public school teachers or principals may sometimes search students' belongings without a warrant but only when no criminal penalty will be pursued; even then, the search must be under exigent circumstances, meaning the situation was so time-sensitive that it would have been impossible or not feasible to obtain a warrant. In that instance, a balancing test is permissible. Brennan agreed that students are confined to a school building for many hours at a time, and circumstances may arise that lessen the requirements of the Fourth

Amendment. However, balancing tests are not permissible when no substantial government interest is involved. Justice White's assertion that the school had an interest in maintaining order was not substantial enough for Brennan in this instance. Instead, it was a general social preference of no considerable emergency.

Choplick had been told the student was smoking in the bathroom. He seized her purse, opened it, and found the cigarettes. At that point, the search was complete. Evidence of the offense had been uncovered and no further investigation was necessary. Choplick could have levied an administrative penalty; T.L.O. could have been given a warning, she could have been given detention, or she could have been suspended for a number of days. Brennan did not decide whether the teacher's observation actually justified the initial purse search.

> On my view of the case, we need not decide whether the initial search conducted by Mr. Choplick — the search for evidence of the smoking violation that was completed when Mr. Choplick found the pack of cigarettes — was valid. (p. 368)

Brennan's argument was that after the cigarettes were discovered, the search should have ended. If Choplick suspected T.L.O. was also in possession of marijuana, he should have telephoned the police department, and it could have used his suspicion to try to obtain a search warrant. Of course, the warrant would not have been issued if the only evidence was the vice principal's suspicion. Suspicion does not constitute *probable cause*, and that was Brennan's main point. No *probable cause* to continue to search T.L.O.'s purse was present.

Brennan created no special category of searches that would be subject to lesser standards when a criminal penalty was pending. He referred to the right to privacy as the

most comprehensive right: "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men."

**SEIZURES**

Eight years later, in *INS v. Delgado*, Brennan once again dissented from the Court's majority. In January, September, and October 1977, the Immigration and Naturalization Service (INS)[208] conducted "factory surveys" at Davis Pleating Company. The purpose of the search was to check for illegal immigrants. The searches were conducted with a warrant based on probable cause, but none of the warrants identified an illegal immigrant by name.

Several INS agents carried out the "factory surveys." When they arrived at the location, some of them blocked the buildings' exits while the others walked around the factory to question the employees. The agents showed their credentials and carried firearms, but none was drawn during the questioning. Agents identified themselves before questioning the employees. Most employees were asked one to three questions regarding their citizenship. If the agent was convinced of the employee's citizenship legitimacy, he or she moved on to the next employee. However, if the agent was not satisfied with a response, the employee was asked to show his or her immigration papers.

Delgado and three other employees and the International Ladies Garment Workers' Union filed suit in a federal district court challenging the constitutionality of the factory surveys. They alleged the surveys violated the employees' right against unreasonable searches and seizures. They also alleged due process and equal protection

[208] In 2003, Immigration and Naturalization Service was restructured. Its functions are now divided among U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection, three agencies within the Department of Homeland Security. U.S. Immigration and Customs Enforcement now performs the "factory surveys" challenged in this case.

violations. The Court had to determine whether the "factory surveys" were an unconstitutional violation of privacy.

Justice Rehnquist wrote the Court's opinion joined by Chief Justice Burger and Justices White, Blackmun, Stevens, and O'Connor. Justice Stevens also wrote a concurring statement, and Justice Powell wrote a concurring opinion. Brennan's opinion concurred in part and dissented in part. Justice Marshall joined Brennan's opinion. Rehnquist began his opinion by stating the purpose of the Fourth Amendment, noting that the Amendment did not prevent all contact between citizens and law enforcement. Rather, it only denounces arbitrary invasions of privacy. As long as the search is not unreasonable, then no Constitutional violation has taken place. The question then becomes: What is an unreasonable search? Rehnquist asserted that the Court generally had not considered mere questioning to constitute a search. Delgado argued that because the exits were blocked, a reasonable person would have believed he or she was not free to leave. The agents did not inform the employees that they were free to leave. Rehnquist denied that the INS agents detained the employees, arguing that they were free to move about and continue their work in the factory.

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits. (p. 218)

Rehnquist believed no reasonable person would have feared detention if he or she decided to leave, so the agents blocking the exits did not constitute a general prohibition on employees leaving the factory.

Rehnquist's second point was in regard to the nature of the questioning. He found that the encounters between the agents and the employees were brief, usually lasting less than a minute. Those who answered the questions were not detained. Delgado chose to answer the questions the agent posed to him, and he was not detained.

> While persons who attempted to flee or evade the agents may eventually have been detained for questioning, respondents did not do so and were not in fact detained. The manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory. Respondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures. (pp. 220-221)

Justice Rehnquist found no Fourth Amendment violation because the "factory surveys" did not constitute a general detention of all employees and included nothing more than questioning.

Justice Powell's concurring opinion was not related to the substantive issue in the case. He merely questioned whether the case was ripe for review. Justice Stevens, however, believed the case to be a close call.

> While the Court's opinion is persuasive, I find the question of whether the factory surveys conducted in this case resulted in any Fourth Amendment "seizures" to be a close one. The question turns on a difficult characterization of fact and law: whether a reasonable person in respondents' position would have believed he was free to refuse to answer the questions put to him by INS officers and leave the factory. I believe that the Court need not decide the question, however, because it is clear that any "seizure" that may have taken place was permissible under the reasoning of our decision in *United States v. Martinez-Fuerte*…. (p. 221)

Stevens also emphasized the practical use of the factory surveys. He noted that INS factory surveys accounted for more than half of the illegal immigrants arrested away from the border each day. Without the use of these surveys, the INS's work would be less efficient and effective. He also asserted that the employees' expectation of privacy in the workplace was not very high.

Brennan was not completely convinced of the constitutionality of the factory surveys.

> Although I generally agree with the Court's first conclusion, I am convinced that a fair application of our prior decisions to the facts of this case compels the conclusion that respondents were unreasonably seized by INS agents in the course of these factory surveys. (pp. 225-226)

He began by stating that there must be a balance between the individual rights guaranteed by the Fourth Amendment and the needs of law enforcement.

> The difficulty springs from the inherent tension between our commitment to safeguarding the precious, and all too fragile, right to go about one's business free from unwarranted government interference, and our recognition that the police must be allowed some latitude in gathering information from those individuals who are willing to cooperate. Given these difficulties, it is perhaps understandable that our efforts to strike an appropriate balance have not produced uniform results. (p. 226)

Even investigations that do not end in an arrest must fall within the guidelines of the Fourth Amendment. Did the employees believe they could disregard the agents' questions and freely walk away? Brennan noted this question to be the most important one. He did not believe the answer was based on the subjective impression of each individual employee but rather on an objective "reasonable person" standard.

> Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a "show of authority" of

> sufficient size and force to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the INS agents' questions. (p. 229)

The factory surveys created an intimidating atmosphere, even if the questioning itself was brief.

> For example, respondent Delgado, a naturalized American citizen, explained that he was standing near his work station when two INS agents approached him, identified themselves as immigration officers, showed him their badges, and asked him to state where he was born. Id. Delgado, of course, had seen all that was going on around him up to that point and naturally he responded. As a final reminder of who controlled the situation, one INS agent remarked as they were leaving Delgado that they would be coming back to check him out again because he spoke English too well. (p. 230)

Because Brennan concluded the factory surveys actually constituted a seizure, he moved to the question of whether the INS had met the *probable cause* standard.

> In this case, the individual seizures of respondents by the INS agents clearly were neither "based on specific, objective facts indicating that society's legitimate interests require[d] the seizure," nor "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, supra, at 51. It is undisputed that the vast majority of the undocumented aliens discovered in the surveyed factories had illegally immigrated from Mexico. Nevertheless, the INS agents involved in this case apparently were instructed, in the words of the INS Assistant District Director in charge of the operations, to interrogate "virtually all persons employed by a company." (p. 233)

Brennan argued that the INS did not selectively question employees; its questioning encompassed anyone who worked at the facility. "To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment" (p. 234). The broad use of questioning violated the rights of American citizens who worked at the factory, according to Brennan. Without having specific suspects in mind, there was no way for the INS to determine which employees were citizens and which ones were likely to be illegal Mexican immigrants. Brennan concluded:

> Moreover, the mere fact that a person is believed to be an alien provides no immediate grounds for suspecting any illegal activity. Congress, of course, possesses broad power to regulate the admission and exclusion of aliens, and resident aliens surely may be required to register with the INS and to carry proper identification. Nonetheless, as we held in *Brignoni-Ponce*, when the Executive Branch seeks to enforce such congressional policies, it may not employ enforcement techniques that threaten the constitutional rights of American citizens. (p. 235)

Brennan asserted that the only way for the INS factory surveys could be constitutional was for the INS to focus the questioning only on those it reasonably suspected of being illegal immigrants; general questioning of all employees should not be allowed. Brennan did not deny the effectiveness of the factory surveys, but the effectiveness of the process did not outweigh the Fourth Amendment violation. For this reason, he dissented.

Brennan once again rejected administrative convenience as a value sufficient enough to deny an individual of his or her constitutional rights. The individual's privacy was the prevailing value.

The Court's majority continued to emphasize administrative convenience as a value. Another case involving a search, *New York v. Burger*, illustrates the Court's *special needs* doctrine. According to this doctrine, warrantless administrative searches are permissible if they are conducted under *special needs* circumstances that usually indicate the presence of a highly regulated industry.

Joseph Burger owned a junkyard in Brooklyn. He dismantled automobiles and sold their parts. The business was conducted on an open lot with no buildings but was surrounded by a metal fence. On November 17, 1982, five New York City police officers entered the junkyard to conduct an inspection under a New York statute that allowed warrantless inspections of junkyards. The officers asked to see Burger's business license and his record of automobiles and parts. Burger told them he had none

of those documents. The officers then told Burger that they were going to inspect his junkyard, and Burger did not object. They copied the Vehicle Identification Numbers for several vehicles and serial numbers for some of the parts. They discovered, based on a computer check, that some of the vehicles and parts had been reported stolen. The offices arrested Burger, charging him with possession of stolen property and operating a business without a license. Burger argued that the evidence should be suppressed because it was obtained through an unconstitutional warrantless search.

Two questions were before the Court. First, it had to determine whether the warrantless search of an automobile junkyard fell within the Fourth Amendment exception granted for administrative inspections in heavily regulated industries. Second, it had to determine whether the inspection was permissible given that the evidence obtained in the inspection was used not only for administrative penalties but also for criminal penalties. Justice Blackmun wrote the opinion of the Court and was joined by Justices White, Powell, Rehnquist, Stevens, and Scalia.

Blackmun began with an important statement. He said the Court had long recognized that the protection of the Fourth Amendment extended not only to private homes but also to commercial businesses. Hence, Burger's reasonable expectation of privacy is solidly grounded in the Fourth Amendment unless his business falls within a categorical exception.

> An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home. This expectation is particularly attenuated in commercial property employed in "closely regulated" industries. The Court observed in *Marshall v. Barlow's, Inc.:* "Certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." (p. 700)

Two examples of heavily regulated industries include those that involve liquor sales and those that involve firearms sales. When an individual is involved in a heavily regulated industry and receives a government license to operate, he or she does so with the understanding that the business is subject to inspection. Blackmun stated that in a heavily regulated industry, the expectation of privacy is lessened; therefore, the demands of the Fourth Amendment also may be lessened.

Even in a heavily regulated industry, a warrantless inspection must be reasonable. In order to be reasonable, three conditions must be met. First, the government must have a "substantial" interest that necessitates the regulatory scheme. Business owners whose industries fall under this scheme must be aware that his property will be subject to periodic inspections. Second, the warrantless inspection must be a necessary part of that regulatory scheme. Third, the statutory inspection plan must provide a constitutionally adequate substitute for a warrant. Blackmun determined that New York's statutory scheme met the requirements.

> The provisions regulating the activity of vehicle dismantling are extensive. An operator cannot engage in this industry without first obtaining a license, which means that he must meet the registration requirements and must pay a fee. Under 415-a5(a), the operator must maintain a police book recording the acquisition and disposition of motor vehicles and vehicle parts, and make such records and inventory available for inspection by the police or any agent of the Department of Motor Vehicles. The operator also must display his registration number prominently at his place of business, on business documentation, and on vehicles and parts that pass through his business. 415-a5(b). Moreover, the person engaged in this activity is subject to criminal penalties, as well as to loss of license or civil fines, for failure to comply with these provisions. See 415-a1, 5, and 6. That other States besides New York have imposed similarly extensive regulations on automobile junkyards further supports the "closely regulated" status of this industry. (p. 704-705)

Blackmun concluded that junkyards were part of an industry that traditionally had been heavily regulated and had in fact been regulated in New York for at least 140 years. The

problem of automobile theft and the economic cost to citizens necessitated the regulation, so the state had a substantial interest. The warrantless inspections were justified because stolen automobiles and parts passed quickly through junkyards, and obtaining a warrant for each inspection would lessen the effectiveness of the inspection. The language of the statute informed the junkyard owner that periodic unannounced inspections would be made, was sufficiently limited in its scope, and informed the owner who would conduct the inspection.

Blackmun argued that the inspection was no less constitutional simply because the evidence recovered could be submitted to another government agency for criminal prosecution.

> Nor do we think that this administrative scheme is unconstitutional simply because, in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself….we fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted to conduct the 415-a5 inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work….we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents. (pp. 716-717)

Justice Marshall joined Justice Brennan's dissent. Justice O'Connor joined Marshall and Brennan in all but Part III of the dissent. Brennan first stated that he had no objection to the "special needs" exception to the Fourth Amendment's warrant requirement. He disagreed with the Court that the New York inspection scheme for junkyard owners fell within the parameters of the exception. He denied that the junkyard business traditionally was a heavily regulated industry.

> Initially, the Court excepted from the administrative-warrant requirement only industries which possessed a "long tradition of government regulation," or which involved an "inherent and immediate danger to health or life." The Court today places substantial reliance on the historical justification, and maintains that vehicle dismantling is part of the general junk and secondhand industry, which has a long history of regulation. In *Dewey*, however, we clarified that, although historical supervision may help to demonstrate that close regulation exists, it is "the pervasiveness and regularity of . . . regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment." (pp. 719-720)

Brennan found the statutory scheme too lax to be considered heavy regulation. The only requirements were that the junkyard owner register with the state, pay a fee, display the registration number on the premises, and be subject to periodic inspection. This was a far cry from the type of industry standards typically qualifying as heavy regulation. The hours of operation were not regulated; nor were the equipment used, or the conditions of the premises.

Even if the industry were a heavily regulated one, Brennan stated he would still find the warrantless inspections unconstitutional. The statute did not inform a business owner how frequently an inspection would occur. In fact, the business may not ever be inspected under the statutory scheme. The statute gave too much discretion to police officers and did not properly guide them in conduct. In addition, the fatal flaw in the statutory scheme, according to Brennan, was that it allowed inspection solely for the purpose of criminal conviction. "In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations" (p. 724). Brennan believed the state was using administrative searches as a pretext for unconstitutional activity. If the evidence was to be used in a criminal conviction, then it must be obtained only through a search warrant secured by *probable cause*. For those reasons, Brennan

dissented. He found the state's warrantless inspections to be in violation of the Fourth Amendment's privacy guarantees.

**PUBLIC DISCLOSURE**

In the final case, *Public Citizen v. Department of Justice*, Brennan upheld a statutory scheme that allowed the U.S. Department of Justice to use the American Bar Association (ABA) for advice on potential federal judicial nominees.

The American Bar Association is a professional, private membership association that accredits law schools, provides information about the law to its members and sometimes to the public, and has various programs to assist legal professionals. The organization also has a Standing Committee on Federal Judiciary. When the president of the United States must make a federal judicial appointment, the Justice Department assists in the process. As one of its tasks, the Justice Department seeks advice from the ABA's Standing Committee on Federal Judiciary. Upon request from the Justice Department, this committee investigates potential federal judiciary nominees, produces reports, and rates potential nominees. The information is confidential, but the ABA does release its rating of nominees if they are in fact nominated (none of the other investigatory information is released).

In *Public Citizen*, the Washington Legal Foundation requested from the ABA's committee the names of potential nominees and also its reports and minutes from its meetings. The request was made under the Federal Advisory Committee Act, which provides that such documentation must be made available to the public for any presidential "advisory committee." The Act defined an "advisory committee" as any group either established or utilized by the president or an agency to give advice on public

questions. Those groups are required to obtain charters, to provide public notice of meetings, to open those meetings to the public, and to make their minutes, records, and reports available to the public.

The ABA's committee refused to provide the information to the Washington Legal Foundation, stating that the information was private. The Foundation, along with Public Citizen, filed suit against the Justice Department. Public Citizen argued that the committee was an "advisory group" subject to the Act's requirements and asked a federal district court to prevent the Justice Department from using the committee until it complied with the requirements. When the case reached the Supreme Court, the question before the Court was whether the ABA's committee qualifies as an "advisory committee" within the meaning of the Act and thus must release its records to the public.

Justice Brennan wrote the majority opinion and was joined by Justices Marshall, White, Blackmun, and Stevens. He first investigated the purpose of the Federal Advisory Committee Act.

> Its purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature. To attain these objectives, FACA directs the Director of the Office of Management and Budget and agency heads to establish various administrative guidelines and management controls for advisory committees. It also imposes a number of requirements on advisory groups. (p. 446)

Some types of advisory groups were exempt from requirements, and the Act defined those situations. Next, Brennan looked at how the statute defined "advisory committee" to determine whether the ABA's committee qualified as one.

> (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any

> subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is – "(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government." (pp. 451-452)

The ABA argued that its committee was not established by the president or utilized by the president or the Justice Department within the meaning of the statute. Brennan determined that the president did not utilize the committee.

> "Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice. We are convinced that Congress did not intend that result….Nor can Congress have meant - as a straightforward reading of "utilize" would appear to require - that all of FACA's restrictions apply if a President consults with his own political party before picking his Cabinet….FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals; although its reach is extensive, we cannot believe that it was intended to cover every formal and informal consultation between the President or an Executive agency and a group rendering advice. (pp. 452-453)

After concluding that the ABA's committee was not being utilized by the Justice Department, Brennan then considered whether its role in the judiciary nomination process was permissible under the Act. The Act's history was important for Brennan. Congress's purpose was to make sure interest groups were not circumventing the political process by having undue influence on government organizations and to make sure the advisory committees were acting in the public interest.

> FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them. That purpose could be accomplished, however, without

> expanding the coverage of Executive Order No. 11007 to include privately organized committees that received no federal funds. Indeed, there is considerable evidence that Congress sought nothing more than stricter compliance with reporting and other requirements - which were made more stringent - by advisory committees already covered by the Order and similar treatment of a small class of publicly funded groups created by the President. (p. 459)

He continued:

> Indeed, it appears that the House bill's initial restricted focus on advisory committees established by the Federal Government, in an expanded sense of the word "established," was retained rather than enlarged by the Conference Committee. In the section dealing with FACA's range of application, the Conference Report stated: "The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies." Id., at 10 (emphasis added). The phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves. (p. 462)

Brennan concluded that to include the ABA's committee under the public disclosure requirements would not be consistent with Congress's statutory intent.

Justice Kennedy wrote a concurring opinion in which Chief Justice Rehnquist and Justice O'Connor joined. Kennedy's opinion rested on an argument for separation of powers. He believed Congress had no authority to pass legislation that interfered with how the president seeks judicial nominations. The Constitution made it clear that Congress's role in the appointment process is one of advice and consent. It may advise a president regarding a nominee, but it may not pass laws to dictate how he chooses the nominee.

Kennedy first disagreed with the Court's finding that the statutory language of "establish or utilize" did not apply to the ABA's committee.

> All concede that the ABA Committee furnishes advice and recommendations to the Department of Justice and through it to the President. Ante, at 452. The only

> question we face, therefore, is whether the ABA Committee is "utilized" by the Department of Justice or the President. There is a ready starting point, which ought to serve also as a sufficient stopping point, for this kind of analysis: the plain language of the statute….We are told that "utilize" is "a woolly verb, "and therefore we cannot be content to rely on what is described, with varying levels of animus, as a "literal reading," a "literalistic reading," and "a dictionary reading" of this word. (p. 469)

For Kennedy, the word *utilize* had a common meaning that the Court was bound to use. No extensive investigation into the legislative history of the Act was necessary to decipher the meaning of the word.

> I believe the Court's loose invocation of the "absurd result" canon of statutory construction creates too great a risk that the Court is exercising its own "Will instead of judgment," with the consequence of "substituting [its own] pleasure to that of the legislative body." (p. 471)

Kennedy believed that the Act did in fact cover the ABA's committee and that no reading of the statute or its intent could show otherwise. The statutory intent was clear, he argued, and the ABA's committee did not fall under any exemption provided for in the statute. Therefore, he could not agree with the Court's construction of the statutory language or intent.

Because the statute interfered with the president's prerogative under Article II of the Constitution, the statute must be held invalid.

> Although I disagree with the Court's conclusion that FACA does not cover the Justice Department's use of the ABA Committee, I concur in the judgment of the Court because, in my view, the application of FACA in this context would be a plain violation of the Appointments Clause of the Constitution.
>
> The essential feature of the separation-of-powers issue in this suit, and the one that dictates the result, is that this application of the statute encroaches upon a power that the text of the Constitution commits in explicit terms to the President. Article II, 2, cl. 2, of the Constitution provides as follows:
> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of he supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be

> established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." (pp. 482-483)

Kennedy relied not only on the language of Article II, Section 2, Clause 2 but also on Federalist No. 76 and determined that the president's role in nominating a federal judge was to be solely his or her responsibility. The Senate could only approve or disapprove once the nomination was made.

Both Brennan and Kennedy had the same goal, and that was to protect the ability of the president to obtain confidential information regarding a potential judiciary nominee. Although the two Justices reasoned differently, this value is present in both of their opinions.

**CONCLUSION**

Although this chapter has focused on privacy rights for individuals who must interact with government personnel, similar concerns have been raised for public employees. For example, can a supervisor search through the personal belongings stored in an employee's desk in a public hospital (*O'Connor v. Ortega*)?[209] Can U.S. Customs Service agents be randomly tested for drug use (*National Treasury Employees Union v. Von Raab*)?[210] On a case-by-case basis, the courts determine whether the Fourth Amendment's provisions apply. They also determine whether administrative necessity outweighs the interest in privacy rights. The implications for citizens and public employees are important because the Court's jurisprudence makes it clear that the privacy standards in criminal and administrative cases are not the same. One may reasonably expect no law enforcement officer to enter one's home without a search warrant, but such

[209] 480 U.S. 709 (1987)
[210] 489 U.S. 656 (1989)

an expectation of privacy may not apply to one's business office or their child's school. Courts allow more flexibility in administrative cases than they do in criminal cases.

Brennan dissented when the Court moved to lessen the privacy rights of individuals. While he recognized the need for administrative flexibility, he also refused to weaken the Fourth Amendment rights of individuals. Table 12 summarizes the themes in Brennan's jurisprudence in regard to privacy and administrative decision making.

**Table 12: Themes and Values in Brennan's Privacy Jurisprudence**

| Regime Value | Theme | Case Law |
|---|---|---|
| Privacy | When there is no substantial government interest in immediate search or seizure, the government must secure a warrant. | *New Jersey v. T.L.O.*<br>*United States v. Miller*<br>*INS v. Delgado* |
| | Evidence uncovered in administrative searches should not be used for criminal prosecutions. | *New Jersey v. T.L.O.*<br>*New York v. Burger* |
| | "Heavily regulated industry" should be narrowly construed to include only those industries in which the government substantially and consistently monitors the industry activity. | *New York v. Burger* |
| | The president has a right to use a private advisory committee confidentially to obtain information about a potential judicial nominee. | *Public Citizen v. Department of Justice* |

# CHAPTER NINE
# THE HIGH ROAD

*The judicial pursuit of equality is, in my view, properly regarded to be the noblest mission of judges.*

-Justice William J. Brennan

## BE ALL THAT YOU CAN BE

James Stanley was an American soldier in 1958 who had eagerly enlisted to serve his country. While in the Army, he volunteered to participate in a program to test the effectiveness of protective clothing and equipment as defenses against chemical warfare. He arrived in Maryland where the studies began. He was given lysergic acid diethylamide (LSD) in a secret plan to determine the effects of the drug on humans. LSD is a psychedelic drug that causes hallucinations, modified sensory perceptions and possibly has long-term psycho-emotional effects. The Army continued to give Stanley LSD, unbeknownst to him. As a result, his life changed drastically. He had periods of incoherence and memory loss, had difficulty performing his military duties, and would sometimes wake up from his sleep and violently beat his wife and children; yet, he would not remember having done it. The Army discharged him eleven years later. The next year he divorced because of the personality changes the LSD caused. Six years afterward, the Army notified Stanley that he had been given LSD and asked for his paid cooperation in the study.

Stanley filed an administrative claim for compensation since he had not known he was being given LSD; the claim was denied. Stanley then sued the Army for monetary damages under the Federal Tort Claims Act, alleging that its actions had been negligent. A federal district court dismissed the suit, ruling that Stanley had no claim under the Act.

An appellate court determined Stanley could file a *Bivens* tort claim[211] and remanded the case back to the federal district court. The case reached the U.S. Supreme Court, which reached a decision against Stanley in 1987.[212]

Writing for the majority, Justice Scalia found that Stanley's injuries were "incident to service" (p. 672) and therefore barred from claims of negligence under the Federal Tort Claims Act. Brennan disagreed.

> The Court disregards the commands of our Constitution, and bows instead to the purported requirements of a different master, military discipline, declining to provide Stanley with a remedy because it finds "special factors counselling hesitation." This is abdication, not hesitation. I dissent. (p. 686).
>
> Having invoked national security to conceal its actions, the Government now argues that the preservation of military discipline requires that Government officials remain free to violate the constitutional rights of soldiers without fear of money damages. What this case and others like it demonstrate, however, is that Government officials (military or civilian) must not be left with such freedom. (p. 689)
>
> Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity. (p. 708)

It is not melodramatic to assert that an administrator's choice of values can at times determine whether one lives or dies and at the very least may have a substantial effect on one's quality of life. In *Stanley*, the military secretly gave an American soldier a drug that caused him to physically attack his family, lose his career, and end his marriage. In *Cruzan*, the state chose the value of life over the values of self-determination and individual autonomy, requiring Nancy Cruzan to remain in a vegetative state for years beyond what she and her family wished. In *Goldberg*, the state's choice of administrative efficiency over procedural due process could have ended

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[211] A *Bivens* tort allows citizens to sue federal employees individually for damages when they negligently violate the citizen's constitutional rights.
[212] *United States v. Stanley*, 483 U.S. 669 (1987)

in the death of John Kelly, a homeless and destitute African American male whose sole source of survival was the welfare benefits he received. In *DeShaney*, an administrative decision to respect Randy DeShaney's parental rights rather than remove his four-year-old son Joshua from his home, led to Joshua's current condition; he is now 32 years old, severely retarded and living in a Wisconsin state institution for the mentally incompetent.

To be sure, reflection on public values is important in administrative decision making. Chapter 1 noted that this study uses Rohr's concept of regime values as a framework for understanding Justice William Brennan's U.S. Supreme Court opinions. I briefly summarized Rohr's idea and its purpose. One examines U.S. Supreme Court opinions to discover what normative values are revealed through the dialogue among Justices. These opinions convey the prominent values of the regime—values that public administrators then may consider in daily decision making. Chapters 4-8 were empirical. Their goal was to analyze Brennan's case law to describe fully, based on the evidence from his texts, his jurisprudence across several areas pertinent to public administration: civil rights, civil liberties, human resource management, due process of law, and privacy. In contrast, this chapter is normative. I revisit the regime values framework to explain its significance as a way to think about ethics in administrative decision making and to explore which values are dominant in Brennan's jurisprudence.

**REGIME VALUES**

In *Ethics for Bureaucrats,*[213] John Rohr argues that understanding regime values may help administrators make more ethical decisions. He also asserts that administrators may be taught how to uncover regime values by using U.S. Supreme Court decisions. This approach can be used to teach ethics in a public administration curriculum for

[213] Rohr 1987.

undergraduate and graduate students at universities and for professionals in management training centers. Before providing the details of his approach, he first ponders two other approaches to teaching ethics and concludes that they are inadequate. He labels these two alternatives "The Low Road" (p. 60) and "The High Road" (p.64).

The *low road* approach involves a fairly mundane emphasis on agency rules and regulations. He states that this approach is negative because it may lead administrators to believe that following agency rules eliminates unethical administrative behavior. Rohr does not write that it is incorrect to emphasize agency rules as a method for teaching about ethical decision making. However, he does recognize the limitation of this approach. Its focus on routine decisions such as whether one should use the office telephone to cancel a personal appointment misses a range of decisions that may not be reduced to the rule of simply staying out of trouble.

The *high road* approach is based on the principle of social equity, and Rohr attributes this emphasis to the "new public administration" movement (p. 64). He divides this approach into two sub-approaches: political philosophy and humanistic psychology. Rohr believes an ethics curriculum based on political philosophy would be too demanding because it would require an in-depth study of philosophical thought that would not be feasible given the significant demands already placed on public administration curricula. Humanistic psychology is inappropriate as a foundation for teaching ethics to public managers because it makes no distinction between public and private decision making and focuses too much on the individual and not enough on how the individual is employed.

After concluding that neither the *low road* nor the *high road* offers a promising opportunity to teach ethics in administrative decision making, Rohr presents a third option that he calls *regime values*. He sees it as a middle-of-the-road approach for administrators. His approach involves a two-step process of discovering the values of the U.S. regime and then considering their significance in administrative decision making.

> As an alternative to political philosophy and humanistic psychology, I would suggest "regime values" as the most appropriate method for integrating the study of ethics into a public administration curriculum. At the outset, let us clarify the word "regime." As indicated earlier, it is not used here in the journalistic sense of the "Carter regime," the "Reagan regime," and so forth. Rather it is proposed as the most appropriate English word to suggest what Aristotle meant by "polity." More specifically, "regime values" refer to the values of that political entity that was brought into being by the ratification of the Constitution that created the present American republic.[214]

The regime values framework is based on three premises:

1. Ethical norms should be derived from the salient values of the regime.
2. These values are normative for bureaucrats because they have taken an oath to uphold the regime.
3. These values can be discovered in the public law of the regime.[215]

Step one of this three-part approach to regime values requires us to first identify the values. Values can be found in various places, such as political speeches, scholarly interpretations of history, campaign platforms, religious sermons, and U.S. Supreme Court opinions. It is this last location that Rohr believes is most useful for public administrators. Since administrators take an oath to uphold the Constitution, it may be a good place to begin the search for regime values. He argues that discovering regime values from Supreme Court opinions is especially useful because the Court's decisions are (1) institutional, (2) dialectic, (3) concrete, and (4) pertinent.

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[214] Rohr 1987, p. 68.
[215] Rohr 1987, p. 68.

Values are discernable attitudes or patterns of behavior that develop over time. Any source of regime values should offer the ability to produce evidence of a value that has stood the test of time. Since U.S. Supreme Court opinions have historical continuity, they are *institutional* and hence suitable indicators of the values of the regime. The values are cloaked in the stability of an institutionalized Court that relies heavily on precedent in its decision making. However, case opinions can be overturned, distinguished, interpreted, and broadened. When this occurs, it may indicate a shift in values and provide even more insight into the values that have remained constant. In either case, we must examine the context of the decision in order to get the best understanding.

Supreme Court opinions also present a *dialectic*, a formal debate on the interpretation of regime values. This is the case because most opinions present at minimum a majority opinion and one dissenting opinion. There also may be one or more concurring opinions and multiple dissents. The result is a public dialogue in which the reader can follow the reasoning in each opinion and then draw his or her own conclusions about the substance. The reasoning in these opinions can help an administrator reflect more thoroughly on his or her own thought process and compare it to those of the Justices.

Next, the Court's opinions are *concrete*. Each case presents a question of law that the Court must at least address. To provide the answer, the Court must apply abstract ideas to the concrete issue at hand. Brennan would agree:

> When litigants approach the bar of the court to adjudicate a constitutional dispute, they may justifiably demand an answer. Judges cannot avoid a definitive interpretation because they feel unable to, or would prefer not to, penetrate to the full meaning of the Constitution's provisions. Unlike literary critics, judges

> cannot merely savor the tensions or revel in the ambiguities inhering in the text—judges must resolve them.[216]

The application illustrates the practical aspect of regime values and provides instruction to the administrator for how to think through the decision. It is here that the Court determines what values will be primary.

Finally, Supreme Court opinions are *pertinent*: they mirror the issues that administrators may face in the daily exercise of administrative discretion, including whether and how to exercise discretion. The questions raised in the cases are of interest to administrators because they also must determine the primary values to apply in their decision making.

Rohr highlights that three regime values have been prevalent in Supreme Court opinions: freedom, equality, and property. It is important to note that he does not define any of these terms. In fact, he says it is necessary to leave them undefined in order to preserve their widespread appeal. For example, if we surveyed most citizens about whether they value freedom, few would respond in the negative. Freedom as a value has a strong appeal to most Americans. However, if we pressed further to ask those citizens to define freedom, there may be little agreement on what the term means. Vague, however, need not be synonymous with meaningless. Rohr states as well that it is not possible to create an exhaustive list of regime values; nor is it necessary to determine whether the values discovered represent the highest political or social ideals of the regime.

> These values are not the highest values to which a regime might aspire. As Robert Goldwin has shown, the American Republic rests on moral principles, but

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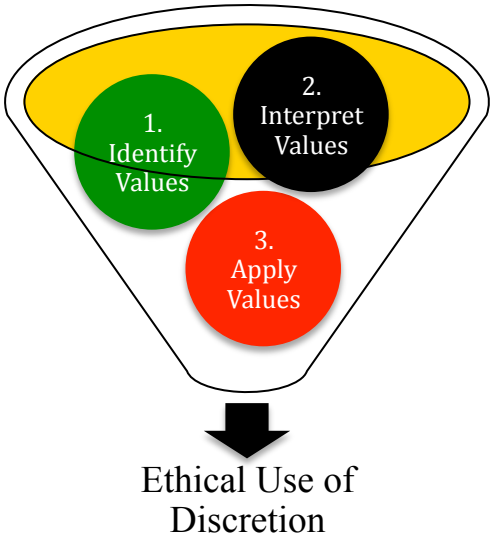
[216] Brennan, William J. "The Constitution of the United States: Contemporary Ratification" in O'Brien, David M. (1997). *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House, p. 201.

> these principles yield only a bounded morality, that is, a morality that "might be called a measured, or a restrained, or a moderated, or even a mean morality.[217]

Step two of the approach to regime values requires us to interpret the values. To interpret a value, one must look for meaningful statements about them. Rohr concedes this task is more difficult than the first. It is important to remember that there may not be a consensus on what a value means: "Thus, as the general values of the regime become sufficiently specific to have a practical effect on bureaucratic decision making, bureaucrats will have to decide which of many interpretations they will take seriously in their efforts to respond to the values of the American people."[218] Administrators should reflect on the dialogue among the Justices in the case opinions and determine how those values can be incorporated in their discretionary decision making. This is the third step. To apply regime values, one should look for consistency among them. If the Court continues to debate a value, the administrator gains more insight into why the value is important. The administrators must choose the values that they find most appealing and persuasive. This is necessarily a subjective endeavor, and administrators must follow their consciences. Finally, administrators use the values to make discretionary decisions in a manner compatible with the values of the regime. Figure 2 describes the process.

[217] Rohr 1987, p. 76.
[218] Rohr 1987, p. 76.

**Figure 2: Rohr's Regime Values Method**




The next section demonstrates how this framework applies to Justice Brennan's jurisprudence by identifying and interpreting his values.

**BRENNAN'S REGIME VALUES**

In Chapters 4-8, I analyzed Brennan's opinions in 25 cases and identified the salient values in his decisions (see Table 13). Judges not only promote regime values in their opinions, but also they give us insight into how those values may be interpreted and applied to administrative decision making. For example, the dialogue among the Justices in *Metro Broadcasting, Inc. v. FCC*[219] reveals that equity is a value. However, even after making this determination, the Court had to go further to assess whether affirmative action policies were an acceptable means of pursuing equity.

Rohr stresses three regime values: freedom, equality, and property. Brennan's jurisprudence sustains these values, and to these I add social justice, accountability, flexibility, unconstitutional conditions, and equity. I distinguish between equality and equity and discuss how I perceive the difference.

[219] 497 U.S. 547 (1990)

**Table 13: Regime Values in Brennan's Jurisprudence**

| Citation | Regime Value | Interpretation of Value |
|---|---|---|
| *DeShaney v. Winnebago County Department of Social Services* 489 U.S. 189 (1989) | Freedom | Individuals must be free from arbitrary government action or inaction. |
| | Accountability | Administrators must be held accountable for negligent actions. |
| | Social Justice | Administrators have an affirmative obligation to protect those who cannot protect themselves. |
| *Sherbert v. Verner* 374 U.S. 398 (1963) | Freedom | Individuals have a right to religious freedom. |
| | Unconstitutional Conditions | Unemployment benefits may not be conditioned on whether one chooses to adhere to a minority religious faith. |
| | Flexibility | Administrators should be flexible to accommodate the rights of individuals. |
| *Grand Rapids School District v. Ball* 473 U.S. 373 (1985)<br><br>*Lynch v. Donnelly* 465 U.S. 668 (1985) | Freedom | Individuals have a right to religious freedom. |
| *Metro Broadcasting v. FCC* 497 U.S. 547 (1990) | Equity | Traditionally disadvantaged races are entitled to equitable treatment. |
| | Social Justice | There should be support for corrective policies that address past injustices. |
| *Frontiero v. Richardson* 411 U.S. 677 (1973) | Equality | Males and females should be treated equally under the law. |
| *Craig v. Boren* 429 U.S. 190 (1976)<br><br>*Schlesinger v. Ballard* 419 U.S. 498 (1975) | Social Justice | Individuals have a right to equitable administrative decisions free from detrimental sex-based social |

| | | |
|---|---|---|
| | | stereotypes. |
| *Connick v. Meyers*<br>461 U.S. 138 (1983)<br><br>*Speiser v. Randall*<br>357 U.S. 513 (1958) | Freedom | Individuals have freedom of speech. |
| | Unconstitutional Conditions | Government employment may not be conditioned on the employee foregoing First Amendment free speech rights. |
| *Elrod v. Burns*<br>427 U.S. 347 (1976)<br><br>*Rutan v. Republican Party of Illinois*<br>497 U.S. 62 (1990)<br><br>*Speiser v. Randall*<br>357 U.S. 513 (1958) | Freedom | Individuals have freedom of association.<br><br>Individuals have freedom of speech. |
| *Goldberg v. Kelly*<br>397 U.S. 254 (1970) | Property | Individual have a property right in welfare benefits. |
| | Social Justice | Individuals have a right to a hearing before being deprived of life-sustaining government benefits. |
| *Green v. County School Board of New Kent County*<br>391 U.S. 430 (1968) | Equality | Non-white individuals cannot be segregated by race in public education. |
| | Social Justice | Individuals have a right to equal opportunities in public education. |
| *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*<br>403 U.S. 388 (1971) | Freedom | Individuals must be free from arbitrary government action. |
| | Accountability | Administrators must be held accountable for negligent actions. |
| *Cleveland v. Loudermill*<br>470 U.S. 532 (1985)<br><br>*Bishop v. Wood*<br>426 U.S. 341 (1976) | Property | Individuals have a property right in employment. |
| | Social Justice | Individuals have a right to a hearing before being deprived of public employment. |

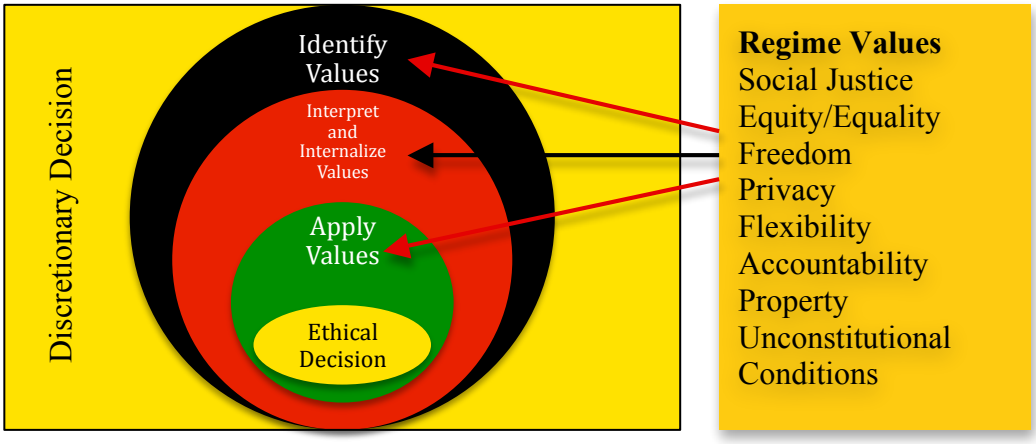
| | | |
|---|---|---|
| *Owen v. City of Independence*<br>445 U.S. 622 (1980) | Freedom | Individuals must be free from arbitrary government action. |
| | Accountability | Administrators must be held accountable for negligent actions. |
| *Greer v. Spock*<br>424 U.S. 828 (1976) | Freedom | Individuals have freedom of speech. |
| | Flexibility | Administrators should be flexible to accommodate the rights of individuals. |
| *Bell v. Burson*<br>402 U.S. 535 (1971) | Freedom | Property right in reputation and in a state-issued drivers' license<br><br>Individuals must be free from arbitrary government action. |
| *United States v. Miller*<br>425 U.S. 435 (1976)<br><br>*INS v. Delgado*<br>466 U.S. 210 (1984)<br><br>*New Jersey v. T.L.O.*<br>469 U.S. 425 (1985)<br><br>*New York v. Burger*<br>482 U.S. 691 (1987)<br><br>*Public Citizen v. Department of Justice*<br>491 U.S. 440 (1989) | Privacy | Individuals must be free from government intrusion into their private affairs. |

Administrators may interpret Brennan's values within the context of the decision to be made. But before the values can be applied, they first must be internalized. That is, based on their interpretation, administrators must understand why they connect with those values. Their reasoning may not be rooted in the same foundation as Brennan's or that of any other Justice, but administrators must be able to articulate a reason for adhering to a regime value. For example, Brennan's belief in social justice is likely the result of his

Roman Catholic upbringing and his involvement with labor law litigation. An administrator who does not share either foundation may still be attracted to social justice based on his or her own experiences and reasoning. The identification should be with the value itself, not necessarily the Justice who advocated it.

Once internalized, these values then can be applied to the decision making process. Administrators will be able to justify their decisions and may even find their decision to be more effective. Figure 3 describes how to apply Brennan's regime values.

**Figure 3: Brennan's Regime Values in Administrative Decision Making**




### FREEDOM

Most constitutional scholars refer to Brennan as a great civil libertarian.[220] They do so because Brennan's opinions advocated protection for the individual when faced with government's restriction on rights. Brennan continued this protection for individuals when they face administrative restrictions on rights. Brennan believed the Constitution required that individuals be given maximum freedom, self-determination,

[220] For example, see David Marion's *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of "Libertarian Dignity"* and Kim Iassac Eisler's *The Last Liberal: Justice William J. Brennan, Jr. and the Decisions that Transformed America*.

and autonomy to make decisions about their lives. His administrative law opinions support this value. In all of the cases analyzed, Brennan favored the individual's interests over those of the administrator. For example, in *Sherbert v. Verner*, Brennan rejected a state unemployment agency's argument that a Seventh Day Adventist was not entitled to unemployment benefits if she refused to accept Saturday work. Similarly, his dissent in *Greer v. Spock* indicated his commitment to civil liberties. He contended that U.S. military regulations that prohibited political candidates access to a military base should be struck down.

*Freedom* is indeed difficult to define. For Brennan, it encompassed more than the ability to secure the fundamental rights guaranteed by the first ten amendments to the Constitution. That was simply a starting point. His opinions went further to advocate self-determination. Wehmeyer argues there are four characteristics of self-determining behavior.[221] First, an individual acts autonomously. Second, her behavior is self-regulated. Third, she interacts with others or responds to her environment from a position of empowerment. Fourth, her behavior stems from self-awareness.

Administrators who hold freedom as a regime value must be aware of how their decisions either increase or decrease an individual's ability to be self-determining. Government is obligated to leave individuals to their own affairs so they have anopportunity to self-actualize through personal maturity, reflexive experiences, and development of their own character. Brennan's opinions support this value; yet, Brennan was no absolutist and often disagreed with Justices Black and Douglas, both of whom were more absolute in this value than Brennan, on where the actual line of non-

[221] Wehmeyer, Michael, Brian Abery, Deirdre Mithaug, and Roger Stancliffe (2003). *Theory in Self-Determination: Foundations for Educational Practice*. Springfield, IL: Charles C. Thomas.

interference should be drawn. However clichéd one might find "the pursuit of happiness," Brennan supported it.

**PRIVACY**

Closely linked to freedom is the value of privacy. For Brennan, privacy was an important value. He believed government should not meddle into the private affairs of citizens. In cases where administrators were involved in regulatory actions, he believed strongly that a warrant was still required. Whenever government executes a search warrant or a subpoena, it should be based on probable cause—a set of facts or evidence that would lead a reasonable person to conclude that wrong had been done. In *New Jersey v. T.L.O.*, Brennan wrote that even a high school student had a reasonable expectation of the privacy of her purse. Privacy allows an individual to act autonomously so long as the government has not garnered sufficient evidence to show wrongdoing has occurred. The government also must have more than a suspicion to sustain an invasion of privacy; Brennan believed it must have probable cause.

Brennan's privacy value may not be shocking to those who understand the value he placed on freedom. He negotiated many of the Court's privacy decisions, and some have asserted that he actually wrote a substantial portion of Justice Douglas's opinion in *Griswold v. Connecticut*,[222] the landmark case that recognized a Constitutional right to privacy in a penumbra stemming from other Constitutional amendments.[223]

**PROPERTY**

Although he did not coin the term, Brennan has been associated with the term *new property* since his opinion in *Goldberg* declared that once government confers this type

[222] 381 U.S. 479 (1965)
[223] See Stern and Wermiel 2010 and Eisler 1993.

of property, it may not be taken without due process of law. One may think of *old property* as tangible physical possessions such as cars, houses, clothing, land, and most items an individual purchases; it is private property. *New property* encompasses government benefits such as welfare payments, disability payments, and public employment; government provides this property to individuals.[224] It was the latter type of property with which Brennan mostly was concerned.

Brennan viewed property as a means of achieving autonomy. Being terminated from one's job deprives him of his livelihood, he noted in *Bishop*. He wrote in *Goldberg* that welfare benefits were recipients' last option for survival. In this sense, property was a means to a social justice end.

**ACCOUNTABILITY**

Administrators may be somewhat disappointed at the frequency with which Brennan sided with the individual over the administrative agency in a dispute. For example, the justice wanted to hold a social services department accountable for its decision not to remove an abused child from his father's custody. Brennan concluded in *Deshaney v. Winnebago County Social Services Department* that the agency's inaction was commensurate with action, and its refusal to remove the child violated his Fourteenth Amendment rights. In *Owen v. City of Independence*, Brennan determined that the city should be held liable for violating the due process rights of an individual who was fired unjustly. Although Brennan wrote that administrative values of efficiency and effectiveness are important, accountability for decisions is also significant.

Administrators are not infallible; we make mistakes. Brennan did not expect every administrative decision to be perfect. At the same time, imperfect decisions can

[224] Rohr 1989.

cause injury to an individual. If administrators are not accountable for their decisions, to whom will the injured person turn? This is one of the most difficult aspects of administration. On one hand, administrators must not become so afraid of being sued that they refuse to act. Could this be what happened to the social workers in *DeShaney*? On the other hand, there must be ways for individuals to receive redress when they are harmed by an administrator's decision.

One should keep in mind that being sued does not mean one will not be protected from liability. The concept of *qualified immunity* ensures that many administrators will be protected for individual accountability if they can show that (1) their actions did not stem from malice, and (2) they acted in "good faith"—they did not know and reasonably could not have known that they were violating an individual's rights. State government employees who are sued under 42 U.S.C. 1983 are usually entitled to such qualified immunity. Perhaps adhering to values that come directly from constitutional jurisprudence may provide a solid foundation for administrative decision making. Scrutinizing the decision making process of a city's planning department, Brennan wrote in *San Diego Gas and Electric Co. v. City of San Diego*[225]*:*

> Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner? (Footnote 26)

### UNCONSTITUTIONAL CONDITIONS

I once informally polled a classroom of undergraduate students enrolled in an Administrative Law course. I asked them which of their constitutional rights they would be willing to give up in order to work for government. Nearly all responded "none." I

[225] 450 U.S. 621 (1981)

then asked them if they should be expected to give up their right to free speech to become a public employee. Nearly all responded "no." I finally asked whether they believed they should be restricted in any way in regard to what they may say while working for government. Again, most answered "no." Then, I recounted the facts of *Rankin v. McPherson* much the way they are presented at the beginning of Chapter 6. After describing the facts of the case, I asked the students how many believed McPherson should have been fired. Nearly all answered "yes." Intrigued, I then retold the facts of *Connick v. Myers*. I asked how many believed Myers should have been fired. Nearly all answered "yes." The cognitive dissonance was overwhelming. Few believed they should be fired for exercising their own Constitutional rights but clearly believed others should be. We engaged in discussion that lead me to two conclusions. First, public sector managers may find it easy to curtail the rights of their subordinates when they believe their authority is challenged. Some students commented that Myers should have "just did what her boss said because he's the boss." Second, public sector managers may find it easy to curtail the rights of their subordinates when their subordinates' values conflict with their own. For example, some students thought McPherson should be fired for being "unpatriotic."

I have mentioned that the Court has at times favored the Doctrine of Privilege and at other times the Doctrine of Unconstitutional Conditions. Brennan was one of the Justices who consistently urged the Court to apply the latter. Based on his support for individual rights, Brennan believed no citizen should forego constitutional rights just because she works for the government or receives some other government benefit. In *Rutan v. Republican Party of Illinois*, Brennan struck down as unconstitutional a plan by

a Republican governor to prevent Democratic party members in the state's public agencies from advancing in their careers or being hired by state agencies. Brennan saw this scheme as an unconstitutional denial of First Amendment rights for the employees. Similarly, in *Elrod v. Burns*, Brennan determined that sheriffs could not be fired simply because they did not support the Democratic Party in an election. State employees cannot suffer employment consequences for exercising their First Amendment right to freely associate with the political party of their choice.

One of the primary tools of effective governments is the ability to mete out rewards and punishments. The Constitution, however, places limitations on the types of rewards and punishments that can be delivered. Advocates for the Doctrine of Privilege are correct to point out that the Constitution does not provide an affirmative right to welfare payments, public employment, drivers licenses, or tax exemptions. So, why did Brennan attack it so sternly? For Brennan, the Doctrine of Privilege could not be reconciled with the principles of freedom and self-determination so esteemed. He found the coercive intent behind the doctrine rather demeaning. If citizens are forced to sign loyalty oaths in order to teach at a state university, are required to stop worshipping on their Sabbath to be eligible for unemployment benefits, or are obligated to allow social workers to randomly inspect their homes in order to receive welfare payments, then the very autonomy the Constitution protects is weakened. For this reason, the value of unconstitutional conditions is closely tied to that of freedom.

**FLEXIBILITY**

Efficiency. Effectiveness. Economy. The "three Es" of management have crept into public sector prominence. These values are widely promoted in public

administration literature and sometimes are combined with discussions on choice, political economy, and cost-benefit analysis.[226] Brennan too saw the value in administrative efficiency and effectiveness as he pointed out in *Goldberg* and *Connick*. However, when weighed against constitutionally protected rights for individuals, these values proved less important. He did not wish for administrators to dispense with administrative convenience altogether. But rather than relying extensively on the "three Es," Brennan urged administrators to practice flexibility and responsiveness. Flexibility allows administrators not only to operate from a general set of guidelines but also to determine on a case-by-case basis how those guidelines may be adjusted to meet an individual's needs. It may not be always possible for administrators to practice this type of flexibility. I speculate that many public organization cultures may be more deeply vested in standardization as opposed to flexibility. For example, the unemployment commission that refused Adell Sherbert's compensation when she refused to work on Saturday was following standard policy. Standardization may lead to more efficient decisions but not necessarily more effective ones. In his opinion, Brennan stressed that the commission must be flexible enough to accommodate Sherbert's religious choice.

**EQUITY AND EQUALITY**

The language of the Fourteenth Amendment's due process and equal protection clauses imply individually-based rights. States cannot deprive any *person* of life, liberty, or property without due process of law or deny any *person* equal protection of the laws. These clauses do not explicitly mention groups of people. In chapter 4, I discussed

[226] For example, see Niskanen, William (1987). "Bureaucracy" in Charles K. Rowley, ed. *Democracy and Public Choice*. Oxford: Blackwell and Ostrom, Vincent and Ostrom, Elinor (March-April, 1971). "Public Choice: A Different Approach to the Study of Public Administration." *Public Administration Review* Vol. 31, No. 2, pp. 203-216.

Brennan's judicial philosophy of equal protection as it relates to both racial minorities and women. It is difficult to determine from his opinions whether Brennan agreed that the Constitution did not support group rights. What is clear is that he respected the right of individuals to identify with a particular group. He also recognized that individuals have suffered adverse effects because of others' stereotypes about such group membership. On the one hand, his body of jurisprudence as a whole emphasizes individual rights as seen in Chapters 5-7. Yet, in regard to equal protection, he did find that members of certain groups who have suffered a historical disadvantage must be afforded an extra measure of protection in administrative decision making.

Based on my analysis of his opinions, I argue that Brennan valued equality but was more concerned with equity. The difference between the two concepts is not simply semantics. In Chapter 6, I quoted a few sentences from Justice Blackmun's opinion in *Bakke*. I again place his words here because they embody the concept of equity that I am interested in.

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetuate racial supremacy. (p. 407)

*The Merriam-Webster* dictionary lists the following synonyms for *equality*: equivalency, sameness, parity, impartiality, uniformity. Equal treatment implies same treatment. The following synonyms are listed for equity: fairness, justness, justice, probity. An emphasis on equality may cause administrators to adopt rigid and inflexible standards for the sake of treating all persons alike. No consideration of individual circumstances is required, nor can such considerations be made. However, same treatment is not necessarily fair treatment, and this is conveyed in Blackmun's comments.

Brennan's jurisprudence on sex discrimination follows the value of equality. However, his jurisprudence on race discrimination follows the value of equity. In *Frontiero*, Brennan ruled that the military must treat Frontiero and her male counterparts as equals when determining eligibility for benefits; Frontiero was to receive the same treatment as the males. Likewise in *Craig*, Brennan ruled that the state could not prohibit the sale of non-alcoholic beer to males if it could be sold to females in the same age range as those males. In *Schlesinger*, Brennan dissented because the Court ruled that the military could continue to treat males and females differently in promotion decisions. Clearly, his opinions advocated sex equality.

In his race discrimination opinions, Brennan did not advocate equality; instead, he chose equity as a value. His approach closely follows Blackmun's. Brennan believed that to correct the history of discrimination against racial minorities, they could receive different treatment designed to promote fairness and a just policy outcome. In *Metro Broadcasting,* Brennan upheld an affirmative action policy designed to increase minority broadcast programming. He understood that systemic white advantages accumulated through a history of racism could not be overcome by now requiring sameness of treatment. So, he proposed different treatment to produce fairness in policy.

Perhaps Brennan's approach to equity can be termed *communitarian liberalism*. Philip Selznick described a communitarian approach to law:

> A communitarian morality looks to the enhancement of personal and social responsibility; exhibits a preference for cooperation and reconciliation in all spheres of life; affirms the interdependence of belonging and freedom, and respects the particularity and diversity of human existence. This doctrine presumes that selfhood can be enlarged as a result of social experience; and also that selfhood requires rootedness…Freedom, equality, and rationality become weak and vulnerable if they are not sustained by shared values, by personal

> commitment, and by appropriate institutions. This structure is incompatible with radical individualism.[227]

This description matches near perfectly the value of equity that Brennan espoused in *Metro Broadcasting,* in which he determined that groups of people—racial minorities—were afforded equity protection under the Fourteenth Amendment, and as Blackmun stated in *Bakke*, the Equal Protection Clause was not used to sustain White supremacy.

**SOCIAL JUSTICE**

All of Brennan's case law promotes social justice, and he wrote no opinions that omitted the concern for human dignity. He believed this principle to be the foundation of the Republic. For Brennan, social justice meant government must respect the humanity of each individual. This included an acknowledgement of the right to exist, the right to pursue life goals, and the right to be treated fairly when interacting with government.

The realization of this value required him to interpret the Constitution in a way that offered the individual the respect that was innate to his or her human existence. Brennan's emphasis on social justice caused him to protect those whom he believed to be most vulnerable in the administrative state: children (*DeShaney v. Winnebago County Social Services Department*), racial minorities (*Metro Broadcasting v. FCC* and *Green v. County School Board*), women (*Frontiero v. Richardson* and *Schlesinger v. Ballard*), and the poor (*Goldberg v. Kelly*). For Brennan, social justice transcended procedural justice. He believed that substantive justice was equally as important. Following policies and procedures set forth by organizations does not guarantee a just outcome in decision making. Brennan likely would agree with Rawls:

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[227] Selznick, Philip (2006). "The Jurisprudence of Communitarian Liberalism" in *Communitarianism in Law and Society*. Paul van Seters, ed. Lanham, MD: Rowman & Littlefield, p. 20.

> A fair procedure translates its fairness to the outcome only when it is actually carried out. In order, therefore, to apply the notion of pure procedural justice to distributive shares it is necessary to set up and to administer impartially a just system of institutions. Only against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedure exists.[228]

Brennan might argue, though, that an emphasis on procedural fairness sometimes may obscure discussion on the fairness of the outcome. He believed the outcome was just as important.

Again, Selznick's comments are relevant: "Furthermore, communitarian liberalism extends and enriches liberal ideas in that it seeks *effective* freedom, *substantive* rationality, and *social* justice."[229] Brennan did not believe that freedom could not be balanced with other values. In fact, he believed social justice was the dominant value that should guide an individual's free actions. Freedom and social justice went hand-in-hand.

## PEDAGOGY

### ETHICS AND THE MPA CURRICULUM

Now that I have more fully described Brennan's regime values, I will reflect on their significance in teaching ethics to public administrators. Rohr argued that the regime values approach could be used to train public administrators in how to think about ethics. Several public administration scholars have contemplated the most effective way to teach administrators how to think about ethical dilemmas. Kitchener describes an ethical dilemma as a situation where an individual has to choose between two or more equally

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[228] Rawls, John (1999). *A Theory of Justice: Revised Edition*. Cambridge, MA: Harvard University, p. 75-76.
[229] Selznick 2006, p. 20.

acceptable alternatives.[230] Mark Moore concludes that an administrator's ethical obligations come from three sources: (1) respecting the processes that give legitimacy to the actions of public administrators, (2) pursuing the public interest, and (3) treating others with respect, fairness and honesty.[231] Kathryn Denhardt asserts that the basis for ethical administrative action rests on the administrator's ability to be honorable, benevolent, and just.[232] Cohen and Eimicke state that administrators should follow five principles: (1) obey the law, (2) pursue the public interest, (3) do no harm, (4) be competent, and (5) take responsibility for their behavior.[233] Finally, Terry Cooper offers ways to think about ethics in the public sector. He argues that the responsible administrator is one who is (1) accountable for his or her behavior to supervisors, courts, the citizens, and elected officials and (2) able to draw on inner convictions guided by professional standards of right and wrong in order to serve the public interest. An ethical administrator must be able to reason through his or her own convictions and then explain how his or her actions promote the public interest.[234]

Rohr believed that alternative methods for teaching ethics in the public sector either did not go far enough (the low road) or went too far (the high road). The low road's emphasis on following rules and avoiding misconduct did not provide a framework for the myriad discretionary decisions administrators must make. Yet

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[230] Kitchener, Karen S. (2000). *Foundations of Ethical Practice, Research, and Teaching in Psychology*. Mahwah, NJ: Lawrence Erlbaum Associates.

[231] Moore, Mark (1976). "Realms of Obligation and Virtue" in Fleishman, Joel L., Lance Liebman, and Mark Moore, eds., *Public Duties: The Moral Obligations of Government Officials*. Cambridge, MA: Harvard University.

[232] Denhardt, Kathryn (1991). "Unearthing the Moral Foundations of Public Administration: Honor, Benevolence, and Justice" in Bowman, James S., ed. *Ethical Frontiers in Public Management.* San Francisco: Jossey-Bass.

[233] Cohen, Steven and Eimicke, William (January 1995). "Ethics and the Public Administrator." *Annals of the American Academy of Political and Social Science*. Vol. 537: 96-108.

[234] Cooper, Terry (2006). *The Responsible Administrator: An Approach to Ethics for the Administrative Role.* 5th ed. San Francisco, CA: Jossey-Bass.

emphasis of the high road on social equity was too ambitious. Rohr gives two reasons why an ethics based in social equity was questionable.[235] First, he said to teach it properly would require a demanding curriculum. He did not believe it was feasible to add courses in political philosophy to an already extensive public administration curriculum. Second, he believed the social equity approach was based in an organizational theory that made no distinction between the public and private sectors. He said traditional public administration was more firmly rooted in law and political science as opposed to organizational theory and psychology. Still, he recognized that public administration curricula must at least mention social equity.

> In questioning the usefulness of political philosophy and humanistic psychology for bureaucratic ethics, I do not intend to launch a diatribe against these disciplines. A public administration curriculum that ignored them would be impoverished indeed. My point is simply to question the propriety of either discipline as the foundation for a course in ethics for bureaucrats.[236]

As already noted, Rohr suggested using regime values as a middle-of-the-road approach. By teaching administrators to read U.S. Supreme Court opinions and extract a set of regime values from the dialogue that takes place among Justices, he believed the administrator could at least form a foundation for thinking about ethical decision making. This approach appears to address the problems associated with both the low and high roads. First, it requires the administrator to do more than simply follow the rules regarding conflicts of interest or proper use of office equipment. The administrator must think about core values that form the basis of the regime. Second, the approach is easily incorporated into an ethics course either by teaching several cases as examples or by

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[235] Rohr, John A. (1989). *Ethics for Bureaucrats: An Essay on Law and Values*. New York, NY: Marcel Dekker.
[236] Rohr 1987, p. 67.

having the bulk of the course dedicated to reading case opinions. Third, regime values are inherently public values. Because they focus on public ideals as opposed to private ones and because they are firmly rooted in law and political science, they are more congruent with the traditional goals of public administration.

Teaching ethics to public administrators is no easy task. I also assume that public administrators want to make ethical decisions, but some may not be familiar with a systematic way to do so. Rohr's *regime values* offers such a system. Like Rohr, I too believe that administrators can be more effective decision makers if they familiarize themselves with Supreme Court decisions. With so many daily tasks, an administrator may believe that reading case law is not time well spent. However, the benefits outweigh the time commitment. Reading case law actually may increase an administrator's effectiveness by helping determine what courses of action are likely to be challenged. And, of course, the opinions can help the administrator reason through the application of regime values.

Brennan's regime values contribute to a foundation for ethical decision making.[237] For nearly 34 years, he found in the Constitution a set of principles he applied to each case before the Court. Although the Court changed leadership three times while Brennan was a member (Chief Justices Warren, Burger, and Rehnquist), Brennan continued to apply his regime values to decisions. He did not waiver in his belief that his values were the appropriate ones given the history of the regime and the principles of governance it represented.

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[237] The opinions of other Justices might also be examined to determine the regime values present in their opinions.

I also believe, as Rohr did, that it is important for administrators to learn how to think about ethical decisions. He noted the difficulty of incorporating ethics courses into a public administration curriculum. In 2012, *U.S. News and World Report*[238] ranked MPA college programs in the United States. The top ten programs were Syracuse University, University of Indiana-Bloomington, Harvard University, University of Georgia, Princeton University, New York University, University of California-Berkeley, University of Southern California, Carnegie Mellon University, and University of Kansas. Of these programs, only one requires a core course in ethics. Although I find this to be a severe weakness in public administrator training, it highlights the difficulties Rohr pointed out. Are public administration curricula too stretched to add a course in ethics? Is there a way to integrate regime values instruction into courses that already exist?

I wondered how many of these universities had at least tried to teach Rohr's method. I investigated the top ten programs and found all but one does offer at least one elective course in ethics (see Table 14). Most, however, still used the traditional case study method to teach ethics. This method presents students with real or imaginary ethical dilemma scenarios. Students then must think through a set of questions to determine how they would have made a decision if they had been the administrator. Using case studies to teach ethics is not new, but I believe the method could be strengthened by adding Rohr's regime values component. None of the top ten programs has integrated a study of regime values into their ethics courses.

[238] http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-public-affairs-schools/public-affairs-rankings

**Table 14: Ethics Courses in Top Ten MPA Programs, 2012**

| Rank | University | Ethics Core Course | Ethics Elective(s) | Ethics Pedagogy |
|---|---|---|---|---|
| 1 | Syracuse University | None | *Ethics and Public Policy* | Case Studies |
| 2 | University of Indiana-Bloomington | None | *Leadership and Ethics* | Case Studies, Political Philosophy |
| 3 | Harvard University | None | *Ethics in Public Life* | Case Studies, Political Philosophy |
| 4 | University of Georgia | None | *(1) Ethics in Public Administration; (2) Administrative Ethics* | Case Studies |
| 5 | Princeton University | None | *Ethics and Economics: Social Justice and Policy* | Case Studies, Economic Philosophy |
| 6 | New York University | None | *Ethics Issues in Public Service* | Case Studies |
| 7 | University of California-Berkeley | None | *Ethics, Policy, and the Power of Ideas* | Case Studies |
| 8 | University of Southern California | None | None | N/A |
| 9 | Carnegie Mellon University | None | *(1) Ethical Issues in Management; (2) Ethics in Public Policy* | Case studies, Video presentations |
| 10 | University of Kansas | *The Role, Context, and Ethics of Public Administration in American Society* | *Administrative Ethics* | Case Studies, Legal Foundations |

## ETHICAL REFLECTION QUESTIONS AS AN ADDITIONAL TOOL

One way to incorporate regime values into ethics curricula may be to use reflection questions as a complement to case studies. These questions would be geared

toward an analysis of regime values in the case scenarios. This would be more difficult to accomplish with traditional case studies because they often omit critical background details in favor of a more general presentation of principles. However, students who have already familiarized themselves with regime values from case law could then use traditional case studies to practice the application of those values. Examples of ethical reflection questions are:

1. Have I ever faced a similar situation? If so, what did I do?
2. What are two regime values I should consider in my decision making?
3. How will I prioritize the applicable values?
4. How did I arrive at these values?
5. What is my justification for applying these values?
6. What are my Constitutional obligations in making this decision?
7. Does my organization support these values? What is my evidence?
8. Does my profession support these values? What is my evidence?
9. Ideally, what outcome would I like to see? Why?
10. What are my expectations for myself as I make this decision?

As an administrator reflects on these questions, he or she is likely to develop a pattern of thinking that allows him or her to quickly assess a situation and make an ethical decision in it.

## CONCLUSION

The regime values that appear in Brennan's administrative law opinions support Rohr's conclusion that freedom, equality, and property are three discernable regime values. However, we can add other values that Brennan articulated, including social

justice, equity, flexibility, privacy, property, unconstitutional conditions, and accountability.

Rohr wrote that a *high road* approach to teaching ethics, an approach that emphasizes social justice as the basis for how administrators should exercise their discretion in decision making, is impractical because a curriculum based on it would be too demanding and too time consuming and also may emphasize principle over pragmatism. It is precisely this high road, however, that Brennan advocated in his jurisprudence; he clearly expected administrators to promote social justice in decision making. At the same time, he offered the administrator practical guidelines for how to pursue social justice as an ethical basis for decision making, hence providing one way of reconciling the *high road* with the *regime values* approach. At times doing so may mean allowing an oral hearing on the evidence before a life-sustaining benefit can be taken away. At other times it may mean rejecting policies that favor the majority religion and disadvantage minority religions. Above all else, Brennan's jurisprudence offers the administrator an opportunity to reflect on the significance of his or her role not only in governing but also in perpetuating a system of values. His values have stood the test of time. Of the thirteen majority and plurality opinions analyzed in this dissertation, only one has been modified from his original vision: affirmative action policies now are subject to strict scrutiny rather than to intermediate scrutiny. This suggests that Brennan's understanding of regime values have endured and are generally supported by the Court.

According to Thomas McCullough:

> Values…are communal. They are public in that they are standards transcending individual taste, carrying a claim to be recognized by the community. They can

> be discussed, analyzed, ordered, justified in a rational discourse. A meaningful discussion about values presupposed a common lifeworld, a shared cultural context within which persons respect one another and care about ideas and values as determinants of their life together.[239]

This communal approach to public values may well be the key to establishing general principles of administrative decision making. Perhaps more public discussions should take place regarding administrative ethics so that ideas are exchanged among administrators, and they can receive feedback on the types of public values they employ.

[239] McCullough, Thomas (1991). *The Moral Imagination and Public Life: Raising the Ethical Question*. Chatham, NJ: Chatham House, p. 19.

## REFERENCES


Ariens, Michael (1991). "On the Road of Good Intentions: Justice Brennan and the Religion Clauses." 27 *California Western Law Review:* 311-338

Atkinson, David N. (1999). *Leaving the Bench: Supreme Court Justices at the End*. Lawrence, KS: University of Kansas Press.

Beckett, Julia, and Heidi O. Koenig (2005). *Public Administration and Law*. Armonk, NY: M.E. Sharpe.

Bell, Derrick (1993). *Faces At The Bottom of the Well: The Permanence of Racism*. New York, NY: Basic Books.

Bendix, Reinhard (1949). *Higher Civil Servants in American Society*. Boulder, CO: University of Colorado Press.

Black, Henry (2004). *Black's Law Dictionary*. 8th edition. Thomson West.

Bouchoux, Deborah E. (1998). *Legal Research and Writing for Paralegals*. New York, NY: Aspen.

Brennan, William J. (October 12, 1985). *Speech to the Text and Teaching Symposium*, Georgetown University.

Brennan, William J. (1997). "Guardians of Our Liberties: State Courts No Less Than Federal" in O'Brien, David M. *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House.

Brennan, William J. (1986). "In Defense of Dissents." 37 *Hastings L.J.* 427.

Brennan, William J. (1977). "State Constitutions and the Protection of Individual Rights." *Harvard Law Review.* Vol. 90, No. 3: 489-504.

Brennan, William J. (1986). "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights." 61 *New York University Law Review.* 535.

Brennan, William J. (1997). "The Constitution of the United States: Contemporary Ratification" in O'Brien, David M. *Judges on Judging: Views from the Bench*. Chatham, NJ: Chatham House.

Biskupic, Joan. "The Biggest Heart in the Building." Washington Post. Friday, July 25, 1997. Page A15. Retrieved: http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/brennan/brennan2.htm.

Cann, Steven J. (2006). *Administrative Law*. 4th ed. Thousand Oaks, CA: Sage.

Clark, Hunter R. (1995). *Justice Brennan: The Great Conciliator*. New York, NY: Birch Lane.

Clayborne, Carson et al. (1991). *The Eyes on the Prize Civil Rights Reader*. New York NY: Penguin.

Cohen, Steven and Eimicke, William (January 1995). "Ethics and the Public Administrator." *Annals of the American Academy of Political and Social Science*. Vol. 537: 96-108.

Cooper, Philip J. (2007). *Public Law and Public Administration*. 4th ed. Belmont, CA: Thomson Wadsworth.

Cox, Raymond W., Susan J. Buck, and Betty N. Morgan (1994). *Public Administration in Theory and Practice*. Englewood, NJ: Prentice Hall.

Crawford Greenburg, Jan (2007). *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court*. New York, NY: The Penguin Press.

Davis, Kenneth C. (1975). *Administrative Law and Government*. St. Paul, MN: West Publishing.

DeLeo, John D. (2008). *Administrative Law*. Florence, KY: Delmar Cengage.

Denhardt, Kathryn (1991). "Unearthing the Moral Foundations of Public Administration: Honor, Benevolence, and Justice" in Bowman, James S., ed. *Ethical Frontiers in Public Management.* San Francisco: Jossey-Bass.

Dolan, Julie and Rosenbloom, David H., eds. (2002). *Representative Bureaucracy: Classic Readings and Continuing Controversies*. Armonk, NY: M.E. Sharpe.

Domino, John C. (2010). *Civil Rights and Liberties in the 21st Century*. 3rd edition. New York, NY: Pearson

Eisler, Kim Isaac. (1993). *A Justice for All: William J. Brennan, Jr. and the Decisions that Transformed America*. New York, NY: Simon & Schuster.

Frankena, William (1967). "Values and Valuation" in Edwards P., ed. *Encyclopedia of Philosophy*. New York, NY: Macmillan.

Frederickson, H. George, and Ghere, Richard K., eds. *Ethics in Public Management*. Armonk, NY: M.E. Sharpe.

Freund, Ernst (1928). *Administrative Powers over Persons and Property: A Comparative Survey*. Chicago, IL: University of Chicago Press.

Glazer, Nathan (1975). *Affirmative Discrimination: Ethnic Inequality and Public Policy*. New York: Basic Books.

Goldman, Roger and Gallen, David (1994). *Justice William J. Brennan, Jr.: Freedom First*. New York, NY: Carroll & Graf.

Hall, Daniel (2011). *Administrative Law: Bureaucracy in a Democracy*. 5th ed. Upper Saddle River, NJ: Prentice Hall.

Harrington, Christine B. and Lief H. Carter (2009). *Administrative Law: Cases and Comments*. 4th ed. Washington, DC: CQ Press.

Hemmingway, Charles W. (1995). "A Closer Look at *Waters v. Churchill* and *United States v. National Treasury Employees Union*: Constitutional Tensions Between the Government as Employer and the Citizen as Federal Employee." 44 American University Law Review: 2231.

Johnstone, Barbara (2008). *Discourse Analysis*. 2nd ed. Malden, MA: Blackwell.

Irons, Peter (1994). *Brennan v. Rehnquist: The Battle for the Constitution*. New York, NY: Alfred A. Knopf.

Kelso, R. Randall (1994). "Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History." *Valparaiso University Law Review.* Vol. 29, No. 1: 121-233.

Kingsley, J. Donald (1944). *Representative Bureaucracy*. Yellow Springs, OH: Antioch Press.

Kitchener, Karen S. (2000). *Foundations of Ethical Practice, Research, and Teaching in Psychology*. Mahwah, NJ: Lawrence Erlbaum Associates.

Konvitz, Milton (2001). *Fundamental Rights: History of a Constitutional Doctrine*. New Brunswick, NJ: Transaction.

Kluckhohn, Clyde (1962). "Values and Value Orientations in the Theory of Action" in Parsons, T. and E.A. Shills, eds. *Toward a General Theory of Action*. New York, NY: Harper, p. 395.

Kramer, Matthew (1994). *Critical Legal Studies and the Challenge of Feminism*. Lanham, MD: Rowman & Littlefield.

Krippendorff, Klaus (2004). *Content Analysis: An Introduction to Its Methodology*. Thousand Oaks, CA: Sage.

Leeds, Jeffrey T. (October 5, 1986). "A Life on the Court." *New York Times*. Retrieved: http://www.nytimes.com/books/97/07/06/reviews/brennan-interview.html.

Leedy, Paul D. and Jeanne E. Ormrod (2001). *Practical Research: Planning and Design*. Upper Saddle River, NJ: Pearson.

Marion, David E. (1997). *The Jurisprudence of Justice William J. Brennan, Jr.: The Law and Politics of "Libertarian Dignity."* Lanham, MD: Rowman & Littlefield.

McCullough, Thomas (1991). *The Moral Imagination and Public Life: Raising the Ethical Question*. Chatham, NJ: Chatham House.

McKeever, Robert (1997). *The United States Supreme Court: A Political and Legal Analysis*. New York, NY: St. Martin's Press.

Michelman, Frank (2005). *Brennan and Democracy*. Princeton, NJ: Princeton University.

Mills, Sara (2004). *Discourse*. 2nd ed. New York, NY: Routledge.

Moore, Mark (1976). "Realms of Obligation and Virtue" in Fleishman, Joel L., Lance Liebman, and Mark Moore, eds., *Public Duties: The Moral Obligations of Government Officials*. Cambridge, MA: Harvard University.

Mosher, Frederick C. (1968). *Democracy and the Public Service*. NY: Oxford University Press.

"Mr. Justice Brennan." Videorecording. Public Affairs Television. Princeton, NJ: Films for the Humanities, 1994.

Phillips, Nelson and Hardy, Cynthia (2002). *Discourse Analysis: Investigating Processes of Social Construction.* Thousand Oaks, CA: Sage.

Rawles, John (1999). *A Theory of Justice: Revised Edition*. Cambridge, MA: Harvard University.

Riccucci, Norma (2002). *Managing Diversity in Public Sector Workforces*. Boulder, CO: Westview.

Rohr, John A. (1989). *Ethics for Bureaucrats: An Essay on Law and Values*. New York, NY: Marcel Dekker.

----------. (1986). *To Run a Constitution: The Legitimacy of the Administrative State*. Lawrence, KS: University Press of Kansas.

Rosenberg, Gerald (2008). *Can Courts Bring About Social Change?* 2nd ed. Chicago, IL: University of Chicago.

Rosenbloom, David, James D. Carroll, and Jonathan D. Carroll (2000*). Constitutional Competence for Public Managers: Cases and Commentary*. Istasca, IL: Peacock.

Rosenbloom, David and Rosemary O'Leary (2010). *Public Administration and Law*. 3rd Edition. Boca Raton, FL: CRC Press.

Rosenkranz, E. Joshua and Schwartz, Bernard, eds. (1997). *Reason and Passion: Justice Brennan's Enduring Influence*. New York, NY: W.W. Norton.

Schwartz, Bernard (1997). "How Justice Brennan Changed America" in E. Joshua Rosenkranz and Bernard Schwartz, eds. *Reason and Passion: Justice Brennan's Enduring Influence*. New York, NY: W.W. Norton.

Selden, Sally Coleman (March 1997). "Representative Bureaucracy: Examining the Linkage Between Passive and Active Representation in the Farmers Home Administration." *American Review of Public Administration*. 27.1:22-42.

Selznick, Philip (2006). "The Jurisprudence of Communitarian Liberalism" in *Communitarianism in Law and Society*. Paul van Seters, ed. Lanham, MD: Rowman & Littlefield.

Shuy, Roger (2003). "Discourse Analysis in the Legal Context" in Schiffrin, Deborah, Deborah Tannen, and Heidi Hamilton, eds. *The Handbook of Discourse Analysis*. Hoboken, NJ: Wiley-Blackwell.

Spicer, Michael and Terry, Larry (May/June 1993). "Legitimacy, History, and Logic: Public Administration and the Constitution." *Public Administration Review*. Vol. 53, No. 3. pp: 239-246.

Spicer, Michael W. (December 2009). "Value Conflict and Legal Reasoning in Public Administration." *Administrative Theory & Praxis*. Vol. 31, No. 4, pp. 537–555.

Stern, Seth and Wermiel, Stephen (2010). *Justice Brennan: Liberal Champion*. New York, NY: Houghton Mifflin Harcourt.

Strossen, Nadine (1991). "Justice Brennan and the Religion Clauses." *Pace Law Review*. Vol. 11: p. 491-508.

Tolchin, Martin (July 22, 1990). "Vacancy on the Court: A Man in Close Touch With People as Well as With History." *New York Times*. Retrieved: http://www.nytimes.com/1990/07/22/us/vacancy-on-the-court-a-man-in-close-touch-with-people-as-well-as-with-history.html.

Toobin, Jeffrey (2007). *The Nine: Inside the Secret World of the Supreme Court*. New York, NY: Doubleday.

Tribe, Laurence H. (1985). *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes our History*. New York, NY: Penguin Books.

Tushnet, Mark. (2006). *A Court Divided: The Rehnquist Court and the future of Constitutional Law*. New York, NY: W.W. Norton & Company.

Tushnet, Mark (1985). *Anti-Formalism in Recent Constitutional Theory. Michigan Law Review,* Vol. 83, No. 6: 1502-1544.

Tushnet, Mark (1991). *Critical Legal Studies: A Political History*. 100 *Yale Law Journal:* 1515.

Urofsky, Melvin I., ed. (1994). *The Supreme Court Justices: A Biographical Dictionary*. NewYork, NY: Garland Publishing.

Warren, Kenneth (1997). *Administrative Law in the Political System*. 3rd ed. Saddle River, NJ: Prentice Hall.

Warwick, Donald (1981). "The Ethics of Administrative Discretion" in Joel Fleishman, Lance Liebman, Mark Moore, eds. *Public Duties: The Moral Obligations of Government Officials*. Cambridge, MA: Harvard University Press.

Wehmeyer, Michael, Brian Abery, Deirdre Mithaug, and Roger Stancliffe (2003). *Theory in Self-Determination: Foundations for Educational Practice*. Springfield, IL: Charles C. Thomas.

Wetherell, Margaret, Stephanie Taylor, and Simeon Yates, eds. (2001). *Discourse as Data*. Thousand Oaks, CA: Sage.

Wilson, Woodrow (June 1887). "The Study of Administration." *Political Science Quarterly*. 2.

Winter, Steven (1990). *Indeterminacy and Incommensurability in Constitutional Law*. *California Law Review*, Vol. 78, No. 6: 1441-1541.

Witter-Merithew, Anna (2001). "Understanding the Meaning of Texts and Reinforcing Foundation Skills Through Discourse Analysis" in Nettles, C., ed. *Tapestry of Our Worlds, Proceedings of the 17th National Conference of the Registry of Interpreters for the Deaf*, pp.177-192.

Zamudio, Margaret et al. (2010). *Critical Race Theory Matters: Education and Ideology.* New York, NY: Routledge.

## APPENDIX A

### POPULATION OF JUSTICE BRENNAN'S OPINIONS

Before selecting cases, I created a population of Brennan's case opinions by using Findlaw® For Legal Professionals: www.lp.findlaw.com. The website provides the text of U.S. Supreme Court opinions since 1893, and the database is searchable by year. I retrieved a list of cases for each year of Brennan's tenure (1956-1990). For each year's list of opinions, I searched each case to determine whether Brennan took part in the decision. I discarded all opinions in which he did not write the majority, plurality, concurrence, or dissent. I discarded all *per curium* opinions, all orders either granting or denying *writs of certiorari*, and all *statements*. Cases were then divided among those four categories and alphabetized within each category.

| No. | Citation | Opinion |
|---|---|---|
| 1 | Abbate v. United States, 359 U. S. 187 (1959) | Majority |
| 2 | Aguilar v Felton, 473 U.S. 402 (1985) | Majority |
| 3 | Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965) | Majority |
| 4 | Allegheny County v. Frank Mashuda Co., 360 U. S. 185 (1959) | Majority |
| 5 | Allied Chemical & Alkali Workers v. Pittsburgh Glass Co., 404 U. S. 157 (1971) | Majority |
| 6 | Allied Tube & Conduit Corporation v. Indian Head, Inc., 486 U.S. 492 (1988) | Majority |
| 7 | American Federation of Musicians v. Carroll, 391 U. S. 99 (1968) | Majority |
| 8 | American Motorists Insurance Co. v. Starnes, 425 U. S. 637 (1976) | Majority |
| 9 | American Textile Manufacturers Institute, Inc. v. Donovan 452 U.S. 490 (1981) | Majority |
| 10 | Andrus v. Allard, 444 U.S. 51(1979) | Majority |
| 11 | Andrus v. Sierra Club, 442 U. S. 337 (1979) | Majority |
| 12 | Antoine v. Washington, 420 U. S. 194 (1975) | Majority |
| 13 | Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) | Majority |
| 14 | Arkansas Electric Coop. Corporation v. Arkansas Public | Majority |

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| | Service Commission, 461 U.S.375 (1983) | |
| 15 | Aro Manufacturing v. Convertible Top Co., Inc., 377 U. S. 476 (1964) | Majority |
| 16 | Arrow Transportation Co. v. Southern R. Co., 372 U. S. 658 (1963) | Majority |
| 17 | Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) | Majority |
| 18 | Automobile Club of Michigan v. Commissioner, 353 U S. 180 (1957) | Majority |
| 19 | Bacheilar v. Maryland, 397 U. S. 564 (1970) | Majority |
| 20 | Baker v. Carr, 369 U. S. 186 (1962) | Majority |
| 21 | Bantam Books, Inc. v. Sullivan, 372. U. S. 58 (1963) | Majority |
| 22 | Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 728 (1981) | Majority |
| 23 | Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985) | Majority |
| 24 | Beasley v. Food Fair of North Carolina, 416 U.S. 653 (1974) | Majority |
| 25 | Bell v. Burson, 402 U. S. 535 (1971) | Majority |
| 26 | Bell v. Maryland, 378 U. S. 226 (1964) | Majority |
| 27 | Beth Israel Hospital v. Labor Board, 437 U. S. 483 (1978) | Majority |
| 28 | Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U. S. 388 (1971) | Majority |
| 29 | Blount v. Rizzi, 400 U. S. 410 (1971) | Majority |
| 30 | Boilermakers v. Hardeman, 401 U. S. 233 (1971) | Majority |
| 31 | Bouie v. Columbia, 378 U. S. 347 (1964) | Majority |
| 32 | Boys Markets, Inc. v. Retail Clerks, 398 U. S. 235 (1970) | Majority |
| 33 | Braden v. 30th Judicial Circuit Court of Kentucky, 410 U. S. 484 (1973) | Majority |
| 34 | Brooks v. Tennessee, 406 U. S. 605 (1972) | Majority |
| 35 | Bruton v. United States, 391 U. S. 123 (1968) | Majority |
| 36 | Bryan v. Itasca County, 426 U. S. 373 (1976) | Majority |
| 37 | Burks v. Lasker, 441 U. S. 471 (1979) | Majority |
| 38 | Beech Aircraft Corporation v. Rainey, 488 U.S. 153 (1988) | Majority |
| 39 | Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) | Majority |
| 40 | Board of Pardons v. Allen, 482 U.S. 369 (1987) | Majority |
| 41 | Bowen v. Galbreath, 485 U.S. 74 (1988) | Majority |
| 42 | Breininger v. Sheet Metal Workers, 493 U.S. 67 (1989) | Majority |
| 43 | Brown v. Hartlage, 456 U.S. 45 (1982) | Majority |
| 44 | Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 (1983) | Majority |
| 45 | Burger King Corporation v. Rudzewicz, 471 U.S. 462 (1985) | Majority |
| 46 | Burlington Northern R. Co. v. Maintenance of Way Employees, 481 U.S. 429 (1987) | Majority |
| 47 | Burns v. Richardson, 384 U. S. 73 (1966) | Majority |
| 48 | Busic v. United States, 446 U. S. 398 (1980) | Majority |

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| 49 | Butz v. Glover Livestock Commission. Co., 411 U. S. 182 (1973) | Majority |
| 50 | Byrd v. Blue Ridge Rural Electric, 356 U. S. 525 (1958) | Majority |
| 51 | Calbeck v. Travelers Insurance Co., 370 U. S. 114 (1962) | Majority |
| 52 | Calero Toledo v. Pearson Yacht Leasing Co., 416 U. S. 663 (1974) | Majority |
| 53 | Califano v. Sanders, 430 U. S. 99 (1977) | Majority |
| 54 | California v. Buzard, 382 U. S. 386 (1966) | Majority |
| 55 | California v. Nevada, 447 U. S. 125 (1980) | Majority |
| 56 | Cameron v. Johnson, 390 U.S. 611 (1968) | Majority |
| 57 | Campbell v. United States, 365 U. S. 85 (1961) | Majority |
| 58 | Campbell v. United States, 373 U. S. 487 (1963) | Majority |
| 59 | Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) | Majority |
| 60 | Carbon Fuel Co. v. Mine Workers, 444 U. S. 212 (1979) | Majority |
| 61 | Cardona v. Power, 384 U. S. 672 (1966) | Majority |
| 62 | Carey v. Brown, 447 U. S. 455 (1980) | Majority |
| 63 | Carey v. Population Services International, 431 U.S. 678 (1977) | Majority |
| 64 | Cargill, Inc. v. Monfort of Cob., Inc., 479 U.S. 104 (1986) | Majority |
| 65 | Carlson v. Green, 446 U. S. 14 (1980) | Majority |
| 66 | Carnley v. Cochran, 369 U. S. 506 (1962) | Majority |
| 67 | Carson v. American Brands, Inc., 450 U.S. 79 (1981) | Majority |
| 68 | Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) | Majority |
| 69 | Ceballos v. Shaughnessy, 352 U. S. 599 (1957) | Majority |
| 70 | Chicago, M., St. P. & P. R. Co. v. Illinois, 355 U. S. 300 (1958) | Majority |
| 71 | Christian v. New York State Department of Labor, 414 U. S. 614 (1974) | Majority |
| 72 | Christianson v. Colt Industries Operating Corporation, 486 U.S. 800 (1988) | Majority |
| 73 | Clayton v. Automobile Workers, 451 U.S. 679 (1981) | Majority |
| 74 | Coigrove v. Battin, 413 U. S. 149 (1973) | Majority |
| 75 | Colonial Pipeline Co. v. Traigle, 421 U. S. 100 (1975) | Majority |
| 76 | Colorado River Water Conservation v. United States, 424 U.S. 800 (1976) | Majority |
| 77 | Commissioner v. Duberstein, 363 U. S. 278 (1960) | Majority |
| 78 | Commissioner v. Kowalski, 434 U. S. 77(1977) | Majority |
| 79 | Commissioner v. Stern, 357 U. S. 39 (1958) | Majority |
| 80 | Communications Workers v. Beck, 487 U.S. 735 (1988) | Majority |
| 81 | Community Communications Co. v. Boulder, 455 U.S. 40 (1982) | Majority |
| 82 | Communist Party of Indiana v. Whitcomb, 414 U. S. 441 (1974) | Majority |
| 83 | Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981) | Majority |
| 84 | Connecticut v. Teal, 457 U.S. 440 (1982) | Majority |

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| 85 | Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983) | Majority |
| 86 | Cooper v. Aaron, 358 U. S. 1 (1958) | Majority |
| 87 | Cort v. Ash, 422 U. S. 66 (1975) | Majority |
| 88 | Costello v. United States, 365 U. S. 265 (1961) | Majority |
| 89 | Cousins v. Wigoda, 419 U. S. 477 (1975) | Majority |
| 90 | Craig v. Boren, 429 U.S. 190 (1976) | Majority |
| 91 | Crane v. Cedar Rapids & I. C. R. Co., 395 U. S. 164 (1969) | Majority |
| 92 | Cuyler v. Adams, 449 U.S. 433 (1981) | Majority |
| 93 | Daily Income Fund, Inc. v. Fox, 464 U.S. 523 (1984) | Majority |
| 94 | Daniel v. Paul, 395 U. S. 298 (1969) | Majority |
| 95 | Davis v. Mississippi, 394 U.S. 721 (1969) | Majority |
| 96 | Davis v. Passman, 442 U. S. 228 (1979) | Majority |
| 97 | De Canas v. Bica, 424 U. S. 351 (1976) | Majority |
| 98 | Delaware Tribal Business Committee v. Weeks, 430 U. S. 73 (1977) | Majority |
| 99 | DelCostello v. Teamsters, 462 U.S. 151 (1983) | Majority |
| 100 | Denver & R. G. W. R. Co. v. United States, 387 U. S. 485 (1967) | Majority |
| 101 | Department of Air Force v. Rose, 425 U.S. 352 (1976) | Majority |
| 102 | District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) | Majority |
| 103 | District of Columbia v. Carter, 409 U. S. 418 (1973) | Majority |
| 104 | Dixon v. United States, 381 U. S. 68 (1965) | Majority |
| 105 | Dole v. Steelworkers, 494 U.S. 26 (1990) | Majority |
| 106 | Dombrowski v. Pflster, 380 U. S. 479 (1965) | Majority |
| 107 | Douglas v. Alabama, 380 U. S. 415 (1965) | Majority |
| 108 | Dukes v. Warden, 406 U. S. 250 (1972) | Majority |
| 109 | Dunaway v. New York, 442 U. S. 200 (1979) | Majority |
| 110 | Dunlop v. Bachowski, 421 U. S. 560 (1975) | Majority |
| 111 | Durst v. United States, 434 U. S. 542 (1978) | Majority |
| 112 | Edwards v. Aguillard, 482 U.S. 578 (1987) | Majority |
| 113 | Eisenstadt v. Baird, 405 U. S. 438 (1972) | Majority |
| 114 | Elkins v. Moreno, 435 U. S. 647 (1978) | Majority |
| 115 | England v. Medical Examiners, 375 U. S. 411(1964) | Majority |
| 116 | Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) | Majority |
| 117 | Evansville Vanderburgh Airport Authority v. Delta Airlines, 405 U. S. 707 (1972) | Majority |
| 118 | Evitts v. Lucey, 469 U.S. 387 (1985) | Majority |
| 119 | Fay v. Noia, 372 U. S. 391 (1963) | Majority |
| 120 | FCC v. League of Women Voters of California, 468 U.S. 364 (1984) | Majority |
| 121 | Federal Energy Regulatory Commission v. Martin Exploration Management Co., 486 U.S. 204 (1988) | Majority |

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| 122 | Federal Maritime Board v. Isbrandtsen Co., 356 U. S. 481 (1958) | Majority |
| 123 | Federal Power Commission v. La. Power & Light Co., 406 U. S. 621 (1972) | Majority |
| 124 | Federal Power Commission v. Moss, 424 U. S. 494 (1976) | Majority |
| 125 | Federal Power Commission. v. Southern California Edison Co., 376 U. S. 205 (1964) | Majority |
| 126 | Federal Trade Commission v. Flotill Products, 389 U. S. 179 (1967) | Majority |
| 127 | Federal Trade Commission v. Henry Broch & Co., 368 U. S. 360 (1962) | Majority |
| 128 | Federal Trade Commission v. Mary Carter Paint Co., 383 U. S. 46 (1965) | Majority |
| 129 | Felder v. Casey, 487 U.S. 131 (1988) | Majority |
| 130 | Felter v. Southern Pacific Co., 359 U. S. 326 (1959) | Majority |
| 131 | Ferguson v. Georgia, 365 U.S. 570 (1961) | Majority |
| 132 | Firefighters v. Cleveland, 478 U.S. 501 (1986) | Majority |
| 133 | First Unitarian Church v. Los Angeles County, 357 U. S. 545 (1958) | Majority |
| 134 | Flemming v. Florida Citrus Exchange, 358 U. S. 153 (1958) | Majority |
| 135 | Florida Lime & Avocado Growers v. Paul, 373 U. S. 132 (1963) | Majority |
| 136 | Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) | Majority |
| 137 | Ford Motor Credit Co. v. Milhollin, 444 U. S. 555 (1980) | Majority |
| 138 | Fort Halifax Packing o. v. Coyne, 482 U.S. 1 (1987) | Majority |
| 139 | Fortson v. Dorsey, 379 U. S. 433 (1965) | Majority |
| 140 | Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) | Majority |
| 141 | Francis v. Franklin, 471 U.S. 307 (1985) | Majority |
| 142 | Franks v. Bowman Transportation Co., 424 U. S. 747 (1976) | Majority |
| 143 | Frazier v. Heebe, 482 U.S. 641 (1987) | Majority |
| 144 | Freedman v. Maryland, 380 U. S. 51(1965) | Majority |
| 145 | Fulman v. United States, 434 U. S. 528 (1978) | Majority |
| 146 | Furniture Moving Drivers v. Crowley, 467 U.S. 526 (1984) | Majority |
| 147 | Gainesville Utilities Department v. Florida Power Corporation, 402 U. S. 515 (1971) | Majority |
| 148 | Garrison v. Louisiana, 379 U. S. 64 (1964) | Majority |
| 149 | Gelbard v. United States, 408 U.S. 41(1972) | Majority |
| 150 | Gilbert v. California, 388 U. S. 263 (1967) | Majority |
| 151 | Ginsberg v. New York, 390 U. S. 629 (1968) | Majority |
| 152 | Ginzburg v. United States, 383 U. S. 463 (1966) | Majority |
| 153 | Globe Newspaper Co. v. Superior Court, Norfolk County, 457 U.S. 596 (1982) | Majority |
| 154 | Goldberg v. Kelly, 397 U.S. 254 (1970) | Majority |
| 155 | Goldberg v. United States, 425 U. S. 94 (1976) | Majority |

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| 156 | Golden State Bottling Co. v. Labor Board, 414 U. S. 168 (1973) | Majority |
| 157 | Golden v. Zwickler, 394 U. S. 103 (1969) | Majority |
| 158 | Gooding v. Wilson, 405 U. S. 518 (1972) | Majority |
| 159 | Goosby v. Osser, 409 U. S. 512 (1973) | Majority |
| 160 | Grady v. Corbin, 495 U.S. 508 (1990) | Majority |
| 161 | Granfinanciera, S. A. v. Nordberg, 492 U.S. 33 (1989) | Majority |
| 162 | Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U. S. 366 (1976) | Majority |
| 163 | Green v. County School Board of New Kent County, 391 U. S. 430 (1968) | Majority |
| 164 | Greene v. Lindsey, 456 U.S. 444 (1982) | Majority |
| 165 | Grunenthal v. Long Island R. Co., 393 U.S. 156 (1968) | Majority |
| 166 | Guam v. Olsen, 431 U. S. 195 (1977) | Majority |
| 167 | Gurley v. Rhoden, 421 U.S. 200 (1975) | Majority |
| 168 | H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) | Majority |
| 169 | Hall v. Cole, 412 U. S. 1 (1973) | Majority |
| 170 | Havens Realty Corporation v. Coleman, 455 U.S. 363 (1982) | Majority |
| 171 | Heckler v. Mathews, 465 U.S. 728 (1984) | Majority |
| 172 | Henry v. Mississippi, 379 U. S. 443 (1965) | Majority |
| 173 | Hensley v. Municipal Court, San Jose Milpitas Jud. Dist., 411 U. S. 345 (1973) | Majority |
| 174 | Herdmari v. Pennsylvania R. Co., 352 U. S. 518 (1957) | Majority |
| 175 | Hernandez v. Veterans' Administration, 415 U. S. 391 (1974) | Majority |
| 176 | Hicklin v. Orbeck, 437 U. S. 518 (1978) | Majority |
| 177 | Hobbie v. Unemployment Appeals Commission of Florida, 480 U.S. 136 (1987) | Majority |
| 178 | Honig v. Doe, 484 U.S. 305 (1988) | Majority |
| 179 | Houston Insulation Contractors Association. v. Labor Board, 386 U. S. 664 (1967) | Majority |
| 180 | Houston v. Hill, 482 U.S. 451 (1987) | Majority |
| 181 | Houston v. Lack, 487 U.S. 266 (1988) | Majority |
| 182 | Hughes v. Oklahoma, 441 U. S. 322 (1979) | Majority |
| 183 | Irvin v. Dowd, 359 U. S. 394 (1959) | Majority |
| 184 | James v. Illinois, 493 U.S. 307 (1990) | Majority |
| 185 | Jencks v. United States, 353 U. S. 657 (1957) | Majority |
| 186 | Johnson v. Robison, 415 U. S. 361 (1974) | Majority |
| 187 | Johnson v. Transportation Agency, Santa Clara County, 480 U.S. (1987) | Majority |
| 188 | Karcher v. Daggett, 462 U.S. 725 (1983) | Majority |
| 189 | Katzenbach v. Morgan, 384 U. S. 641 (1966) | Majority |
| 190 | Kaufman v. United States, 394 U. S. 217 (1969) | Majority |
| 191 | Keeble v. United States, 412 U. S. 205 (1973) | Majority |
| 192 | KeIly v. Kosuga, 358 U.S. 516 (1959) | Majority |

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| 193 | Kernan v. American Dredging Co., 355 U.S. 426 (1958) | Majority |
| 194 | Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189 (1973) | Majority |
| 195 | Keyishian v. Board of Regents, 385 U. S. 589 (1967) | Majority |
| 196 | Kimmelman v. Morrison, 477 U.S. 365 (1986) | Majority |
| 197 | Kirkpatrick v. Preisler, 394 U. S. 526 (1969) | Majority |
| 198 | Kmart Corporation v. Cartier, Inc., 485 U.S. 176 (1988) | Majority |
| 199 | Knetsch v. United States, 364 U. S. 361 (1960) | Majority |
| 200 | Labor Board v. Allis Chalmers Manufacturing Co., 388 U. S. 175 (1967) | Majority |
| 201 | Labor Board v. Brown, 380 U. S. 278 (1965) | Majority |
| 202 | Labor Board v. District 50, United Mine Workers, 355 U. S. 453 (1958) | Majority |
| 203 | Labor Board v. Food Store Employees, 417 U.S. 1 (1974) | Majority |
| 204 | Labor Board v. Fruit & Vegetable Packers, 377 U. S. 58 (1964) | Majority |
| 205 | Labor Board v. Insurance Agents' Union, 361 U. S. 477 (1960) | Majority |
| 206 | Labor Board v. J. Weingarten, Inc., 420 U. S. 251 (1975) | Majority |
| 207 | Labor Board v. Katz, 369 U. S. 736 (1962) | Majority |
| 208 | Labor Board v. Natural Gas Utility District of Hawkins County, 402 U. S. 600 (1971) | Majority |
| 209 | Labor Board v. Ochoa Fertilizer Corporation, 368 U. S. 318 (1961) | Majority |
| 210 | Labor Board v. Servette, 377 U. S. 46 (1964) | Majority |
| 211 | Labor Board v. Teamsters Union, 362 U. S. 274 (1960) | Majority |
| 212 | Labor Board v. Truck Drivers Union, 353 U. S. 87 (1957) | Majority |
| 213 | Ladies' Garment Workers v. Quality Mfg. Co., 420 U. S. 276 (1975) | Majority |
| 214 | Ladner v. United States, 358 U. S. 169 (1958) | Majority |
| 215 | Lake Carriers' Association v. MacMullan, 406 U. S. 498 (1972) | Majority |
| 216 | Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) | Majority |
| 217 | Larson v. Valente, 456 U.S. 228 (1982) | Majority |
| 218 | Lauro Lines v. Chasser, 490 U.S. 495 (1989) | Majority |
| 219 | Lee v. Illinois, 476 U.S. 530 (1986) | Majority |
| 220 | Lewis v. Benedict Coal Corporation, 361 U. S. 459 (1960) | Majority |
| 221 | Lewis v. New Orleans, 415 U. S. 130 (1974) | Majority |
| 222 | Lindahi v. Office of Personnel Management, 470 U.S. 768 (1985) | Majority |
| 223 | Liner v. Jafco, Inc., 375 U. S. 301 (1964) | Majority |
| 224 | Liparota v. United States, 471 U.S. 419 (1985) | Majority |
| 225 | Longshoremen's Association v. Ariadne Shipping Co., 397 U. S. 195 (1970) | Majority |

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| 226 | Los Angeles v. Davis, 440 U. S. 625 (1979) | Majority |
| 227 | Louisiana Public Service Commission. v. FCC, 476 U.S. 355 (1986) | Majority |
| 228 | Machinists v. Street, 367 U. S. 740 (1961) | Majority |
| 229 | Machinists v. Wisconsin Employment Relations Commission, 427 U. S. 132 (1976) | Majority |
| 230 | Maine v. Moulton, 474 U.S. 159 (1985) | Majority |
| 231 | Maine v. Thiboutot, 448 U. S. 1 (1980) | Majority |
| 232 | Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990) | Majority |
| 233 | Mallard v. U. S. District Court, 490 U.S. 296 (1989) | Majority |
| 234 | Malloy v. Hogan, 378 U. S. 1 (1964) | Majority |
| 235 | Marcus v. Search Warrant, 367 U. S. 717 (1961) | Majority |
| 236 | Marquette Nat. Bank of Minneapolis v. First of Omaha Services, 439 U. S. 299 (1978) | Majority |
| 237 | Maryland Penitentiary Warden v. Hayden, 387 U. S. 294 (1967) | Majority |
| 238 | Massachusetts v. United States, 435 U. S. 444 (1978) | Majority |
| 239 | Mayer v. Chicago, 404 U. S. 189 (1971) | Majority |
| 240 | McDonald v. West Branch, 466 U.S. 284 (1984) | Majority |
| 241 | McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) | Majority |
| 242 | Mechling Barge Lines v. United States, 368 U. S. 324 (1961) | Majority |
| 243 | Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) | Majority |
| 244 | Michalic v. Cleveland Tankers, 364 U. S. 325 (1960) | Majority |
| 245 | Michelin Tire Corporation v. Wages, 423 U. S. 276 (1976) | Majority |
| 246 | Michigan Canners & Freezers Association v. Agricultural Manufacturing and Bargaining Board, 467 U.S. 461 (1984) | Majority |
| 247 | Miller v. United States, 357 U. S. 301 (1958) | Majority |
| 248 | Mine Workers v. Gibbs, 383 U. S. 715 (1966) | Majority |
| 249 | Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) | Majority |
| 250 | Mishkin v. New York, 383 U. S. 502 (1966) | Majority |
| 251 | Mississippi Rand of Choctaw Indians v. Holytield, 490 U.S. 30 (1989) | Majority |
| 252 | Missouri v. Jenkins, 491 U.S. 274 (1989) | Majority |
| 253 | Mobil Oil Corporation v. Federal Power Commission, 417 U. S. 283 (1974) | Majority |
| 254 | Monell v. Department of Social Services of New York City, 436 U.S. 658 (1978) | Majority |
| 255 | Monroe v. Board of Commissioners of Jackson, 391 U. S. 450 (1968) | Majority |
| 256 | Monrosa v. Carbon Black Export, 359 U. S. 180 (1959) | Majority |
| 257 | Moore v. Michigan, 355 U. S. 155 (1957) | Majority |
| 258 | Moses H. Cone Memorial Hospital v. Mercury Construction | Majority |

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| | Corporation, U.S. 1(1983) | |
| 259 | National Association for Colored People v. Button, 371 U. S. 415 (1963) | Majority |
| 260 | National Geographic Society v. California Equalization Board, 430 U. S. 551 (1977) | Majority |
| 261 | National Labor Relations Board v. Electrical Workers, 481 U.S. 573 (1987) | Majority |
| 262 | National Labor Relations Board v. Financial Institution Employees, 475 U.S.192 (1986) | Majority |
| 263 | National Labor Relations Board v. Food & Commercial Workers, 484 U.S. 112 (1987) | Majority |
| 264 | National Labor Relations Board v. Longshoremen, 473 U.S. 61 (1985) | Majority |
| 265 | National Woodwork Mfrs. Association v. Labor Board, 386 U. S. 612 (1967) | Majority |
| 266 | Nebraska v. Iowa, 406 U.S. 117 (1972) | Majority |
| 267 | New Hampshire v. Maine, 426 U. S. 363 (1976) | Majority |
| 268 | New Motor Vehicle Board v. Orrin W. Fox Co., 439 U. S. 96 (1978) | Majority |
| 269 | New York Times Co. v. Sullivan, 376 U. S. 254 (1964) | Majority |
| 270 | Nixon v. Administrator of General Services, 433 U. S. 425 (1977) | Majority |
| 271 | NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984) | Majority |
| 272 | NLRB v. Hendricks County Rural Electric Membership Corporation, 454 U.S. 170 (1981) | Majority |
| 273 | Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976) | Majority |
| 274 | Northern Natural Gas Co. v. Corporation Commission of Kansas, 372 U. S. 84 (1963) | Majority |
| 275 | Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas, U.S. 493 (1989) | Majority |
| 276 | Northwest Wholesale Stationers v. Pacific Stationery & Printing, 472 U.S. 284 (1985) | Majority |
| 277 | Operating Engineers v. Flair Builders, Inc., 406 U. S. 487 (1972) | Majority |
| 278 | Orr v. Orr, 440 U. S. 268 (1979) | Majority |
| 279 | Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) | Majority |
| 280 | Owen v. Independence, 445 U. S. 622 (1980) | Majority |
| 281 | Parden v. Terminal Ry. of Alabama Docks Department, 377 U.S. 184 (1964) | Majority |
| 282 | Pembaur v. Cincinnati, 475 U.S. 469 (1986) | Majority |
| 283 | Penn Central Transportation Co. v. New York City, 438 U. S. 104 (1978) | Majority |
| 284 | Pennsylvania v. New York, 407 U. S. 206 (1972) | Majority |
| 285 | Pension Benefit Guaranty Corporation v. R. A. Gray & Co., | Majority |

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| | 467 U.S. 717 (1984) | |
| 286 | Perkins v. Matthews, 400 U. S. 379 (1971) | Majority |
| 287 | Phelps v. United States, 421 U. S. 330 (1975) | Majority |
| 288 | Picard v. Connor, 404 U.S. 270 (1971) | Majority |
| 289 | Pickett v. Brown, 462 U.S. 1 (1983) | Majority |
| 290 | Pipefitters v. United States, 407 U. S. 385 (1972) | Majority |
| 291 | Plumbers & Pipefitters v. Plumbers & Pipefitters, 452 U.S. 615 (1981) | Majority |
| 292 | Plyler v. Doe, 457 U.S. 202 (1982) | Majority |
| 293 | Power Reactor Co. v. Electrical Workers, 367 U. S. 396 (1961) | Majority |
| 294 | Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U. S. 440 (1969) | Majority |
| 295 | Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990) | Majority |
| 296 | Public Citizen v. Department of Justice, 491 U.S. 440 (1989) | Majority |
| 297 | Putnam v. Commissioner, 352 U. S. 82 (1956) | Majority |
| 298 | Rabang v. Boyd, 353 U. S. 427 (1957) | Majority |
| 299 | Railway & S. S. Clerks v. Allen, 373 U.S. 113 (1963) | Majority |
| 300 | Raley v. Ohio, 360 U. S. 423 (1959) | Majority |
| 301 | Raney v. Board of Education of Gould School District, 391 U. S. 443 (1968) | Majority |
| 302 | Red Ball Motor Freight v. Shannon, 377 U. S. 311 (1964) | Majority |
| 303 | Reed v. Transportation Union, 488 U.S. 319 (1989) | Majority |
| 304 | Reedy v. Ross, 468 U.S. 1(1984) | Majority |
| 305 | Regional Rail Reorganization Act Cases, 419 U. S. 102 (1974) | Majority |
| 306 | Reina v. United States, 364 U. S. 507 (1960) | Majority |
| 307 | Retail Clerks v. Lion Dry Goods, 369 U. S. 17 (1962) | Majority |
| 308 | Riley v. National Federal of Blind of N. C., Inc., 487 U.S. 781 (1988) | Majority |
| 309 | Roberts v. United States Jaycees, 468 U.S. 609 (1984) | Majority |
| 310 | Rogers v. Missouri Pacific R. Co., 352 U. S. 500 (1957) | Majority |
| 311 | Rosenblatt v. Baer, 383 U. S. 75 (1966) | Majority |
| 312 | Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) | Majority |
| 313 | Roth v. United States, 354 U. S. 476 (1957) | Majority |
| 314 | Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) | Majority |
| 315 | Sakraida v. Ag Pro, Inc., 425 U. S. 273 (1976) | Majority |
| 316 | Salem v. United States Lines Co., 370 U. S. 31(1962) | Majority |
| 317 | Sanders v. United States, 373 U. S. 1 (1963) | Majority |
| 318 | Sandstrom v. Montana, 442 U. S. 510 (1979) | Majority |
| 319 | Schmerber v. California, 384 U. S. 757 (1966) | Majority |
| 320 | School Board of Nassau County v. Arline, 480 U.S. 273 (1987) | Majority |
| 321 | School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) | Majority |
| 322 | Sea Land Services, Inc. v. Gaudet, 414 U. S. 573 (1974) | Majority |
| 323 | Seatrain Shipbuilding Corporation v. Shell Oil Co., 444 U. S. | Majority |

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| | 572 (1980) | |
| 324 | Securities & Exchange Commission v. New Eng. Elec. System, 390 U. S. 207 (1968) | Majority |
| 325 | Sentilles v. InterCaribbean Shipping Corporation, 361 U. S. 107 (1959) | Majority |
| 326 | Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U. S. 696 (1976) | Majority |
| 327 | Shapiro v. Thompson, 394 U. S. 618 (1969) | Majority |
| 328 | Sherbert v. Verner, 374 U. S. 398 (1963) | Majority |
| 329 | Simons v. Miami Beach First Nat. Bank, 381 U. S. 81(1965) | Majority |
| 330 | Simpson v. United States, 435 U. S. 6 (1978) | Majority |
| 331 | Sinkler v. Missouri Pacific R. Co., 356 U. S. 326 (1958) | Majority |
| 332 | Slodov v. United States, 436 U. S. 238 (1978) | Majority |
| 333 | Smith u. Wade, 461 U.S. 30 (1983) | Majority |
| 334 | Smith v. California, 361 U. S. 147 (1959) | Majority |
| 335 | Smith v. Organization of Foster Families, 431 U. S. 816 (1977) | Majority |
| 336 | Snapp v. Neal, 382 U. S. 397 (1966) | Majority |
| 337 | South Carolina v. Baker, 485 U.S. 505 (1988) | Majority |
| 338 | South Carolina v. Gathers, 490 U.S. 805 (1989) | Majority |
| 339 | Speiser v. Randall, 357 U. S. 513 (1958) | Majority |
| 340 | Steadman v. Securities and Exchange Commission, 450 U.S. 91 (1981) | Majority |
| 341 | Steelworkers v. Usery, 429 U. S. 305 (1977) | Majority |
| 342 | Steelworkers v. Weber, 443 U. S. 193 (1979) | Majority |
| 343 | Steffel v. Thompson, 415 U. S. 452 (1974) | Majority |
| 344 | Stovall v. Denno, 388 U. S. 293 (1967) | Majority |
| 345 | Sun Oil Co. v. Federal Power Commission, 364 U. S. 170 (1960) | Majority |
| 346 | Sun Ship, Inc. v. Pennsylvania, 447 U. S. 715 (1980) | Majority |
| 347 | Sunray Mid Continent Oil Co. v. Federal Power Commission, 364 U. S. 137 (1960) | Majority |
| 348 | Tak Shan Fong v. United States, 359 U. S. 102 (1959) | Majority |
| 349 | Tate v. Short, 401 U. S. 395 (1971) | Majority |
| 350 | Teamsters Union v. Oliver, 358 U. S. 283 (1959) | Majority |
| 351 | Texas Gas Transmission Corporation v. Shell Oil Co., 363 U. S. 263 (1960) | Majority |
| 352 | Texas v. Johnson, 491 U.S. 397 (1989) | Majority |
| 353 | Texas v. New Mexico, 462 U.S. 554 (1983) | Majority |
| 354 | Time, Inc. v. Hill, 385 U. S. 374 (1967) | Majority |
| 355 | Toll v. Moreno, 458 U.S. 1 (1982) | Majority |
| 356 | Townsend v. Swank, 404 U. S. 282 (1971) | Majority |
| 357 | Trans Alaska Pipeline Rate Cases, 436 U. S. 631 (1978) | Majority |
| 358 | Tulle. United States, 481 U.S. 412 (1987) | Majority |
| 359 | U. S. Department of Agriculture v. Moreno, 413 U. S. 528 | Majority |

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| | (1973) | |
| 360 | Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982) | Majority |
| 361 | Union Pacific v. Price, 360 U. S. 601 (1959) | Majority |
| 362 | United States u. Board of Commissioners of Sheffield, 435 U. S. 110 (1978) | Majority |
| 363 | United States v. Baggot, 463 U.S. 476 (1983) | Majority |
| 364 | United States v. Bess, 357 U. S. 51(1958) | Majority |
| 365 | United States v. Crews, 445 U. S. 463 (1980) | Majority |
| 366 | United States v. Dann, 470 U.S. 39 (1985) | Majority |
| 367 | United States v. Drum, 368 U. S. 370 (1962) | Majority |
| 368 | United States v. E. 1. du Pont de Nemours & Co., 353 U. S. 586 (1957) | Majority |
| 369 | United States v. E. I. du Pont de Nemours & Co., 366 U. S. 316 (1961) | Majority |
| 370 | United States v. Eichman, 496 U.S. 310 (1990) | Majority |
| 371 | United States v. ITT Continental Baking Co., 420 U. S. 223 (1975) | Majority |
| 372 | United States v. Larionoff, 431 U. S. 864 (1977) | Majority |
| 373 | United States v. Louisiana, 394 U.S. 1 (1969) | Majority |
| 374 | United States v. Lucchese, 365 U. S. 290 (1961) | Majority |
| 375 | United States v. Martin Linen Supply Co., 430 U. S. 564 (1977) | Majority |
| 376 | United States v. Midland Ross Corporation, 381 U. S. 54 (1965) | Majority |
| 377 | United States v. Naftalin, 441 U. S. 768 (1979) | Majority |
| 378 | United States v. New York, N. H. & H. R. Co., 355 U. S. 253 (1957) | Majority |
| 379 | United States v. Parke, Davis & Co., 362 U.S. 29 (1960) | Majority |
| 380 | United States v. Pennsylvania Industrial Chem. Corporation, 411 U. S. 655 (1973) | Majority |
| 381 | United States v. Philadelphia National Bank, 374 U.S. 321 (1963) | Majority |
| 382 | United States v. Phillipsburg National Bank & Trust Co., 399 U. S. 350 (1970) | Majority |
| 383 | United States v. Raines, 362 U.S. 17 (1960) | Majority |
| 384 | United States v. Rodgers, 461 U.S. 677 (1983) | Majority |
| 385 | United States v. Ryan, 402 U. S. 530 (1971) | Majority |
| 386 | United States v. Seckinger, 397 U.S. 203 (1970) | Majority |
| 387 | United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) | Majority |
| 388 | United States v. Southern Ute Tribe or Band of Indians, 402 U. S. 159 (1971) | Majority |
| 389 | United States v. Stuart, 489 U. S. 353 (1989) | Majority |
| 390 | United States v. Tax Commission of Mississippi, 421 U. S. 599 (1975) | Majority |
| 391 | United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) | Majority |

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| 392 | United States v. Von Neumann, 474 U.S. 242 (1986) | Majority |
| 393 | United States v. Wade, 388 U. S. 218 (1967) | Majority |
| 394 | United States v. Wells Fargo Bank, 485 U.S. 351 (1988) | Majority |
| 395 | Van Lare v. Hurley, 421 U. S. 338 (1975) | Majority |
| 396 | Vella v. Ford Motor Co., 421 U. S. 1 (1975) | Majority |
| 397 | Virginia v. American Booksellers Assoc., Inc., 484 U.S. 383 (1988) | Majority |
| 398 | Wade v. Wilson, 396 U. S. 282 (1970) | Majority |
| 399 | Walsh v. Schlecht, 429 U. S. 401 (1977) | Majority |
| 400 | Ward v. Monroeville, 409 U. S. 57 (1972) | Majority |
| 401 | Wardair Canada Inc. v. Florida Department of Revenue, 477 U.S. 1 (1986) | Majority |
| 402 | Warden v. Marrero, 417 U. S. 653 (1974) | Majority |
| 403 | Washington County u. Gunther, 452 U.S. 161 (1981) | Majority |
| 404 | Webb v. Illinois Central R. Co., 352 U. S. 512 (1957) | Majority |
| 405 | Weinberger v. Wiesenfeld, 420 U. S. 636 (1975) | Majority |
| 406 | Wells v. Rockefeller, 394 U. S. 542 (1969) | Majority |
| 407 | Welsh v. Wisconsin, 466 U.S. 740 (1984) | Majority |
| 408 | Western & Southern Life Ins. Co. v. Board of Equalization of California, 451 U.S. 648 (1981) | Majority |
| 409 | Wheeler v. Montgomery, 397 U. S. 280 (1970) | Majority |
| 410 | Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) | Majority |
| 411 | William E. Arnold Co. v. Carpenters, 417 U. S. 12 (1974) | Majority |
| 412 | Wingo v. Wedding, 418 U. S. 461 (1974) | Majority |
| 413 | Winship, in re, 397 U. S. 358 (1970) | Majority |
| 414 | Winston v. Lee, 470 U.S. 753 (1985) | Majority |
| 415 | Wirtz v. Glass Bottle Blowers Association, 389 U. S. 463 (1968) | Majority |
| 416 | Wirtz v. Hotel, Motel & Club Employees, 391 U. S. 492 (1968) | Majority |
| 417 | Wirtz v. Laborers' International Union of North America, 389 U. S. 477 (1968) | Majority |
| 418 | Wolf v. Weinstein, 372 U. S. 633 (1963) | Majority |
| 419 | Wong Sun v. United States, 371 U. S. 471 (1963) | Majority |
| 420 | Young Men's Christian Associations v. United States, 395 U. S. 85 (1969) | Majority |
| 421 | Zwickler v. Koota, 389 U. S. 241 (1967) | Majority |
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| 422 | A Quantity of Books v. Kansas, 378 U. S. 205 (1964) | Plurality |
| 423 | Adams v. Illinois, 405 U. S. 278 (1972) | Plurality |
| 424 | Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) | Plurality |
| 425 | American Export Lines, Inc. v. Alvez, 446 U. S. 274 (1980) | Plurality |
| 426 | Attorney General of New York v. Soto Lopez, 476 U.S. 898 (1986) | Plurality |
| 427 | Board of Education, Island Trees Union Free School District | Plurality |

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| | No. 26 v. Pico, 457 U.S. 853 (1982) | |
| 428 | Brown v. Louisiana, 447 U. S. 323 (1980) | Plurality |
| 429 | Califano v. Goldfarb, 430 U. S. 199 (1977) | Plurality |
| 430 | Coleman v. Alabama, 399 U. S. 1 (1970) | Plurality |
| 431 | Elrod v. Burns, 427 U. S. 347 (1976) | Plurality |
| 432 | Federal Election Commission v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986) | Plurality |
| 433 | Frontiero v. Richardson, 411 U. S. 677 (1973) | Plurality |
| 434 | Giles v. Maryland, 386 U. S. 66 (1967) | Plurality |
| 435 | In Re Sawyer, 360 U. S. 622 (1959) | Plurality |
| 436 | Jacobeths v. Ohio, 378 U. S. 184 (1964) | Plurality |
| 437 | John Cleland's Memoirs v. Atty. Gen. of Mass., 383 U. S. 413 (1966) | Plurality |
| 438 | Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 1978) | Plurality |
| 439 | Lathrop v. Donohue, 367 U. S. 820 (1961) | Plurality |
| 440 | Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) | Plurality |
| 441 | Pennsylvania v. Muniz, 496 U.S. 582 (1990) | Plurality |
| 442 | Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) | Plurality |
| 443 | Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) | Plurality |
| 444 | Riverside v. Rivera, 477 U.S. 561 (1986) | Plurality |
| 445 | Rosenbloom v. Metromedia, Inc., 403 U. S. 29 (1971) | Plurality |
| 446 | Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) | Plurality |
| 447 | Sheet Metal Workers v. Equal Employment Opportunity Commission, 478 U.S. 421 (1986) | Plurality |
| 448 | South Carolina v. Regan, 465 U.S. 367 (1984) | Plurality |
| 449 | Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) | Plurality |
| 450 | Thornburg v. Gingles, 478 U.S. 30 (1986) | Plurality |
| 451 | United States v. Kaiser, 363 U. S. 299 (1960) | Plurality |
| 452 | United States v. Midwest Video Corporation, 406 U. S. 649 (1972) | Plurality |
| 453 | United States v. Paradise, 480 U.S. 149 (1987) | Plurality |
| 454 | Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) | Plurality |
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| 455 | Adams v. Texas, 448 U. S. 38 (1980) | Concurring |
| 456 | Adickes v. S. H. Kress & Co., 398 U. S. 144 (1970) | Concurring in part, Dissenting in part |
| 457 | Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) | Concurring |
| 458 | Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez, 458 U.S. 592 (1982) | Concurring |
| 459 | Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989) | Concurring in part, |

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| | | Dissenting in part |
| 460 | Allied Stores of Ohio v. Bowers, 358 U. S. 522 (1959) | Concurring |
| 461 | Argersinger v. Hamlin, 407 U. S. 25 (1972) | Concurring |
| 462 | Arizona v. California, 460 U.S. 605 (1983) | Concurring in part, Dissenting in part |
| 463 | Aro Mfg. Co. v. Convertible Top Replacement Co., Inc., 365 U. S. 336 (1961) | Concurring |
| 464 | Asahi Metal Industry Co. v. Superior Court of California, Solano County, 480 U.S. 102 (1987) | Concurring |
| 465 | ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) | Concurring |
| 466 | Ashe v. Swenson, 397 U.S. 436 (1970) | Concurring |
| 467 | Associated Press v. Walker, 388 U. S. 130 (1967) | Concurring |
| 468 | AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643 (1986) | Concurring |
| 469 | Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) | Concurring |
| 470 | Babbitt v. Farm Workers, 442 U. S. 289 (1979) | Concurring in part, Dissenting in part |
| 471 | Ballew v. Georgia, 435 U. S. 223 (1978) | Concurring |
| 472 | Baltimore & O. R. Co. v. United States, 386 U. S. 372 (1967) | Concurring |
| 473 | Barlow v. Collins, 397 U. S. 159, 167 (1970) | Concurring in part, Dissenting in part |
| 474 | Barry v. Barchi, 443 U. S. 55 (1979) | Concurring |
| 475 | Baxter v. Palmigiano, 425 U. S. 308 (1976) | Concurring in part, Dissenting in part |
| 476 | Bazemore v. Friday, 478 U.S. 385 (1986) | Concurring in part, Dissenting in part |
| 477 | Beck v. Alabama, 447 U. S. 625 (1980) | Concurring |
| 478 | Beecher v. Alabama, 389 U. S. 35 (1967) | Concurring |
| 479 | Berry v. Doles, 438 U. S. 190 (1978) | Concurring |
| 480 | Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) | Concurring |
| 481 | Bill Johnson's Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731 (1983) | Concurring |
| 482 | Blum v. Stenson, 465 U.S. 886 (1984) | Concurring |
| 483 | Board of Estimate of New York City v. Morris, 489 U.S. 688 | Concurring |

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| | (1990) | |
| 484 | Boddie v. Connecticut, 401 U. S. 371 (1971) | Concurring |
| 485 | Boos v. Barry, 485 U.S. 312 (1988) | Concurring |
| 486 | Brady v. United States, 397 U. S. 742 (1970) | Concurring |
| 487 | Braunfeld v. Brown, 366 U. S. 599 (1961) | Concurring in part, Dissenting in part |
| 488 | Breen v. Selective Service Local Board No. 16, 396 U. S. 460 (1970) | Concurring |
| 489 | Brock v. Roadway Express, Inc., 481 U.S. 252 (1987) | Concurring in part, Dissenting in part |
| 490 | Brown Transport Corporation v. Atcon, Inc., 439 U. S. 1014 (1978) | Concurring |
| 491 | Brown v. Louisiana, 383 U. S. 13 (1966) | Concurring |
| 492 | Brown v. Ohio, 432 U. S. 161 (1977) | Concurring |
| 493 | Browning Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989) | Concurring |
| 494 | Burch v. Louisiana, 441 U. S. 130 (1979) | Concurring in part, Dissenting in part |
| 495 | Burnham v. Superior Court of California, Mann County, 495 U.S. 604 (1990) | Concurring in part, Dissenting in part |
| 496 | Califano v. Aznavorian, 439 U. S. 170 (1978) | Concurring |
| 497 | California v. Texas, 437 U. S. 601 (1978) | Concurring |
| 498 | Canton v. Harris, 489 U.S. 378 (1989) | Concurring |
| 499 | Case v. Nebraska, 381 U.S. 336 (1965) | Concurring |
| 500 | Central Hudson Gas & Elec. Corporation v. Public Service Commission of N. Y., 447 U. S. 557 (1980) | Concurring |
| 501 | Central Illinois Public Service Co. v. United States, 435 U. S. 21 (1978) | Concurring |
| 502 | Chan v. Korean Air Lines, Ltd., 490 U.S. 122 (1989) | Concurring |
| 503 | Chauffeurs v. Yellow Transit Freight Lines, 370 U.S. 711 (1962) | Concurring |
| 504 | Chiarella v. United States, 445 U. S. 222 (1980) | Concurring |
| 505 | Clemons v. Mississippi, 494 U.S. 738 (1990) | Concurring in part, Dissenting in part |
| 506 | Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) | Concurring in part, |

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| | | Dissenting in part |
| 507 | Coker v. Georgia, 433 U. S. 584, 600 (1977) | Concurring |
| 508 | Connecticut Rd. of Pardons v. Dumschat, 452 U.S. 458 (1981) | Concurring |
| 509 | Connecticut v. Barrett, 479 U.S. 523 (1987) | Concurring |
| 510 | Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) | Concurring |
| 511 | Cory v. White, 457 U.S. 85 (1982) | Concurring |
| 512 | Couch v. United States, 409 U. S. 322 (1973) | Concurring |
| 513 | Culombe v. Connecticut, 367 U. S. 568 (1961) | Concurring |
| 514 | Cuyler v. Sullivan, 446 U. S. 335 (1980) | Concurring in part, Dissenting in part |
| 515 | Dalia v. United States, 441 U. S. 238 (1979) | Concurring in part, Dissenting in part |
| 516 | Data Processing Service Organizations v. Camp, 397 U. S. 150 (1970) | Concurring |
| 517 | Davis v. Scherer, 468 U.S. 183 (1984) | Concurring in part, Dissenting in part |
| 518 | Dayton Board of Education v. Brinkman, 433 U. S. 406 (1977) | Concurring |
| 519 | Dickey v. Florida, 398 U. S. 30 (1970) | Concurring |
| 520 | Dixon v. Love, 431 U.S. 105 (1977) | Concurring |
| 521 | Dyson v. Stein, 401 U.S. 200 (1971) | Concurring |
| 522 | Eaton v. Price, 364 U. S. 263 (1960) | Concurring |
| 523 | Eddings v. Oklahoma, 455 U.S. 104 (1982) | Concurring |
| 524 | Enmund v. Florida, 458 U.S. 782 (1982) | Concurring |
| 525 | Environmental Protection Agency v. Mink, 410 U. S. 73 (1973) | Concurring in part, Dissenting in part |
| 526 | Estelle v. Smith, 451 U.S. 454 (1981) | Concurring |
| 527 | Estes v. Texas, 381 U. S. 532 (1965) | Concurring |
| 528 | Evans v. Bennett, 440 U. S. 987 (1979) | Concurring |
| 529 | Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100 (1981) | Concurring |
| 530 | Falk v. Brennan, 414 U. S. 190 (1973) | Concurring in part, Dissenting in part |
| 531 | Federal Election Commission v. Massachusetts Citizens For | Concurring in |

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| | Life, Inc., 479 U.S. 238 (1986) | part, Dissenting in part |
| 532 | Federal Trade Commission v. Grolier Inc., 462 U.S. 1928 (1983) | Concurring |
| 533 | Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990) | Concurring in part, Dissenting in part |
| 534 | Fisher v. United States, 425 U. S. 391 (1976) | Concurring |
| 535 | Fitzpatrick v. Bitzer, 427 U. S. 445 (1976) | Concurring |
| 536 | Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) | Concurring in part, Dissenting in part |
| 537 | Florida v. Royer, 460 U.S. 491 (1983) | Concurring |
| 538 | Florida v. Wells, 495 U.S. 1 (1990) | Concurring |
| 539 | Furman v. Georgia, 408 U. S. 238 (1972) | Concurring |
| 540 | FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) | Concurring |
| 541 | Gardner v. Florida, 430 U. S. 349 (1977) | Concurring |
| 542 | Gilmore v. Montgomery, 417 U. S. 556 (1974) | Concurring |
| 543 | Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) | Concurring in part, Dissenting in part |
| 544 | Grosso v. United States, 390 U. S. 62 (1968) | Concurring |
| 545 | Grove City College v. Bell, 465 U.S. 555 (1984) | Concurring in part, Dissenting in part |
| 546 | H. A. Artists & Associates, Inc. v. Actors' Equity Association, 451 U.S. 704 (1981) | Concurring in part, Dissenting in part |
| 547 | Halliburton Oil Well Cementing Co. v. Reily, 373 U. S. 64 (1963) | Concurring |
| 548 | Hampton v. Mow Sun Wong, 426 U. S. 88 (1976) | Concurring |
| 549 | Hanna Mm. Co. v. Marine Eng. Association, 382 U. S. 181(1965) | Concurring |
| 550 | Harlow v. Fitzgerald, 457 U.S. 800 (1982) | Concurring |
| 551 | Harris v. Oklahoma, 433 U. S. 682 (1977) | Concurring |
| 552 | Hayes v. Florida, 470 U.S. 811 (1985) | Concurring |
| 553 | Hazelwood School District v. United States, 433 U. S. 299 (1977) | Concurring |
| 554 | Head. v. New Mexico Board of Examiners in Optometry, 374 U. S. 424 (1963) | Concurring |

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| 555 | Heckler v. Campbell, 461 U.S. 458 (1983) | Concurring |
| 556 | Heckler v. Chaney, 470 U.S. 821 (1985) | Concurring |
| 557 | Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) | Concurring in part, Dissenting in part |
| 558 | Hensley v. Eckerhart, 461 U.S. 424 (1983) | Concurring in part, Dissenting in part |
| 559 | Hillsboro National Bank v. Commissioner, 460 U.S. 370 (1983) | Concurring in part, Dissenting in part |
| 560 | Hodel v. Irving, 481 U.S. 704 (1987) | Concurring |
| 561 | Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) | Concurring |
| 562 | Hopper v. Evans, 456 U.S. 605 (1982) | Concurring in part, Dissenting in part |
| 563 | Hurtado v. United States, 410 U. S. 578 (1973) | Concurring in part, Dissenting in part |
| 564 | Hutcheson v. United States, 369 U. S. 599 (1962) | Concurring |
| 565 | Hutto v. Finney, 437 U. S. 678 (1978) | Concurring |
| 566 | Hynes v. Mayor of Oradell, 425 U. S. 610 (1976) | Concurring |
| 567 | Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983) | Concurring |
| 568 | Illinois v. Allen, 397 U. S. 337 (1970) | Concurring |
| 569 | Illinois v. Perkins, 496 U.S. 292 (1990) | Concurring |
| 570 | Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984) | Concurring in part, Dissenting in part |
| 571 | Immigration and Naturalization Service v. Phinpathya, 464 U.S. 183 (1984) | Concurring |
| 572 | International Paper Co. v. Ouellette, 479 U.S. 481 (1987) | Concurring in part, Dissenting in part |
| 573 | Irving Independent School District v. Tatro, 468 U.S. 883 (1984) | Concurring in part, Dissenting in part |
| 574 | Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984) | Concurring |

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|---|---|---|
| 575 | Jenkins v. Georgia, 418 U. S. 153 (1974) | Concurring |
| 576 | John Doe Agency v. John Doe Corporation, 493 U.S. 146 (1989) | Concurring |
| 577 | Johnson v. Mississippi, 486 U.S. 578 (1988) | Concurring |
| 578 | Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) | Concurring |
| 579 | Kaiser Steel Corporation v. W. S. Ranch Co., 391 U. S. 593 (1968) | Concurring |
| 580 | Kassel v. Consolidated Freightways Corporation of Delaware, 450 U.S. 662 (1981) | Concurring |
| 581 | Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) | Concurring |
| 582 | Kennedy v. Mendoza Martinez, 372 U. S. 144 (1963) | Concurring |
| 583 | Kenosha v. Bruno, 412 U. S. 507 (1973) | Concurring |
| 584 | Ker v. California, 374 U.S. 23 (1963) | Concurring |
| 585 | Kissinger v. Reporters Committee for Freedom of Press, 445 U. S. 136 (1980) | Concurring in part, Dissenting in part |
| 586 | Kmart Corporation v. Cartier, Inc., 486 U.S. 281 (1988) | Concurring in part, Dissenting in part |
| 587 | Knapp v. Schweitzer, 357 U.S. 371 (1958) | Concurring |
| 588 | Kolender v. Lawson, 461 U.S. 352 (1983) | Concurring |
| 589 | Kungys v. United States, 485 U.S. 759 (1988) | Concurring |
| 590 | Labor Board v. Baptist Hospital, Inc., 442 U. S. 773 (1979) | Concurring |
| 591 | Laing v. United States, 423 U. S. 161 (1976) | Concurring |
| 592 | Lamont v. Postmaster General, 381 U. S. 301 (1965) | Concurring |
| 593 | Lanza v. New York, 370 U. S. 139 (1962) | Concurring |
| 594 | Lee v. United States, 432 U. S. 23 (1977) | Concurring |
| 595 | Lefkowitz v. Cunningham, 431 U. S. 801 (1977) | Concurring |
| 596 | Lefkowitz v. Turley, 414 U. S. 70 (1973) | Concurring |
| 597 | Lemon v. Kurtzman, 403 U. S. 602 (1971) | Concurring |
| 598 | Lewis v. United States, 385 U. S. 206 (1966) | Concurring |
| 599 | Lippitt v. Cipollone, 404 U. S. 1032 (1972) | Concurring |
| 600 | Longshoremen v. Philadelphia Marine Trade Association, 389 U. S. 64 (1967) | Concurring |
| 601 | Luce v. United States, 469 U.S. 38 (1984) | Concurring |
| 602 | Mackey v. United States, 401 U. S. 667 (1971) | Concurring |
| 603 | Madison Joint School District v. Wisconsin Employee Relations Commission, 429 U. S. 167 (1976) | Concurring |
| 604 | Mahan v. Howell, 410 U. S. 315 (1973) | Concurring in part, Dissenting in part |

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|---|---|---|
| 605 | Mandel v. Bradley, 432 U. S. 173, 179 (1977) | Concurring |
| 606 | Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) | Concurring |
| 607 | Marchetti v. United States, 390 U. S. 39 (1968) | Concurring |
| 608 | Marks v. United States, 430 U. S. 188 (1977) | Concurring in part, Dissenting in part |
| 609 | Martin v. Creasy, 360 U. S. 219 (1959) | Concurring |
| 610 | Martinez v. Bynum, 461 U.S. 321 (1983) | Concurring |
| 611 | Maryland & Va. Eldership v. Church of God at Sharpsburg, 396 U. S. 367 (1970) | Concurring |
| 612 | Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) | Concurring |
| 613 | Mathews v. United States, 485 U.S. 58 (1988) | Concurring |
| 614 | Maynard v. Cartwright, 486 U.S. 356 (1988) | Concurring |
| 615 | McAllister v. Magnolia Petroleum Co., 357 U. S. 221 (1958) | Concurring |
| 616 | McDaniel v. Paty, 435 U. S. 618 (1978) | Concurring |
| 617 | McDonald v. Smith, 472 U.S. 479 (1985) | Concurring |
| 618 | McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) | Concurring |
| 619 | McKeiver v. Pennsylvania, 403 U. S. 528 (1971) | Concurring |
| 620 | McKinney v. Alabama, 424 U. S. 669 (1976) | Concurring |
| 621 | McLucas v. DeChamplain, 421 U. S. 21 (1975) | Concurring |
| 622 | Meek v. Pittenger, 421 U. S. 349 (1975) | Concurring |
| 623 | Mesa v. California, 489 U.S. 121 (1989) | Concurring |
| 624 | Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) | Concurring |
| 625 | Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983) | Concurring |
| 626 | Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) | Concurring |
| 627 | Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241 (1974) | Concurring |
| 628 | Michigan v. Tucker, 417 U. S. 433 (1974) | Concurring |
| 629 | Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982) | Concurring |
| 630 | Mills v. Maryland, 486 U.S. 367 (1988) | Concurring |
| 631 | Minnick v. California Department of Corrections, 452 U.S. 105 (1981) | Concurring |
| 632 | Mitchell v. Forsyth, 472 U.S. 511 (1985) | Concurring in part, Dissenting in part |
| 633 | Monsanto Co. v. Spray Rite Service Corporation, 465 U.S. 752 (1984) | Concurring |
| 634 | Moore v. East Cleveland, 431 U. S. 494 (1977) | Concurring |
| 635 | Morris v. Slappy, 461 U.S. 1 (1983) | Concurring |

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| 636 | Morrissey v. Brewer, 408 U. S. 471 (1972) | Concurring |
| 637 | National Broiler Marketing Association v. United States, 436 U. S. 816 (1978) | Concurring |
| 638 | National Labor Relations Board v. Biklisco & Bildisco, 465 U.S. 513 (1984) | Concurring |
| 639 | National Railroad Passenger Corporation v. RR. Passengers, 414 U. S. 453 (1974) | Concurring |
| 640 | Nebraska Board of Ed. v. School Dist. of Hartington, 409 U. S. 921 (1972) | Concurring |
| 641 | Nebraska Press Association v. Stuart, 427 U. S. 539 (1976) | Concurring |
| 642 | Neil v. Biggers, 409 U. S. 188 (1972) | Concurring in part, Dissenting in part |
| 643 | Nevada v. United States, 463 U.S. 110 (1983) | Concurring |
| 644 | New Jersey v, T. L. 0., 469 U.S. 325 (1985) | Concurring in part, Dissenting in part |
| 645 | New Jersey v. Portash, 440 U. S. 450 (1979) | Concurring |
| 646 | New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) | Concurring |
| 647 | New York Telephone Co. v. New York State Department of Labor, 440 U. S. 519 (1979) | Concurring |
| 648 | New York Times Co. v. United States, 403 U. S. 713 (1971) | Concurring |
| 649 | New York v. Class, 475 U.S. 106 (1986) | Concurring in part, Dissenting in part |
| 650 | New York v. Ferber, 458 U.S. 747 (1982) | Concurring |
| 651 | Nix v. Whiteside, 475 U.S. 157 (1986) | Concurring |
| 652 | North Dakota u. United States, 495 U.S. 423 (1990) | Concurring |
| 653 | Office Employees Union v. Labor Board, 353 U. S. 313 (1957) | Concurring in part, Dissenting in part |
| 654 | Ohio ex rel. Eaton v. Price, 360 U. S. 246 (1959) | Concurring |
| 655 | Ohio v. Johnson, 467 U.S. 493 (1984) | Concurring in part, Dissenting in part |
| 656 | Oklahoma City v. Tuttle, 471 U.S. 808 (1985) | Concurring |
| 657 | Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985) | Concurring in part, Dissenting in |

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| | | part |
| 658 | Oregon v. Kennedy, 456 U.S. 667 (1982) | Concurring |
| 659 | Oregon v. Mitchell, 400 U. S. 112 (1970) | Concurring in part, Dissenting in part |
| 660 | Palerrno v. United States, 360 U. S. 343 (1959) | Concurring |
| 661 | Papasan v. Allain, 478 U.S. 265 (1986) | Concurring in part, Dissenting in part |
| 662 | Parham v. J. R., 442 U. S. 584 (1979) | Concurring in part, Dissenting in part |
| 663 | Patterson v. McLean Credit Union, 491 U.S. 164 (1989) | Concurring in part, Dissenting in part |
| 664 | Pennsylvania v. Muniz, 496 U.S. 582 (1990) | Concurring |
| 665 | Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) | Concurring |
| 666 | Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) | Concurring |
| 667 | Penry v. Lynaugh, 492 U.S. 302 (1989) | Concurring in part, Dissenting in part |
| 668 | Perez v. Ledesma, 401 U.S. 82 (1971) | Concurring in part, Dissenting in part |
| 669 | Petite v. United States, 361 U. S. 529 (1960) | Concurring |
| 670 | Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) | Concurring |
| 671 | Pierce v. Underwood, 487 U.S. 552 (1988) | Concurring |
| 672 | Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) | Concurring |
| 673 | Pinkus v. United States, 436 U. S. 293 (1978) | Concurring |
| 674 | Poe v. Ullman, 367 U. S. 497 (1961) | Concurring |
| 675 | Port Authority Trans Hudson Corporation v. Feeney, 495 U.S. 299 (1990) | Concurring |
| 676 | Presnell v. Georgia, 439 U. S. 14 (1978) | Concurring |
| 677 | Quern v. Jordan, 440 U. S. 332 (1979) | Concurring |
| 678 | Railway Express Agency, Inc. v. Virginia, 358 U. S. 434 (1959) | Concurring |
| 679 | Regan v. Time, Inc., 468 U.S. 641 (1984) | Concurring in part, Dissenting in part |

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| 680 | Regents of University of California v. Bakke, 438 U. S. 265 (1978) | Concurring in part, Dissenting in part |
| 681 | Rhodes v. Chapman, 452 U.S. 337 (1981) | Concurring |
| 682 | Richardson v. United States, 468 U.S. 317 (1984) | Concurring in part, Dissenting in part |
| 683 | Richardson Merrell Inc. v. Koller, 472 U.S. 424 (1985) | Concurring |
| 684 | Richmond Newspapers, Inc. v. Virginia, 448 U. S. 555 (1980) | Concurring |
| 685 | Roaden v. Kentucky, 413 U. S. 496 (1973) | Concurring |
| 686 | Roberts v. Louisiana, 428 U. S. 325 (1976) | Concurring |
| 687 | Roberts v. United States, 445 U. S. 552 (1980) | Concurring |
| 688 | Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) | Concurring |
| 689 | Robinson v. Neil, 409 U.S. 505 (1973) | Concurring |
| 690 | Romero v. International Terminal Operating Co., 358 U. S. 354 (1959) | Concurring in part, Dissenting in part |
| 691 | Rose v. Lundy, 455 U.S. 509 (1982) | Concurring in part, Dissenting in part |
| 692 | Rowan v. U. S. Post Office Department, 37 U. S. 728 (1970) | Concurring |
| 693 | Rusk v. Cort, 369 U.S. 367 (1962) | Concurring |
| 694 | Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989) | Concurring in part, Dissenting in part |
| 695 | Saint Francis College v. Al Khazraji, 481 U.S. 604 (1987) | Concurring |
| 696 | Samuels v. Mackell, 401 U. S. 66 (1971) | Concurring |
| 697 | Schlesinger v. Councilman, 420 U. S. 738 (1975) | Concurring in part, Dissenting in part |
| 698 | School District of Abington Township v. Schempp, 374 U. S. 203 (1963) | Concurring |
| 699 | Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) | Concurring |
| 700 | Seattle Times Co. v, Rhinehart, 467 U.S. 20 (1984) | Concurring |
| 701 | Secretary of Public Welfare of PA. v. Institutionalized Juveniles, 442 U. S. 640 (1979) | Concurring in part, Dissenting in part |

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| 702 | Securities & Exchange Commission v. Variable Annuity Co., 359<br>U. S. 65 (1959) | Concurring |
| 703 | Securities and Exchange Commission. v. Sloan, 436 U. S. 103 (1978) | Concurring |
| 704 | Selvage v. Collins, 494 U.S. 108 (1990) | Concurring |
| 705 | Shaffer v. Heitner, 433 U. S. 186 (1977) | Concurring in part,<br>Dissenting in part |
| 706 | Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) | Concurring |
| 707 | Sheet Metal Workers v. Equal Employment Opportunity Commission, 478 U.S. 421 (1986) | Concurring |
| 708 | Shuttiesworth v. Birmingham, 382 U. S. 87 (1965) | Concurring |
| 709 | Simon v. Eastern Kentucky Welfare Rights Organization, 426 U. S. 26 (1976) | Concurring |
| 710 | Simpson v. Florida, 403 U. S. 384 (1971) | Concurring |
| 711 | Simpson v. Union Oil Co. of California, 377 U. S. 13 (1964) | Concurring |
| 712 | South Carolina v. Regan, 465 U.S. 367 (1984) | Concurring |
| 713 | South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) | Concurring |
| 714 | St. Louis v. Praprotnik, 485 U.S. 112 (1988) | Concurring |
| 715 | Steelworkers v. American Manufacturing Co., 363 U. S. 564 (1960) | Concurring |
| 716 | Steelworkers v. Enterprise Corporation, 363 U. S. 593 (1960) | Concurring |
| 717 | Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) | Concurring |
| 718 | Strickland v. Washington, 466 U.S. 668 (1984) | Concurring in part,<br>Dissenting in part |
| 719 | Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) | Concurring |
| 720 | Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) | Concurring |
| 721 | Sure Tan, Inc. v. National Labor Relations Board, 467 U.S. 883 (1984) | Concurring in part,<br>Dissenting in part |
| 722 | Taylor v. Kentucky, 436 U. S. 478 (1978) | Concurring |
| 723 | Teamsters v. Terry, 494 U.S. 558 (1990) | Concurring |
| 724 | Tennessee v. Street, 471 U.S. 409 (1985) | Concurring |
| 725 | Texas v. McCullough, 475 U.S. 134, 144 (1986) | Concurring |
| 726 | Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) | Concurring |
| 727 | Thornburg v. Gingles, 478 U.S. 30 (1986) | Concurring |
| 728 | Tilton v. Richardson, 403 U. S. 672 (1971) | Concurring |

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| 729 | Torres v. Puerto Rico, 442 U. S. 465 (1979) | Concurring |
| 730 | Touche Ross & Co. v. Redington, 442 U. S. 560 (1979) | Concurring |
| 731 | Tower v. Glover, 467 U.S. 914 (1984) | Concurring |
| 732 | Trop v. Dulles, 356 U. S. 86 (1958) | |
| 733 | Tungus, The v. Skovgaard, 358 U. S. 588 (1959) | Concurring in part, Dissenting in part |
| 734 | Turner v. Murray, 476 U.S. 28 (1986) | Concurring in part, Dissenting in part |
| 735 | U. S. Postal Service v. Council of Greenburgh Civic Associations, 453 U.S. 114 (1981) | Concurring |
| 736 | United Jewish Organizations of Williamsburgh v. Carey, 430 U. S. 144 (1977) | Concurring |
| 737 | United States v. Apfelbaum, 445 U. S. 115 (1980) | Concurring |
| 738 | United States v. Boyle, 469 U.S. 241 (1985) | Concurring |
| 739 | United States v. Chadwick, 433 U. S. 1 (1977) | Concurring |
| 740 | United States v. Dionisio, 410 U. S. 1 (1973) | Concurring |
| 741 | United States v. Ewell, 383 U. S. 116 (1966) | Concurring |
| 742 | United States v. Freed, 401 U. S. 601 (1971) | Concurring |
| 743 | United States v. Guest, 383 U. S. 745 (1966) | Concurring in part, Dissenting in part |
| 744 | United States v. Hasting, 461 U.S. 499 (1983) | Concurring in part, Dissenting in part |
| 745 | United States v. Hensley, 469 U.S. 221 (1985) | Concurring |
| 746 | United States v. Johnson, 457 U.S. 537 (1982) | Concurring |
| 747 | United States v. Knotts, 460 U.S. 276 (1983) | Concurring |
| 748 | United States v. Kozminski, 487 U.S. 931 (1988) | Concurring |
| 749 | United States v. Lane, 474 U.S. 438 (1986) | Concurring in part, Dissenting in part |
| 750 | United States v. Mandujano, 425 U. S. 564 (1976) | Concurring |
| 751 | United States v. Mersky, 361 U. S. 431 (1960) | Concurring |
| 752 | United States v. Place, 462 U.S. 696 (1983) | Concurring |
| 753 | United States v. Robel, 389 U. S. 258 (1967) | Concurring |
| 754 | United States v. Shearer, 473 U.S. 52 (1985) | Concurring |
| 755 | United States v. Stanley, 483 U.S. 669 (1987) | Concurring in part, |

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| | | Dissenting in part |
| 756 | United States v. U. S. Coin & Currency, 401 U. S. 715 (1971) | Concurring |
| 757 | United States v. White, 401 U. S. 745 (1971) | Concurring |
| 758 | United States v. Young, 470 U.S. 1 (1985) | Concurring in part, Dissenting in part |
| 759 | Uphaus v. Wyman, 364 U. S. 388 (1960) | Concurring |
| 760 | Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) | Concurring |
| 761 | Wailer v. Florida, 397 U. S. 387 (1970) | Concurring |
| 762 | Walz v. Tax Commission of New York City, 397 U. S. 664 (1970) | Concurring |
| 763 | Washington v. Confederated Tribes of Colville Indian Reservation, 447 U. S. 134 (1980) | Concurring in part, Dissenting in part |
| 764 | Wasman v. United States, 468 U.S. 559 (1984) | Concurring |
| 765 | Webb v. County Board of Education of Dyer County, 471 U.S. 234 (1985) | Concurring in part, Dissenting in part |
| 766 | Whalen v. Roe, 429 U. S. 589 (1977) | Concurring |
| 767 | White Motor Co. v. United States, 372 U. S. 253 (1963) | Concurring |
| 768 | White v. Regester, 412 U. S. 755 (1973) | Concurring in part, Dissenting in part |
| 769 | Williams v. United States, 401 U. S. 646 (1971) | Concurring |
| 770 | Williams v. Vermont, 472 U.S. 14 (1985) | Concurring |
| 771 | Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) | Concurring |
| 772 | Wolman v. Walter, 433 U. S. 229 (1977) | Concurring in part, Dissenting in part |
| 773 | Wood u. Georgia, 450 U.S. 261 (1981) | Concurring in part, Dissenting in part |
| 774 | Woodson v. North Carolina, 428 U. S. 280 (1976) | Concurring |
| 775 | Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) | Concurring |
| 776 | Younger v. Harris, 401 U. S. 37 (1971) | Concurring |
| 777 | Zant v. Moore, 489 U.S. 836 (1989) | Concurring |
| 778 | Zauderer v. Office of Disciplinary Counsel of Supreme Court | Concurring in |

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| | of Ohio, 471 U.S. 626 (1985) | part, Dissenting in part |
| 779 | Zobel v. Williams, 457 U.S. 55 (1982) | Concurring |
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| 780 | Abate v. Mundt, 403 U. S. 182 (1971) | Dissenting |
| 781 | Abel v. United States, 362 U. S. 217 (1960) | Dissenting |
| 782 | Adams v. Williams, 407 U. S. 143 (1972) | Dissenting |
| 783 | Adult Book Store v. Sensenbrenner, 421 U. S. 934 (1975) | Dissenting |
| 784 | Aidridge v. Florida, 439 U. S. 882 (1978) | Dissenting |
| 785 | Aldinger v. Howard, 427 U. S. 1 (1976) | Dissenting |
| 786 | Alexander v. Virginia, 413 U. S. 836 (1973) | Dissenting |
| 787 | Alford v. Florida, 428 U. S. 912 (1976) | Dissenting |
| 788 | Allen v. Wright, 468 U.S. 737 (1984) | Dissenting |
| 789 | Allied Structural Steel Co. v. Spannaus, 438 U. S. 234 (1978) | Dissenting |
| 790 | Alvord v. Florida, 428 U. S. 923 (1976) | Dissenting |
| 791 | Alyeska Pipeline Service Co. v. Wilderness Society, 421 U. S. 240 (1975) | Dissenting |
| 792 | Amadeo v. Georgia, 444 U. S. 974 (1979) | Dissenting |
| 793 | American Farm Lines v. Black Ball Freight Service, 397 U. S. 532 (1970) | Dissenting |
| 794 | American Theatre Corporation v. United States, 430 U. S. 938 (1977) | Dissenting |
| 795 | American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) | Dissenting |
| 796 | Anastaplo, In re, 366 U. S. 82 (1961) | Dissenting |
| 797 | Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) | Dissenting |
| 798 | Andresen v. Maryland, 427 U. S. 463 (1976) | Dissenting |
| 799 | Antone v. Dugger, 465 U.S. 200 (1984) | Dissenting |
| 800 | Apodaca v. Oregon, 406 U. S. 404 (1972) | Dissenting |
| 801 | Arizona v. Manypenny, 451 U.S. 232 (1981) | Dissenting |
| 802 | Art Theater Guild V. Ewing, 421 U.S. 923 (1975) | Dissenting |
| 803 | Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) | Dissenting |
| 804 | Atheneuni Book Store v. City of Miami Beach, 420 U. S. 982 (1975) | Dissenting |
| 805 | Atkins v. Parker, 472 U.S. 115 (1985) | Dissenting |
| 806 | Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U. S. 281, 297 (1970) | Dissenting |
| 807 | Autry v. Estelle, 464 U.S. 1 (1983) | Dissenting |
| 808 | Baker v. General Motors Corporation, 478 U.S. 621 (1986) | Dissenting |
| 809 | Baldwin v. Alabama, 472 U.S. 372 (1985) | Dissenting |
| 810 | Baldwin v. Fish and Game Commission of Montana, 436 U. S. 371 (1978) | Dissenting |
| 811 | Ballew v. Alabama, 419 U. S. 1130 (1975) | Dissenting |
| 812 | Ballew v. Georgia, 436 U. S. 962 (1978) | Dissenting |
| 813 | Banks v. Glass, 440 U. S. 986 (1979) | Dissenting |

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| 814 | Baranov v. United States, 429 U. S. 944 (1976) | Dissenting |
| 815 | Barenblatt v. United States, 360 U. S. 109 (1959) | Dissenting |
| 816 | Barfield v. North Carolina, 448 U. S. 907 (1980) | Dissenting |
| 817 | Barnes v. United States, 412 U. S. 837 (1973) | Dissenting |
| 818 | Barr v. Matteo, 360 U. S. 564 (1959) | Dissenting |
| 819 | Bartkus v. Illinois, 359 U. S. 121 (1959) | Dissenting |
| 820 | Battie v. Texas, 434 U. S. 1041 (1978) | Dissenting |
| 821 | Bazemore v. Friday, 478 U.S. 385 (1986) | Dissenting |
| 822 | Beal v. Doe, 432 U. S. 438 (1977) | Dissenting |
| 823 | Beckwith v. United States, 425 U. S. 341 (1976) | Dissenting |
| 824 | Beilan v. Board of Public Education, 357 U. S. 399 (1958) | Dissenting |
| 825 | Belknap, Inc. v. Hale, 463 U.S. 491 (1983) | Dissenting |
| 826 | Bell V. Mississippi, 440 U. S. 950 (1979) | Dissenting |
| 827 | Belle Terre v. Boraas, 416 U. S. 1 (1974) | Dissenting |
| 828 | Bishop v. Wood, 426 U. S. 341 (1976) | Dissenting |
| 829 | Blank v. California, 419 U. S. 913 (1974) | Dissenting |
| 830 | Blum v. Yaretsky, 457 U.S. 991 (1982) | Dissenting |
| 831 | Blystone v. Pennsylvania, 494 U.S. 299 (1990) | Dissenting |
| 832 | Board of Regents of State Colleges v. Roth, 408 U. S. 564 (1972) | Dissenting |
| 833 | Board of Regents of University of New York v. Tomanio, 446 U. S. 478 (1980) | Dissenting |
| 834 | Bodde v. Texas, 440 U. S. 968 (1979) | Dissenting |
| 835 | Bowen v. Gilliard, 483 U.S. 587 (1987) | Dissenting |
| 836 | Boyle v. United Technologies Corporation, 487 U.S. 500 (1988) | Dissenting |
| 837 | Briscoe v. LaHue, 460 U.S. 325 (1983) | Dissenting |
| 838 | British Transport Commission v. United States, 354 U. S. 129 (1957) | Dissenting |
| 839 | Broadrickv. Oklahoma, 413 U.S. 601 (1973) | Dissenting |
| 840 | Brock v. Texas, 434 U. S. 1002 (1977) | Dissenting |
| 841 | Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) | Dissenting |
| 842 | Brown v. Glines, 444 U. S. 348 (1980) | Dissenting |
| 843 | Brown v. Thomson, 462 U.S. 835 (1983) | Dissenting |
| 844 | Brown v. United States, 356 U. S. 148 (1958) | Dissenting |
| 845 | Brown v. United States, 418 U. S. 928 (1974) | Dissenting |
| 846 | Bryant v. North Carolina, 419 U. S. 974 (1974) | Dissenting |
| 847 | Buckley v. New York, 418 U. S. 944 (1974) | Dissenting |
| 848 | Burger v. Georgia, 446 U. S. 988 (1980) | Dissenting |
| 849 | Burrell v. McCray, 426 U. S. 471 (1976) | Dissenting |
| 850 | Butler v. Fogg, 434 U. S. 896 (1977) | Dissenting |
| 851 | Butler v. McKellar, 494 U.S. 407 (1990) | Dissenting |
| 852 | Bynum v. United States, 423 U. S. 952 (1975) | Dissenting |
| 853 | Byrne v. Karalexis, 401 U. S. 216 (1971) | Dissenting |
| 854 | Cabana v. Bullock, 474 U.S. 376 (1986) | Dissenting |

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|---|---|---|
| 855 | Cady v. Dombrowski, 413 U. S. 433 (1973) | Dissenting |
| 856 | Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) | Dissenting |
| 857 | California Bankers Association v. Shultz, 416 U. S. 21 (1974) | Dissenting |
| 858 | California v. Brown, 479 U.S. 538 (1987) | Dissenting |
| 859 | California v. Byers, 402 U. S. 424, 464 (1971) | Dissenting |
| 860 | California v. Green, 399 U. S. 149, 189 (1970) | Dissenting |
| 861 | California v. Greenwood, 486 U.S. 35 (1988) | Dissenting |
| 862 | California v. LaRue, 409 U. S. 109, 123 (1972) | Dissenting |
| 863 | California v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90 (1981) | Dissenting |
| 864 | Carchman v. Bagley, 473 U.S. 716 (1985) | Dissenting |
| 865 | Cargal v. Georgia, 438 U. S. 906 (1978) | Dissenting |
| 866 | Carlsonv. United States, 418 U.S. 924 (1974) | Dissenting |
| 867 | Carriger v. Arizona, 444 U. S. 1049 (1980) | Dissenting |
| 868 | Carter v. United States, 422 U. S. 1020 (1975) | Dissenting |
| 869 | Carver v. Florida, 438 U. S. 905 (1978) | Dissenting |
| 870 | Cecil v. United States, 444 U. S. 881 (1979) | Dissenting |
| 871 | Celotex Corporation v. Catrett, 477 U.S. 317 (1986) | Dissenting |
| 872 | Chambers v. Cox, 400 U. S. 870 (1970) | Dissenting |
| 873 | Chardon v. Fernandez, 454 U.S. 6 (1981) | Dissenting |
| 874 | Chase v. Oklahoma, 414 U. S. 1028 (1973) | Dissenting |
| 875 | Cherokee News & Arcade, Inc. v. Oklahoma, 414 U. S. 967 (1973) | Dissenting |
| 876 | Chicago & N. W. R. Co. v. Transportation Union, 402 U. S. 570 (1971) | Dissenting |
| 877 | Christian v. United States, 432 U. S. 910 (1977) | Dissenting |
| 878 | Christofferson v. Washington, 393 U. S. 1090 (1969) | Dissenting |
| 879 | Cinema Classics v. Busch, 414 U. S. 946 (1973) | Dissenting |
| 880 | Ciuzio v. United States, 416 U. S. 995 (1974) | Dissenting |
| 881 | Cleary v. Bolger, 371 U. S. 392 (1963) | Dissenting |
| 882 | Clements v. Fashing, 457 U.S. 957 (1982) | Dissenting |
| 883 | Clift v. Alabama, 435 U. S. 909 (1978) | Dissenting |
| 884 | Codd v. Velger, 429 U. S. 624 (1977) | Dissenting |
| 885 | Cohenv. Hurley, 366 U.S. 117 (1961) | Dissenting |
| 886 | Coleman v. Montana, 446 U. S. 970 (1980) | Dissenting |
| 887 | Collier v. Georgia, 445 U. S. 946 (1980) | Dissenting |
| 888 | Colorado Springs Amusements, Ltd. v. Rizzo, 428 U. S. 913 (1976) | Dissenting |
| 889 | Colorado v. Connelly, 479 U.S. 157 (1986) | Dissenting |
| 890 | Columbia Broadcasting System v. Democratic National Committee, 412 U. S. 94 (1973) | Dissenting |
| 891 | Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) | Dissenting |
| 892 | Communist Party v. Subversive Activities Control Board, 367 U. S. 1 (1961) | Dissenting |

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|---|---|---|
| 893 | Confederation Life Insurance Co. v. De Lara, 409 U. S. 953 (1972) | Dissenting |
| 894 | Connick v. Myers, 461 U.S. 138 (1983) | Dissenting |
| 895 | Consolidated Rail Corporation v. Railway Labor Executives' Association, 491 U.S. 299 (1989) | Dissenting |
| 896 | Continental T. V. Inc. v. GTE Sylvania, Inc., 433 U. S. 36 (1977) | Dissenting |
| 897 | Coppola v. Virginia, 444 U. S. 1103 (1980) | Dissenting |
| 898 | Corn v. Georgia, 436 U. S. 914 (1978) | Dissenting |
| 899 | Cousins v. Maryland, 429 U. S. 1027 (1976) | Dissenting |
| 900 | Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) | Dissenting |
| 901 | Cuip v. United States, 434 U. S. 895 (1977) | Dissenting |
| 902 | Cupp v. Murphy, 412 U. S. 291 (1973) | Dissenting |
| 903 | Cupp v. Naughten, 414 U. S. 141 (1973) | Dissenting |
| 904 | Curtis Publishing Co. v. Butts, 388 U. S. 130 (1967) | Dissenting |
| 905 | Cutting v. United States, 429 U. S. 1052 (1977) | Dissenting |
| 906 | Dachsteiner v. United States, 421 U. S. 954 (1975) | Dissenting |
| 907 | Danley v. United States, 424 U. S. 929 (1976) | Dissenting |
| 908 | Darden v. Wainwright, 477 U.S. 168 (1986) | Dissenting |
| 909 | Davidson v. Cannon, 474 U.S. 344 (1986) | Dissenting |
| 910 | Davis v. Georgia, 439 U. S. 947 (1978) | Dissenting |
| 911 | DeFault v. United States, 429 U. S. 869 (1976) | Dissenting |
| 912 | DeFunis v. Odegaard, 416 U. S. 312 (1974) | Dissenting |
| 913 | Deilmuth v. Muth, 491 U.S. 223 (1989) | Dissenting |
| 914 | Delo v. Stokes, 495 U.S. 320 (1990) | Dissenting |
| 915 | Demosthenes v. Bail, 495 U.S. 731 (1990) | Dissenting |
| 916 | Dempsey v. United States, 423 U. S. 1079 (1976) | Dissenting |
| 917 | Denney v. Texas, 437 U. S. 911 (1978) | Dissenting |
| 918 | Department of Treasury, IRS v. Federal Labor Relations Authority, 494 U.S. 922 (1990) | Dissenting |
| 919 | DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) | Dissenting |
| 920 | Diamond v. Chakrabarty, 447 U. S. 303 (1980) | Dissenting |
| 921 | Dobbert v. Florida, 432 U. S. 282 (1977) | Dissenting |
| 922 | Dobbert v. Florida, 447 U. S. 912 (1980) | Dissenting |
| 923 | Dobbs v. Georgia, 446 U. S. 913 (1980) | Dissenting |
| 924 | Dobbs v. Hopper, 447 U. S. 930 (1980) | Dissenting |
| 925 | Doe v. Delaware, 450 U.S. 382 (1981) | Dissenting |
| 926 | Douglas v. Florida, 429 U. S. 871 (1976) | Dissenting |
| 927 | Dowling v. United States, 493 U.S. 342 (1990) | Dissenting |
| 928 | Drake v. Georgia, 440 U. S. 928 (1979) | Dissenting |
| 929 | DuFault v. United States, 429 U. S. 869 (1976) | Dissenting |
| 930 | Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) | Dissenting |

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|---|---|---|
| 931 | Duncan v. Tennessee, 405 U. S. 127 (1972) | Dissenting |
| 932 | Duro v. Reina, 495 U.S. 676 (1990) | Dissenting |
| 933 | Dyke v. Georgia, 421 U. S. 952 (1975) | Dissenting |
| 934 | E. I. du Pont de Nemours & Co. v. Collins, 432 U. S. 46 (1977) | Dissenting |
| 935 | Eakes v. South Dakota, 414 U. S. 1017 (1973) | Dissenting |
| 936 | Edelman v. Jordan, 415 U. S. 651 (1974) | Dissenting |
| 937 | Ehlert v. United States, 402 U. S. 99 (1971) | Dissenting |
| 938 | Employees v. Department of Public Health & Welfare of Missouri, 411 U. S. 279 (1973) | Dissenting |
| 939 | Employment Division, Department of Human Resources of Oregon. v. Smith, 485 U.S. 660 (1988) | Dissenting |
| 940 | Engle v. Isaac, 456 U.S. 107 (1982) | Dissenting |
| 941 | Enskat v. California, 418 U. S. 937 (1974) | Dissenting |
| 942 | Estelle v. Williams, 425 U. S. 501 (1976) | Dissenting |
| 943 | Evans v. Abney, 396 U. S. 435 (1970) | Dissenting |
| 944 | Evans v. Alabama, 440 U. S. 930 (1979) | Dissenting |
| 945 | Evans v. Jeff D., 475 U.S. 717 (1986) | Dissenting |
| 946 | Federal Communications Commission v. Pacifica Foundation, 438 U. S. 726 (1978) | Dissenting |
| 947 | Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981) | Dissenting |
| 948 | Film Follies v. Haas, 426 U. S. 913 (1976) | Dissenting |
| 949 | Finney v. Georgia, 441 U. S. 916 (1979) | Dissenting |
| 950 | First National City Bank v. Banco Nacional de Cuba, 406 U. S. 759 (1972) | Dissenting |
| 951 | First National Maintenance Corporation v. National Labor Relations Board, 452 U.S. 666 (1981) | Dissenting |
| 952 | Fisher v. Berkeley, 475 U.S. 260 (1986) | Dissenting |
| 953 | Flemming v. Nestor, 363 U. S. 603 (1960) | Dissenting |
| 954 | Florida Department of Health v. Florida Nursing Home Association, 450 U.S. 147 (1981) | Dissenting |
| 955 | Florida v. Riley, 488 U.S. 445(1989) | Dissenting |
| 956 | Forsham v. Harris, 445 U. S. 169 (1980) | Dissenting |
| 957 | Foster v. Florida, 444 U. S. 885 (1979) | Dissenting |
| 958 | Francis v. Henderson, 425 U. S. 536 (1976) | Dissenting |
| 959 | Frisby v. Schultz, 487 U.S. 474 (1988) | Dissenting |
| 960 | Gaffney v. Cummings, 412 U. S. 735 (1973) | Dissenting |
| 961 | Gates v. Georgia, 445 U. S. 938 (1980) | Dissenting |
| 962 | Gay Times v. Louisiana, 414 U. S. 994 (1973) | Dissenting |
| 963 | Geduldig v. Aiello, 417 U. S. 484 (1974) | Dissenting |
| 964 | General Electric Co. v. Gilbert, 429 U. S. 125 (1976) | Dissenting |
| 965 | General Motors Corporation v. Washington, 377 U. S. 436 (1964) | Dissenting |
| 966 | Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974) | Dissenting |

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|---|---|---|
| 967 | Gholson v. Texas, 432 U. S. 911 (1977) | Dissenting |
| 968 | Gibson v. Florida, 435 U. S. 1004 (1978) | Dissenting |
| 969 | Gibson v. Ricketts, 445 U. S. 920 (1980) | Dissenting |
| 970 | Goldman v. Weinberger, 475 U.S. 503 (1986) | Dissenting |
| 971 | Goldstein v. Virginia, 419 U. S. 928 (1974) | Dissenting |
| 972 | Goldwater v. Carter, 444 U. S. 996 (1979) | Dissenting |
| 973 | Goode v. Florida, 441 U. S. 967 (1979) | Dissenting |
| 974 | Goodwin v. Hopper, 442 U. S. 947 (1979) | Dissenting |
| 975 | Gore v. United States, 357 U. S. 386 (1958) | Dissenting |
| 976 | Gravel v. United States, 408 U. S. 606 (1972) | Dissenting |
| 977 | Green v. Mansour, 474 U.S. 64 (1985) | Dissenting |
| 978 | Green v. United States, 356 U. S. 165 (1958) | Dissenting |
| 979 | Greer v. Miller, 483 U.S. 756 (1987) | Dissenting |
| 980 | Greer v. Spock, 424 U. S. 828 (1976) | Dissenting |
| 981 | Gregg v. Georgia, 428 U. S. 153 (1976) | Dissenting |
| 982 | Groner v. United States, 414 U. S. 969 (1973) | Dissenting |
| 983 | Groner v. United States, 419 U. S. 1010 (1974) | Dissenting |
| 984 | Group Life & Health Ins. Co. v. Royal Drug Co., 440 U. S. 205 (1979) | Dissenting |
| 985 | Grubb v. Oklahoma, 409 U. S. 1017 (1972) | Dissenting |
| 986 | Haig v. Agee, 453 U.S. 280 (1981) | Dissenting |
| 987 | Hall v. Beals, 396 U. S. 45 (1969) | Dissenting |
| 988 | Hallman v. Florida, 428 U. S. 911 (1976) | Dissenting |
| 989 | Hamling v. United States, 418 U. S. 87 (1974) | Dissenting |
| 990 | Hampton v. United States, 425 U. S. 484 (1976) | Dissenting |
| 991 | Hanner v. DeMarcus, 390 U. S. 736 (1968) | Dissenting |
| 992 | Harding v. United States, 414 U. S. 964 (1973) | Dissenting |
| 993 | Harding v. United States, 420 U. S. 997 (1975) | Dissenting |
| 994 | Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) | Dissenting |
| 995 | Harrington v. California, 395 U. S. 250 (1969) | Dissenting |
| 996 | Harris v. McRae, 448 U. S. 297 (1980) | Dissenting |
| 997 | Harris v. New York, 401 U. S. 222 (1971) | Dissenting |
| 998 | Harris v. Oklahoma, 439 U. S. 970 (1978) | Dissenting |
| 999 | Hawaii v. Standard Oil Co. of California, 405 U. S. 251 (1972) | Dissenting |
| 1000 | Hazeiwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) | Dissenting |
| 1001 | Heath v. Alabama, 474 U.S. 82 (1985) | Dissenting |
| 1002 | Heistoski v. Meanor, 442 U. S. 500 (1979) | Dissenting |
| 1003 | Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) | Dissenting |
| 1004 | Heller v. New York, 413 U. S. 483 (1973) | Dissenting |
| 1005 | Herbert v. Lando, 441 U. S. 153 (1979) | Dissenting |
| 1006 | Herman v. Arkansas, 420 U. S. 953 (1975) | Dissenting |
| 1007 | Hildwin v. Florida, 490 U.S. 638 (1989) | Dissenting |
| 1008 | Hill v. United States, 420 U. S. 952 (1975) | Dissenting |

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|---|---|---|
| 1009 | Hodgson v. Steelworkers, 403 U. S. 333 (1971) | Dissenting |
| 1010 | Holt Civic Club v. Tuscaloosa, 439 U. S. 60 (1978) | Dissenting |
| 1011 | Horton v. California, 496 U.S. 128 (1990) | Dissenting |
| 1012 | House v. Georgia, 428 U. S. 910 (1976) | Dissenting |
| 1013 | Hovila v. Texas, 439 U. S. 1135 (1979) | Dissenting |
| 1014 | Howard v. Lyons, 360 U. S. 593 (1959) | Dissenting |
| 1015 | Hoy v. Florida, 439 U. S. 920 (1978) | Dissenting |
| 1016 | Huffman v. Pursue, Ltd., 420 U. S. 592 (1975) | Dissenting |
| 1017 | Hughes v. Alexandria Scrap Corporation, 426 U. S. 794 (1976) | Dissenting |
| 1018 | Hughes v. Texas, 439 U. S. 903 (1978) | Dissenting |
| 1019 | Hunt v. McNair, 413 U. S. 734 (1973) | Dissenting |
| 1020 | Hutchinson v. Proxrnire, 443 U. S. 111 (1979) | Dissenting |
| 1021 | Hutto v. Davis, 454 U.S. 370 (1982) | Dissenting |
| 1022 | Hysaw v. Estelle, 414 U. S. 1030 (1973) | Dissenting |
| 1023 | Iannelli v. United States, 420 U. S. 770 (1975) | Dissenting |
| 1024 | Idaho Department of Employment v. Smith, 434 U. S. 100 (1977) | Dissenting |
| 1025 | Illinois Brick Co. v. Illinois, 431 U. S. 720 (1977) | Dissenting |
| 1026 | Illinois v. Andreas, 463 U.S. 765 (1983) | Dissenting |
| 1027 | Illinois v. Gates, 462 U.S. 213 (1983) | Dissenting |
| 1028 | Immigration and Naturalization Service v. Lopez Mendoza, 468 U.S. 1032 (1984) | Dissenting |
| 1029 | Imperial County v. Munoz, 449 U.S. 54 (1980) | Dissenting |
| 1030 | In Re Burrus, 403 U. S. 528 (1971) | Dissenting |
| 1031 | In Re McDonald 489 U.S. 180 (1989) | Dissenting |
| 1032 | International Amusements, 434 U. S. 1023 (1978) | Dissenting |
| 1033 | Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) | Dissenting |
| 1034 | Isola v. United States, 419 U. S. 933 (1974) | Dissenting |
| 1035 | Jackson v. Metropolitan Edison Co., 419 U. S. 345 (1974) | Dissenting |
| 1036 | Jackson v. Taylor, 353 U. S. 569 (1957) | Dissenting |
| 1037 | Jett v. Dallas Independent School Dist., 491 U.S. 701 (1989) | Dissenting |
| 1038 | Johansen v. California, 434 U. S. 1001 (1977) | Dissenting |
| 1039 | Johnson v. Louisiana, 406 U. S. 356 (1972) | Dissenting |
| 1040 | Jones v. Barnes, 463 U.S. 745 (1983) | Dissenting |
| 1041 | Jones v. Florida, 419 U. S. 1081 (1974) | Dissenting |
| 1042 | Jones v. Thomas, 491 U.S. 376 (1989) | Dissenting |
| 1043 | Jones v. United States, 463 U.S. 354 (1983) | Dissenting |
| 1044 | J. R. Distributors, Inc. v. Washington, 418 U. S. 949 (1974) | Dissenting |
| 1045 | Juiclice v. Vail, 430 U. S. 327 (1977) | Dissenting |
| 1046 | Jurek v. Texas, 428 U. S. 262 (1976) | Dissenting |
| 1047 | Kahn v. Shevin, 416 U. S. 351 (1974) | Dissenting |
| 1048 | Kaiser Steel Corporation v. Mullins, 455 U.S. 72 (1982) | Dissenting |
| 1049 | Kaplan v. California, 413 U. S. 115 (1973) | Dissenting |
| 1050 | Kaplan v. California, 419 U. S. 915 (1974) | Dissenting |

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|---|---|---|
| 1051 | Kaplan v. United States, 418 U. S. 942 (1974) | Dissenting |
| 1052 | Killian v. United States, 368 U. S. 231 (1961) | Dissenting |
| 1053 | Kimm v. Rosenberg, 363 U.S. 405 (1960) | Dissenting |
| 1054 | King v. Texas, 434 U. S. 1088 (1978) | Dissenting |
| 1055 | Kingsley Books, Inc. v. Brown, 354 U. S. 436 (1957) | Dissenting |
| 1056 | Kirby v. Illinois, 406 U.S. 682 (1972) | Dissenting |
| 1057 | Kirkpatrick v. New York, 414 U. S. 948 (1973) | Dissenting |
| 1058 | Knapp v. Arizona, 435 U. S. 908 (1978) | Dissenting |
| 1059 | Konigsberg v. State Bar of California, 366 U. S. 36 (1961) | Dissenting |
| 1060 | Kremens v. Bartley, 431 U. S. 119 (1977) | Dissenting |
| 1061 | Kuhlmann v. Wilson, 477 U.S. 436 (1986) | Dissenting |
| 1062 | Kuhns v. California, 431 U. S. 973 (1977) | Dissenting |
| 1063 | Kulko v. Superior Court of California, 436 U. S. 84 (1978) | Dissenting |
| 1064 | Kutler v. United States, 423 U. S. 959 (1975) | Dissenting |
| 1065 | La Buy v. Howes Leather Co., 352 U. S. 249 (1957) | Dissenting |
| 1066 | Labine v. Vincent, 401 U. S. 532 (1971) | Dissenting |
| 1067 | Labor Board v. Baylor University Medical Center, 439 U. S. 9 (1978) | Dissenting |
| 1068 | Labor Board v. Catholic Bishop of Chicago, 440 U. S. 490 (1979) | Dissenting |
| 1069 | Labor Board v. Pipefitters, 429 U. S. 507 (1977) | Dissenting |
| 1070 | Laird v. Tatum, 408 U. S. 1 (1972) | Dissenting |
| 1071 | Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U. S. 391 (1979) | Dissenting |
| 1072 | Lalli v. Lalli, 439 U. S. 259 (1978) | Dissenting |
| 1073 | Leedom v. Kyne, 358 U. S. 184 (1958) | Dissenting |
| 1074 | Leeke v. Timmerman, 454 U.S. 83 (1981) | Dissenting |
| 1075 | Lego v. Twomey, 404 U. S. 477 (1972) | Dissenting |
| 1076 | Lehman v. Nakshian, 453 U.S. 156 (1981) | Dissenting |
| 1077 | Lehman v. Shaker Heights, 418 U. S. 298 (1974) | Dissenting |
| 1078 | Lerner v. Casey, 357 U.S. 468 (1958) | Dissenting |
| 1079 | Levine v. United States, 362 U. S. 610 (1960) | Dissenting |
| 1080 | Lewis v. Jeffers, 497 U.S. 764 (1990) | Dissenting |
| 1081 | Lewis v. United States, 445 U. S. 55 (1980) | Dissenting |
| 1082 | Library of Congress v. Shaw, 478 U.S. 310 (1986) | Dissenting |
| 1083 | Liles v. Oregon, 425 U. S. 963 (1976) | Dissenting |
| 1084 | Liles v. Oregon, 425 U.S. 963 (1976) | Dissenting |
| 1085 | Lindsey v. Normet, 405 U. S. 56 (1972) | Dissenting |
| 1086 | Little Art Corporation v. Nebraska, 414 U. S. 1151 (1974) | Dissenting |
| 1087 | Little Art Corporation v. Nebraska, 414 U. S. 992 (1973) | Dissenting |
| 1088 | London Press, Inc. v. United States, 429 U. S. 1120 (1977) | Dissenting |
| 1089 | Long v. United States, 436 U.S. 931 (1978) | Dissenting |
| 1090 | Lopez v. United States, 373 U. S. 427 (1963) | Dissenting |
| 1091 | Louisiana Power & Light Co. v. Thibodaux, 360 U. S. 25 (1959) | Dissenting |

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|---|---|---|
| 1092 | Lynch v. Donnelly, 465 U.S. 668 (1984) | Dissenting |
| 1093 | Lyng v. Castillo, 477 U.S. 635 (1986) | Dissenting |
| 1094 | Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988) | Dissenting |
| 1095 | Maggio v. Fulford, 462 U.S. 111 (1983) | Dissenting |
| 1096 | Maggio v. Williams, 464 U.S. 46 (1983) | Dissenting |
| 1097 | Maher v. Roe, 432 U. S. 464 (1977) | Dissenting |
| 1098 | Marek v. Chesny, 473 U.S. 1 (1985) | Dissenting |
| 1099 | Marks v. Leis, 421 U. S. 940 (1975) | Dissenting |
| 1100 | Marler v. California, 434 U. S. 1000 (1977) | Dissenting |
| 1101 | Marsh v. Chambers, 463 U.S. 783 (1983) | Dissenting |
| 1102 | Marshall v. Lonberger, 459 U.S. 422 (1983) | Dissenting |
| 1103 | Maryland v, Buie, 494 U.S. 325 (1990) | Dissenting |
| 1104 | Maryland v. Macon, 472 U.S. 463 (1985) | Dissenting |
| 1105 | Mason v. Virginia, 444 U. S. 919 (1979) | Dissenting |
| 1106 | Massachusetts v. Oakes, 491 U.S. 576 (1989) | Dissenting |
| 1107 | Massachusetts v. Sheppard, 468 U.S. 981 (1984) | Dissenting |
| 1108 | Matheny v. Alabama, 425 U. S. 982 (1976) | Dissenting |
| 1109 | Mathews v. Eldridge, 424 U. S. 319 (1976) | Dissenting |
| 1110 | Mazer v. Weinberger, 422 U. S. 1050 (1975) | Dissenting |
| 1111 | McCleskey v. Kemp, 481 U.S. 279 (1987) | Dissenting |
| 1112 | McCorquodale v. Stynchcombe, 434 U. S. 975 (1977) | Dissenting |
| 1113 | McCoy v. Court of Appeals of Wisconsin, Dist. 1, 486 U.S. 429 (1988) | Dissenting |
| 1114 | McCrary v. Oklahoma, 414 U. S. 966 (1973) | Dissenting |
| 1115 | McGautha v. California, 402 U. S. 183 (1971) | Dissenting |
| 1116 | McKenzie v. Montana, 443 U. S. 912 (1979) | Dissenting |
| 1117 | McKinney v. Birmingham, 420 U. S. 950 (1975) | Dissenting |
| 1118 | McKinney v. Parsons, 423 U. S. 960 (1975) | Dissenting |
| 1119 | McMann v. Richardson, 397 U. S. 759 (1970) | Dissenting |
| 1120 | Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) | Dissenting |
| 1121 | Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804 (1986) | Dissenting |
| 1122 | Michael H. v. Gerald D., 491 U.S. 110 (1989) | Dissenting |
| 1123 | Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) | Dissenting |
| 1124 | Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) | Dissenting |
| 1125 | Michigan v. Bloss, 413 U. S. 909 (1973) | Dissenting |
| 1126 | Michigan v. DeFillippo, 443 U. S. 31 (1979) | Dissenting |
| 1127 | Michigan v. Long, 463 U.S. 1032 (1983) | Dissenting |
| 1128 | Michigan v. Mosley, 423 U. S. 96 (1975) | Dissenting |
| 1129 | Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) | Dissenting |
| 1130 | Miller v. Oregon, 405 U. S. 1047 (1972) | Dissenting |

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| 1131 | Miller v. California, 413 U. S. 15 (1973) | Dissenting |
| 1132 | Miller v. California, 418 U. S. 915 (1974) | Dissenting |
| 1133 | Miller v. United States, 413 U. S. 913 (1973) | Dissenting |
| 1134 | Miller v. United States, 422 U. S. 1024 (1975) | Dissenting |
| 1135 | Miller v. United States, 422 U. S. 1025 (1975) | Dissenting |
| 1136 | Millican, DBA Hip Magazine v. United States, 418 U. S. 947 (1974) | Dissenting |
| 1137 | Miner v. Atlass, 363 U. S. 641 (1960) | Dissenting |
| 1138 | Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) | Dissenting |
| 1139 | Mississippi Power & Light Co. v. Mississippi ex ret. Moore, 487 U.S. 354 (1988) | Dissenting |
| 1140 | Mitchell v. Hopper, 435 U. S. 937 (1978) | Dissenting |
| 1141 | Mobil Alaska Pipeline Co. v. United States, 434 U. S. 949 (1977) | Dissenting |
| 1142 | Mobile v. Bolden, 446 U. S. 55 (1980) | Dissenting |
| 1143 | Moore v. Texas, 431 U. S. 949 (1977) | Dissenting |
| 1144 | Moore v. Zant, 446 U. S. 947 (1980) | Dissenting |
| 1145 | Moorman Manufacturing Co. v. Bair, 437 U. S. 267 (1978) | Dissenting |
| 1146 | Moose Lodge No. 107 v. Irvis, 407 U. S. 163 (1972) | Dissenting |
| 1147 | Morgan v. Georgia, 441 U. S. 967 (1979) | Dissenting |
| 1148 | Morris v. Mathews, 475 U.S. 237 (1986) | Dissenting |
| 1149 | Morton v. Swenson, 417 U. S. 957 (1974) | Dissenting |
| 1150 | Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) | Dissenting |
| 1151 | Mullin v. Wyoming, 414 U. S. 940 (1973) | Dissenting |
| 1152 | Murch v. Mottram, 409 U. S. 41 (1972) | Dissenting |
| 1153 | Murphy v. Florida, 421 U. S. 794 (1975) | Dissenting |
| 1154 | Murray v. Carrier, 477 U.S. 478 (1986) | Dissenting |
| 1155 | NAACP v. New York, 413 U. S. 345 (1973) | Dissenting |
| 1156 | National Equipment Rental v. Szukhent, 375 U. S. 311 (1964) | Dissenting |
| 1157 | National Labor Relations Board v. Retail Store Employees, 447 U. S. 607 (1980) | Dissenting |
| 1158 | National Labor Relations Board v. Yeshiva University, 444 U. S. 672 (1980) | Dissenting |
| 1159 | National League of Cities v. Usery, 426 U. S. 833 (1976) | Dissenting |
| 1160 | Neal v. Arkansas, 429 U. S. 808 (1976) | Dissenting |
| 1161 | Nelson v. Los Angeles County, 362 U. S. 1 (1960) | Dissenting |
| 1162 | Nelson v. O'Neil, 402 U. S. 622 (1971) | Dissenting |
| 1163 | New Orleans Book Mart, Inc. v. United States, 419 U. S. 1007 (1974) | Dissenting |
| 1164 | New York City Transit Authority v. Beazer, 440 U. S. 568 (1979) | Dissenting |
| 1165 | New York v. Belton, 453 U.S. 454 (1981) | Dissenting |
| 1166 | New York v. Burger, 482 U.S. 691 (1987) | Dissenting |

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| 1167 | Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) | Dissenting |
| 1168 | Ngiraingas v. Sanchez, 495 U.S. 182 (1990) | Dissenting |
| 1169 | Nissinoff v. California, 414 U. S. 1122 (1974) | Dissenting |
| 1170 | Nix v. Williams, 467 U.S. 431 (1984) | Dissenting |
| 1171 | Nollan v. California Coastal Commission, 483 U.S. 825 (1987) | Dissenting |
| 1172 | North Carolina Department of Transp. v. Crest Street Community Council, 479 U.S. 6 (1986) | Dissenting |
| 1173 | North Carolina v. Alford, 400 U. S. 25 (1970) | Dissenting |
| 1174 | North Carolina v. Butler, 441 U. S. 369 (1979) | Dissenting |
| 1175 | O'Bannon v. Town Court Nursing Center, 447 U. S. 773 (1980) | Dissenting |
| 1176 | O'Lone v. Shabazz' Estate, 482 U.S. 342 (1987) | Dissenting |
| 1177 | Ohio v. Roberts, 448 U. S. 56 (1980) | Dissenting |
| 1178 | Oregon ex rel. Land Board v. Corvallis Sand & Gravel Co., 429 U. S. 363 (1977) | Dissenting |
| 1179 | Oregon v. Elstad, 470 U.S. 298 (1985) | Dissenting |
| 1180 | Oregon v. Hass, 420 U. S. 714 (1975) | Dissenting |
| 1181 | Ortwein v. Schwab, 410 U. S. 656 (1973) | Dissenting |
| 1182 | Osborne v. Ohio, 495 U.S. 103 (1990) | Dissenting |
| 1183 | Pan American World Airways v. United States, 371 U. S. 296 (1963) | Dissenting |
| 1184 | Paris Adult Theatre I v. Slaton, 413 U. S. 49 (1973) | Dissenting |
| 1185 | Paris Adult Theatre I v. Slaton, 418 U. S. 939 (1974) | Dissenting |
| 1186 | Parker v. North Carolina, 397 U. S. 790 (1970) | Dissenting |
| 1187 | Paul v. Davis, 424 U. S. 693 (1976) | Dissenting |
| 1188 | Pendleton v. California, 423 U. S. 1068 (1976) | Dissenting |
| 1189 | Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) | Dissenting |
| 1190 | Pennsylvania v. Finley, 481 U.S. 551 (1987) | Dissenting |
| 1191 | Pennsylvania v. Ritchie, 480 U.S. 39 (1987) | Dissenting |
| 1192 | Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) | Dissenting |
| 1193 | Perry v. Sindermann, 408 U. S. 593 (1972) | Dissenting |
| 1194 | Piccirillo v. New York, 400 U. S. 548 (1971) | Dissenting |
| 1195 | Pickens v. Arkansas, 435 U. S. 909 (1978) | Dissenting |
| 1196 | Pittsburgh Plate Glass Co. v. United States, 360 U. S. 395 (1959) | Dissenting |
| 1197 | Poelker v. Doe, 432 U. S. 519 (1977) | Dissenting |
| 1198 | Polites v. United States, 364 U. S. 426 (1960) | Dissenting |
| 1199 | Pope v. Illinois, 481 U.S. 497 (1987) | Dissenting |
| 1200 | Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) | Dissenting |
| 1201 | Powell v. Estelle, 444 U. S. 892 (1979) | Dissenting |
| 1202 | Preiser v. Rodriguez, 411 U. S. 475 (1973) | Dissenting |

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| 1203 | Price v. Virginia, 419 U. S. 902 (1974) | Dissenting |
| 1204 | Procaccini v. Jones, 414 U. S. 951 (1973) | Dissenting |
| 1205 | Profitt v. Florida, 428 U. S. 242 (1976) | Dissenting |
| 1206 | Pryba v. United States, 419 U. S. 1127 (1975) | Dissenting |
| 1207 | Pryor v. Georgia, 434 U. S. 935 (1977) | Dissenting |
| 1208 | Pulley v. Harris, 465 U.S. 37 (1984) | Dissenting |
| 1209 | Puyallup Tribe v. Department of Game of Washington, 433 U. S. 165 (1977) | Dissenting |
| 1210 | Ragano v. United States, 427 U. S. 905 (1976) | Dissenting |
| 1211 | Randall v. Loftsgaarden, 478 U.S. 647 (1986) | Dissenting |
| 1212 | Ratner v. United States, 423 U. S. 898 (1975) | Dissenting |
| 1213 | Raulerson v. Florida, 439 U. S. 959 (1978) | Dissenting |
| 1214 | Reid v. Immigration and Naturalization Service, 420 U. S. 619 (1975) | Dissenting |
| 1215 | Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) | Dissenting |
| 1216 | Richardson v. Wright, 405 U. S. 208 (1972) | Dissenting |
| 1217 | Richmond v. Arizona, 433 U. S. 915 (1977) | Dissenting |
| 1218 | Richmond v. United States, 422 U. S. 358 (1975) | Dissenting |
| 1219 | Ricketts v. Adarnson, 483 U.S. 1 (1987) | Dissenting |
| 1220 | Ridens v. Illinois, 421 U. S. 993 (1975) | Dissenting |
| 1221 | Rivera v. Delaware, 429 U. S. 877 (1976) | Dissenting |
| 1222 | Rivera v. Minnich, 483 U.S. 574 (1987) | Dissenting |
| 1223 | Rivera v. United States, 446 U. S. 957 (1980) | Dissenting |
| 1224 | Robins v. United States, 404 U. S. 1049 (1972) | Dissenting |
| 1225 | Robinson v. Birmingham, 436 U. S. 932 (1978) | Dissenting |
| 1226 | Robinson v. Georgia, 435 U. S. 991 (1978) | Dissenting |
| 1227 | Roemer v. Board of Public Works of Maryland, 426 U. S. 736 (1976) | Dissenting |
| 1228 | Rogers v. Bellei, 401 U. S. 815 (1971) | Dissenting |
| 1229 | Rondeau v. Mosinee Paper Corporation, 422 U. S. 49 (1975) | Dissenting |
| 1230 | Rose v. Hodges, 423 U. S. 19 (1975) | Dissenting |
| 1231 | Rose v. Locke, 423 U. S. 48 (1975) | Dissenting |
| 1232 | Rosenberg v. United States, 360 U. S. 367 (1959) | Dissenting |
| 1233 | Ross v. Hopper, 435 U. S. 1018 (1978) | Dissenting |
| 1234 | Roth v. New Jersey, 414 U. S. 962 (1973) | Dissenting |
| 1235 | Rush v. Savchuk, 444 U. S. 320 (1980) | Dissenting |
| 1236 | Rust v. Nebraska, 434 U. S. 912 (1977) | Dissenting |
| 1237 | S & E Contractors, Inc. v. United States, 406 U. S. 1 (1972) | Dissenting |
| 1238 | S. S. & W., Inc. v. Kansas City, 421 U. S. 925 (1975) | Dissenting |
| 1239 | Saffle v. Parks, 494 U.S. 484 (1990) | Dissenting |
| 1240 | San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973) | Dissenting |
| 1241 | San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) | Dissenting |
| 1242 | San Francisco Arts & Athletics v. United States Olympic | Dissenting |

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| | Committee, 483 U.S. 522 (1987) | |
| 1243 | Sanders v. Georgia, 424 U. S. 931 (1976) | Dissenting |
| 1244 | Sandquist v. California, 423 U. S. 900 (1975) | Dissenting |
| 1245 | Santa Fe Industries, Inc. v. Green, 430 U. S. 462 (1976) | Dissenting |
| 1246 | Scales v. United States, 367 U. S. 203 (1961) | Dissenting |
| 1247 | Schilling v. Rogers, 363 U. S. 666 (1960) | Dissenting |
| 1248 | Schlesinger v. Ballard, 419 U. S. 498 (1975) | Dissenting |
| 1249 | Schlesinger v. Reservists Committee to Stop the War, 418 U. S. 208 (1974) | Dissenting |
| 1250 | Schneckloth v. Bustamonte, 412 U. S. 218 (1973) | Dissenting |
| 1251 | School District of Omaha v. United States, 433 U. S. 667 (1977) | Dissenting |
| 1252 | Schuster v. New York, 434 U. S. 910 (1977) | Dissenting |
| 1253 | Schweiker v. Chilicky, 487 U.S. 412 (1988) | Dissenting |
| 1254 | Scott v. Illinois, 440 U. S. 367 (1979) | Dissenting |
| 1255 | Scott v. United States, 425 U. S. 917 (1976) | Dissenting |
| 1256 | Scott v. United States, 436 U. S. 128 (1978) | Dissenting |
| 1257 | Sears, Roebuck & Co. v. Carpenters, 436 U. S. 180 (1978) | Dissenting |
| 1258 | Secretary of the Navy v. Huff, 444 U. S. 453 (1980) | Dissenting |
| 1259 | Selective Service System v. Minnesota Public Interest Research Group, 46 U.S. 841 (1984) | Dissenting |
| 1260 | Sendak v. Nihiser, 423 U. S. 976 (1975) | Dissenting |
| 1261 | Sewell v. Georgia, 435 U. S. 982 (1978) | Dissenting |
| 1262 | Sharp v. Texas, 414 U.S. 1118 (1974) | Dissenting |
| 1263 | Sherwin v. United States, 437 U. S. 909 (1978) | Dissenting |
| 1264 | Sians v. United States, 418 U. S. 926 (1974) | Dissenting |
| 1265 | Sidle v. Majors, 429 U. S. 945 (1976) | Dissenting |
| 1266 | Sierra Club v. Morton, 405 U. S. 727 (1972) | Dissenting |
| 1267 | Sinclair Refining Co. v. Atkinson, 370 U. S. 195 (1962) | Dissenting |
| 1268 | Slepicoff v. United States, 425 U. S. 998 (1976) | Dissenting |
| 1269 | Smith v. Butler, 366 U. S. 161 (1961) | Dissenting |
| 1270 | Smith v. Hopper, 436 U. S. 950 (1978) | Dissenting |
| 1271 | Smith v. Hurley, 444 U. S. 984 (1979) | Dissenting |
| 1272 | Smith v. Missouri, 414 U. S. 1031 (1973) | Dissenting |
| 1273 | Smith v. Murray, 477 U.S. 527 (1986) | Dissenting |
| 1274 | Smith v. Robinson, 468 U.S. 992 (1984) | Dissenting |
| 1275 | Smith v. United States, 431 U. S. 291 (1977) | Dissenting |
| 1276 | Songer v. Florida, 441 U. S. 956 (1979) | Dissenting |
| 1277 | South Dakota v. Dole, 483 U.S. 203 (1987) | Dissenting |
| 1278 | Spallone v. United States, 493 U.S. 265 (1990) | Dissenting |
| 1279 | Spencer v. Texas, 385 U. S. 554 (1967) | Dissenting |
| 1280 | Spenkelink v. Florida, 434 U. S. 960 (1977) | Dissenting |
| 1281 | Spenkelink v. Wainwright, 440 U. S. 976 (1979) | Dissenting |
| 1282 | Spivey v. Georgia, 439 U. S. 1039 (1978) | Dissenting |
| 1283 | Spivey v. Zant, 444 U. S. 957 (1979) | Dissenting |

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| 1284 | Splawn v. California, 431 U. S. 595 (1977) | Dissenting |
| 1285 | Stanford v. Kentucky, 492 U.S. 361 (1989) | Dissenting |
| 1286 | Star v. Preller, 419 U. S. 956 (1974) | Dissenting |
| 1287 | Stephens v. Hopper, 439 U. S. 991 (1978) | Dissenting |
| 1288 | Stewart v. Iowa, 423 U. S. 902 (1975) | Dissenting |
| 1289 | Stone v. Powell, 428 U. S. 465 (1976) | Dissenting |
| 1290 | Storer v. Brown, 415 U. S. 724 (1974) | Dissenting |
| 1291 | Sulaiman v. United States, 419 U. S. 911 (1974) | Dissenting |
| 1292 | Sullivan v. Askew, 434 U. S. 878 (1977) | Dissenting |
| 1293 | Sullivan v. Wainwright, 464 U.S. 109 (1983) | Dissenting |
| 1294 | Sumner v. Mata, 449 U.S. 539 (1981) | Dissenting |
| 1295 | Sumner v. Mata, 455 U.S. 591 (1982) | Dissenting |
| 1296 | Susi v. Flowers, 423 U. S. 1006 (1975) | Dissenting |
| 1297 | Sykes v. Maryland, 419 U.S. 1126 (1975) | Dissenting |
| 1298 | Taylor v. Illinois, 484 U.S. 400 (1988) | Dissenting |
| 1299 | Taylor v. Tennessee, 429 U. S. 930 (1976) | Dissenting |
| 1300 | Teague v, Lane, 489 U.S. 288 (1989) | Dissenting |
| 1301 | Teal v. Georgia, 435 U. S. 989 (1978) | Dissenting |
| 1302 | Tecider v. Hanners, 465 U.S. 1077 (1984) | Dissenting |
| 1303 | Texaco, Inc. v. Short, 454 U.S. 516 (1982) | Dissenting |
| 1304 | Thevis v. United States, 418 U.S. 932 (1974) | Dissenting |
| 1305 | Thevis v. United States, 429 U. S. 928 (1976) | Dissenting |
| 1306 | Thomas v. Am, 474 U.S. 140 (1985) | Dissenting |
| 1307 | Thompson v. Oklahoma, 429 U.S. 1053 (1977) | Dissenting |
| 1308 | Tijerina v. New Mexico, 417 U.S. 956 (1974) | Dissenting |
| 1309 | Time, Inc. v. Firestone, 424 U. S. 448 (1976) | Dissenting |
| 1310 | Tison v. Arizona, 481 U.S. 137 (1987) | Dissenting |
| 1311 | Tobalina v. California, 419 U.S. 926 (1974) | Dissenting |
| 1312 | Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) | Dissenting |
| 1313 | Trainor v. Hernandez, 431 U. S. 434 (1977) | Dissenting |
| 1314 | Trans World Airlines, Inc. v. Flight Attendants, 489 U.S. 426 (1989) | Dissenting |
| 1315 | Trinkler v. Alabama, 418 U.S. 917 (1974) | Dissenting |
| 1316 | Tucker v. Georgia, 445 U. S. 972 (1980) | Dissenting |
| 1317 | U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608 (1982) | Dissenting |
| 1318 | U. S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) | Dissenting |
| 1319 | United Housing Foundation, Inc. v. Forman, 421 U. S. 837 (1975) | Dissenting |
| 1320 | United Sandy Hook Pilots Association v. Halecki, 358 U. S. 613 (1959) | Dissenting |
| 1321 | United States v. Leon, 468 U.S. 897 (1984) | Dissenting |
| 1322 | United States v. Sharpe, 470 U.S. 675 (1985) | Dissenting |
| 1323 | United States v. 12 200 ft. Reels of Super 8mm. Film, 413 U. S. 123 (1973) | Dissenting |

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| 1324 | United States v. Ash, 413 U. S. 300 (1973) | Dissenting |
| 1325 | United States v. Benchimol, 471 U.S. 453 (1985) | Dissenting |
| 1326 | United States v. Brewster, 408 U. S. 501 (1972) | Dissenting |
| 1327 | United States v. Calandra, 414 U. S. 338 (1974) | Dissenting |
| 1328 | United States v. Citizens & Southern National Bank, 422 U. S. 86 (1975) | Dissenting |
| 1329 | United States v. DiFrancesco, 449 U.S. 117 (1980) | Dissenting |
| 1330 | United States v. Dinitz, 424 U. S. 600 (1976) | Dissenting |
| 1331 | United States v. Doe, Inc. I, 481 U.S. 102 (1987) | Dissenting |
| 1332 | United States v. Dunn, 480 U.S. 294 (1987) | Dissenting |
| 1333 | United States v. Euge, 444 U.S. 707 (1980) | Dissenting |
| 1334 | United States v. Frady, 456 U.S. 152 (1982) | Dissenting |
| 1335 | United States v. Gagnon, 470 U.S. 522 (1985) | Dissenting |
| 1336 | United States v. Goodwin, 457 U.S. 368 (1982) | Dissenting |
| 1337 | United States v. Havens, 446 U.S. 620 (1980) | Dissenting |
| 1338 | United States v. Heistoski, 442 U.S. 477 (1979) | Dissenting |
| 1339 | United States v. Jacobsen, 466 U.S. 109 (1984) | Dissenting |
| 1340 | United States v. Janis, 428 U. S. 433 (1976) | Dissenting |
| 1341 | United States v. Johns, 469 U.S. 478 (1985) | Dissenting |
| 1342 | United States v. Kokinda, 497 U.S. 720 (1990) | Dissenting |
| 1343 | United States v. Kras, 409 U. S. 434 (1973) | Dissenting |
| 1344 | United States v. MacCollom, 426 U. S. 317 (1976) | Dissenting |
| 1345 | United States v. Mara, 410 U. S. 19 (1973) | Dissenting |
| 1346 | United States v. Martinez Fuerte, 428 U. S. 543 (1976) | |
| 1347 | United States v. Matlock, 415 U. S. 164 (1974) | Dissenting |
| 1348 | United States v. Miller, 425 U. S. 435 (1976) | Dissenting |
| 1349 | United States v. Montoya de Hernandez, 473 U.S. 531 (1985) | Dissenting |
| 1350 | United States v. Onto, 413 U.S. 139 (1973) | Dissenting |
| 1351 | United States v. Owens, 484 U.S. 554 (1988) | Dissenting |
| 1352 | United States v. Peltier, 422 U. S. 531 (1975) | Dissenting |
| 1353 | United States v. Richardson, 418 U. S. 166 (1974) | Dissenting |
| 1354 | United States v. Scott, 437 U.S. 82 (1978) | Dissenting |
| 1355 | United States v. Valenzuela Bernal, 458 U.S. 858 (1982) | Dissenting |
| 1356 | United States v. Verdugo Urquiclez, 494 U.S. 259 (1990) | Dissenting |
| 1357 | United States v. Villamonte Marquez, 462 U.S. 579 (1983) | Dissenting |
| 1358 | United States v. Washington, 431 U. S. 181 (1977) | Dissenting |
| 1359 | United States v. Wilson, 421 U. S. 309 (1975) | Dissenting |
| 1360 | United States Trust Co. of New York v. New Jersey, 431 U. S. 1(1977) | Dissenting |
| 1361 | Uphaus v. Wyman, 360 U. S. 72 (1959) | Dissenting |
| 1362 | Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) | Dissenting |
| 1363 | Van Gundy v. United States, 419 U. S. 1004 (1974) | Dissenting |
| 1364 | Vance v. Terrazas, 444 U. S. 252 (1979) | Dissenting |
| 1365 | Vardas v. Texas, 423 U. S. 904 (1975) | Dissenting |

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| 1366 | Village Books, Inc. v. Marshall, 418 U. S. 930 (1974) | Dissenting |
| 1367 | Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) | Dissenting |
| 1368 | Wainwright v. Goode, 464 U.S. 78 (1983) | Dissenting |
| 1369 | Wainwright v. Sykes, 433 U. S. 72 (1977) | Dissenting |
| 1370 | Wainwright v. Witt, 469 U.S. 412 (1985) | Dissenting |
| 1371 | Walker v. Birmingham, 388 U. S. 307 (1967) | Dissenting |
| 1372 | Waller v. Florida, 414 U. S. 945 (1973) | Dissenting |
| 1373 | Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) | Dissenting |
| 1374 | Walton v. Arizona, 497 U.S. 639 (1990) | Dissenting |
| 1375 | Ward v. Illinois, 431 U. S. 767 (1977) | Dissenting |
| 1376 | Warth v. Seldin, 422 U. S. 490 (1975) | Dissenting |
| 1377 | Washington v. Davis, 426 U. S. 229 (1976) | Dissenting |
| 1378 | Washington v. Florida, 441 U. S. 937 (1979) | Dissenting |
| 1379 | Washington v. United States, 402 U. S. 978 (1971) | Dissenting |
| 1380 | Watkins v. South Carolina, 418 U. S. 911 (1974) | Dissenting |
| 1381 | Watkins v. Sowders, 449 U.S. 341 (1981) | Dissenting |
| 1382 | Waugh v. Gray, 422 U. S. 1027 (1975) | Dissenting |
| 1383 | Waye v. Virginia, 442 U. S. 924 (1979) | Dissenting |
| 1384 | Weinberger v. Salfi, 422 U. S. 749 (1975) | Dissenting |
| 1385 | Welch v. Texas Department of Highways & Public Transportation, 483 U.S. 468 (1987) | Dissenting |
| 1386 | Wells v. Missouri, 419 U. S. l075 (1974) | Dissenting |
| 1387 | West v. Texas, 414 U. S. 961 (1973) | Dissenting |
| 1388 | Westbrook v. Georgia, 439 U. S. 1102 (1979) | Dissenting |
| 1389 | Wheeldin v. Wheeler, 373 U. S. 647 (1963) | Dissenting |
| 1390 | White v. Georgia, 414 U. S. 886 (1973) | Dissenting |
| 1391 | Wilkinson v. United States, 365 U. S. 399 (1961) | Dissenting |
| 1392 | Will v. Calvert Fire Insurance Co., 437 U. S. 655 (1978) | Dissenting |
| 1393 | Will v. Michigan Department of State Police, 491 U.S. 58 (1989) | Dissenting |
| 1394 | Williams v. Brown, 446 U. S. 236 (1980) | Dissenting |
| 1395 | Williams v. Zbaraz, 448 U. S. 358 (1980) | Dissenting |
| 1396 | Windward Shipping (London) v. American Radio Association, 415 U. S. 104 (1974) | Dissenting |
| 1397 | Winslow v. Virginia, 419 U. S. 906 (1974) | Dissenting |
| 1398 | Woiston v. Reader's Digest Association, Inc., 443 U. S. 157 (1979) | Dissenting |
| 1399 | Womack v. United States, 422 U. S. 1022 (1975) | Dissenting |
| 1400 | Woodard v. Arkansas, 439 U. S. 1122 (1979) | Dissenting |
| 1401 | Woodard v. Hutchins, 464 U.S. 377 (1984) | Dissenting |
| 1402 | Woodkins v. Texas, 431 U. S. 960 (1977) | Dissenting |
| 1403 | World Wide Volkswagen Corporation v. Woodson, 444 U. S. 286 (1980) | Dissenting |

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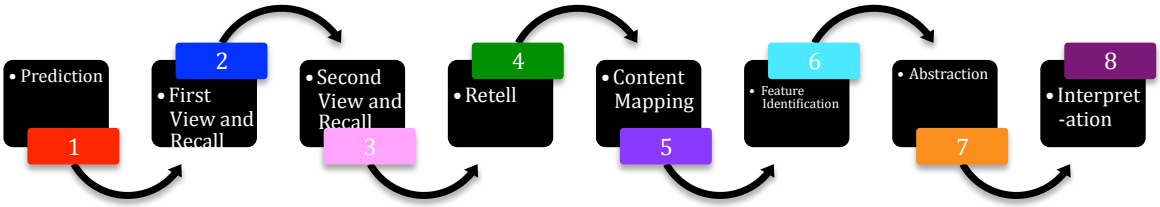
| 1404 | Wrenn v. Benson, 490 U.S. 89 (1989) | Dissenting |
| 1405 | Yeomans v. Kentucky, 423 U. S. 983 (1975) | Dissenting |
| 1406 | Young v. Zant, 442 U. S. 934 (1979) | Dissenting |
| 1407 | Zahn v. International Paper Co., 414 U. S. 291 (1973) | Dissenting |

# APPENDIX B

## DISCOURSE ANALYSIS MODEL FOR *DESHANEY V. WINNEBAGO COUNTY SOCIAL SERVICES DEPARTMENT*, 489 U.S. 189 (1989)




1 Step One: Prediction

The purpose of this step is for the reader to draw on prior knowledge of the subject matter in order to predict the likely content of the text being subject to analysis. In the prediction step, I made a list of ideas, topics, and relationships that I believed would emerge in the text of the case.

The case involves one important administrative concept: accountability. The case also involves two important administrative law concepts: liability and due process under 14A.

Predictions:

1. The state will deny both liability and accountability.
2. The state may argue it followed the proper procedures in decision making.
3. Some of the justices may sympathize with the state's administrative burdens.
4. Some of the justices may attack the state's negligence.
5. It may be difficult to hold the state accountable if the official policies and procedures were adequate.

6. The case may be decided on the basis of which justices value procedural due process more than substantive due process.
7. Brennan will want to hold the state accountable for its decisions.
8. Based on the make-up of the Court, a majority of justices will not find a 14A-DP violation.

2 Step Two: First View and Recall

In this phase, the analyst reads the text completely for a substantive understanding of the information being communicated. No notes are taken, and the analyst recalls only from memory the major points of the text.

Memory Recall:

1. Joshua DeShaney's parents divorced, and Joshua's father, Randy, was granted custody of him.
2. Joshua was taken to the hospital several times with injuries. The doctors noted the injuries were likely the result of abuse. DSS was notified.
3. DSS's actions included an interview with Joshua's father and his girlfriend, home visits, and recommendations for the family. The recommendations weren't followed, and the social worker assigned to the case noted that Joshua was probably being abused.
4. The social workers continued to follow-up on the case. When making home visits, they were sometimes told that Joshua was sick or absent.
5. Important due process factors: (a) a social worker was assigned to the case, (b) the social worker kept records of all communication with the family, (c) both the

doctors and the assigned social workers noted abuse was probably occurring, (d) the social worker's recommendations were not mandatory, (e) Joshua was never removed from the home.

3 Step Three: Second View and Recall

I re-read the case for a more in-depth understanding of the content. In this step, I produced the case briefs. I also produced detailed notes about the ideas, themes, and values being communicated.

**DeShaney v. Winnebago County Social Services Department**

**489 U.S. 189 (1989)**

***Case Brief***

**Facts:**

Joshua DeShaney was born in 1979. His parents divorced in 1980, and his father, Randy, was granted custody. Joshua and his father moved to Neenah, located in Winnebago County, Wisconsin. Randy DeShaney remarried but divorced soon afterward.

In January 1982, Joshua's step-mom told police that Randy had previously hit Joshua. The police notified DSS. DSS interviewed Randy, but he denied the accusations. In January 1983, Joshua was taken to the hospital with bruises and abrasions. The doctor suspected child abuse and notified DSS. DSS obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county formed a Child Protection Team composed of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS social workers, and hospital administrators. The team determined there was insufficient evidence of abuse, and Joshua was given back to his father. The team recommended several protective measures that included (1) enrolling Joshua in preschool, (2) counseling for Randy, and (3) moving Randy's girlfriend out of the home. Randy DeShaney entered into a voluntary agreement with DSS to accomplish these objectives.

One month later, the hospital called DSS to report that Joshua had once again been treated for suspicious injuries. The social worker concluded that there was no basis for action. For the next six months, the social worker made monthly home visits and observed a number of injuries on Joshua's head; she also noticed that he had not been enrolled in school and that Randy's girlfriend had not moved out. The social worker recorded these notes in her files and also noted that someone in the DeShaney household

was likely physically abusing Joshua. In November 1983, the emergency room notified DSS that Joshua had been treated yet again for injuries. On the social worker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. No action was taken. In March 1984, Randy DeShaney severely beat Joshua, and he fell into a life-threatening coma. Emergency brain surgery revealed traumatic injuries to his head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he was expected to spend the rest of his life in an institution for the mentally ill. Joshua and his mother sued Winnebago County DSS, and various individual employees of DSS. They alleged that respondents deprived Joshua of his 14A liberty by failing to protect him from abuse that they knew or reasonably should have known was occurring.

**Question:** Did DSS's failure to remove Joshua from his father's custody violate his due process within the meaning of 14A?

**Decision:** Negative

**Vote:** 6-3
Majority: Rehnquist (Opinion of the Court), White, Stevens, O'Connor, Scalia, Kennedy
Dissent: Brennan (Dissenting Opinion) joined by Marshall and Blackmun
Dissent: Blackmun (Dissenting Opinion)

**Reasoning:**

*Rehnquist's Majority:*

**Argument:** DSS deprived Joshua of 14A-DP liberty by failing to protect him from his father's abuse.

**Response:** The state has no affirmative duty to protect citizens from private action.

1. The Constitution does not require states to take protective actions, it only prohibits states from taking actions that unjustly infringe on rights and liberties.
2. Joshua has no liberty interest stemming from state action. Randy DeShaney caused the tangible harm, not DSS.

**Argument:** The state was in a "special relationship" with Joshua. DSS investigated the case, assigned social workers to the case, and temporarily took Joshua into its custody. Therefore, the state was obligated to protect him. It is liable for the liberty deprivation.

**Response:** Joshua was deprived of his liberty because of his father's private action. The only way the state can be liable is if it caused the abuse.

1. Joshua's father would have abused him even if the state had never been involved. There was no "special relationship" that created an affirmative obligation to protect Joshua.

2. The state could be liable if it had recklessly placed Joshua in a violent situation, but that was not the case. Adequate procedures were followed.
3. DSS returned Joshua to his father only because it did not have sufficient evidence of abuse.

*Brennan's Dissent:*

**Argument:** The state had knowledge of Joshua's abuse and expressed its intent to help him.

**Argument:** The state's actions limited Joshua's ability to act on his own behalf or to obtain help from others. The creation of DSS creates an expectation that once reported, the agency alone is responsible for protection.

**Argument:** The state took the following actions:

A. The state established a DSS, and part of the agency's mission is to protect children from abuse. The state voluntarily assumed the duty to protect children in the state.

B. The primary effect of the state's DSS system is to relieve others of any obligation to help protect children; they now depend on the state to provide the necessary protection. In fact, state law requires that potential avenues of assistance, such as doctors and law enforcement offices, report cases of suspected child abuse to DSS.

C. The state, through DSS, intervened in Joshua's life when it learned he was likely being harmed by his father. Because DSS had control over the decision to remove him from his father's home, it "effectively confined" Joshua to his father's violence.

D. Because the state intervened and voluntarily assumed a duty to protect Joshua, its failure to do so did deprive him of his 14A-DP liberty.

**Argument:** Inaction, as when a state assumes a duty and then neglects it, can be just as harmful as direct action.

*Blackmun's Dissent:*

**Argument:** The state actively intervened in Joshua's life and thus took on an affirmative obligation to protect him.

**Argument:** There is no clear distinction between action and inaction.

**Precedent:** The state has no affirmative obligation to protect citizens from private action. The state is not liable when it fails to protect an individual from private action. Liability may be triggered only when the state causes the injury in fact.

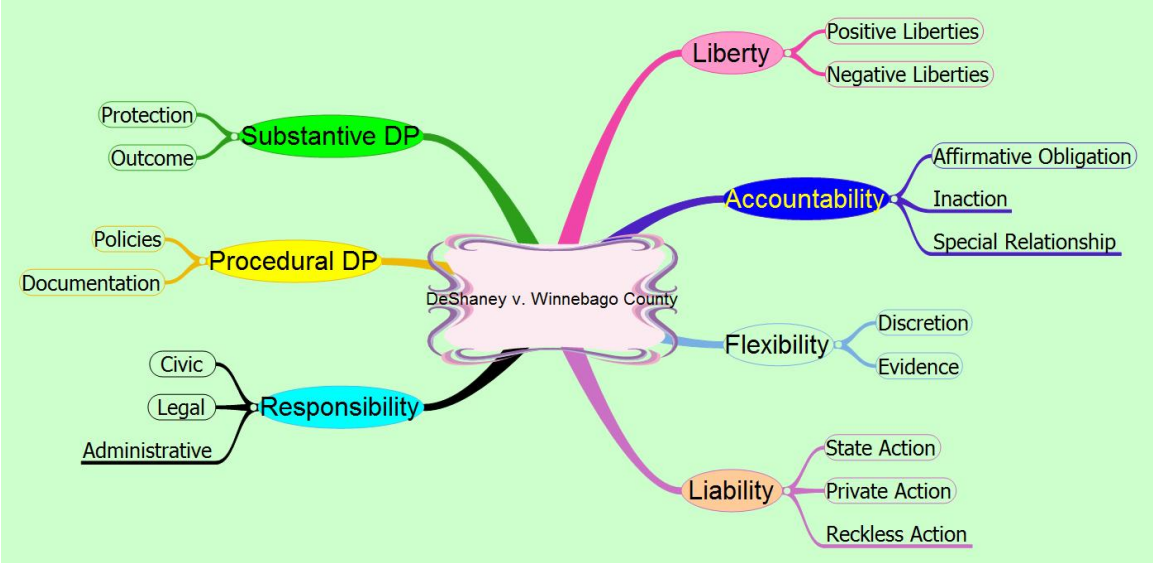
**Rehnquist's primary value:** flexibility
**Brennan's primary value:** accountability
**Blackmun's primary value:** accountability

## 4 Step Four: Retell

In this phase of the process, the analyst retells the primary details of the text in her own words to determine whether she has captured the essence of the text's major points. For this step, I produced an audio recording of each case's facts and conclusions as well as my own thoughts about the case.

## 5 Step Five: Content Mapping

A content map, or chart, is a visual representation of how the content fits together. Information is organized according to main ideas and supporting details. The analyst also notes any potential relationships among those ideas. I produced the content maps from both the text of the case and the audio recordings.



6 Step Six: Feature identification

Feature identification is an analysis of how the message is communicated. The meaning of text is gathered not only by what is said but also by the language used and the style of the writing. In this step, I looked for features such as text emphasis (italicized or bolded script, for example), and the repetition of key words, phrases, or constitutional principles. I also noted the evident tone of the writing.

*Repeated Key Words*: abuse of power, state action, private action, due process, affirmative obligation, affirmative act, action, inaction, protect, abuse, special relationship

*Tone*: regretful, empathetic, tense (Brennan and Blackmun), detached (Rehnquist)

*Emphasis*: The emphasis is on the difference between private action and state action. Rehnquist supports rationality over sympathy.

7 Step Seven: Abstraction

During the abstraction phase, the analyst makes inferences from the text itself, noting any implied meaning and also noting the supporting evidence. It was at this step that I considered the context of the case and inferred what Brennan might have wanted to convey about administrative decision making. What general principles did Brennan want us to recognize about how decisions should be made?

*Brennan's Abstract Principles*:

1. The state does have an affirmative obligation to fulfill its mission, and in this case that mission was to assist children suspected of being abused.
2. The state must be accountable for erroneous decisions.
3. A decision not to act can be as much of a liberty deprivation as a decision to act.
4. Since the state has replaced traditional services once performed by communities, it must be responsible for adequately performing those services.
5. When performance is inadequate, the state may be liable for damages.
6. The state deprived Joshua DeShaney's of his essential human dignity.

*Rehnquist's Abstract Principles*:

1. The state does not have an affirmative obligation to protect citizens from private action.
2. The foundation of the Constitution is rooted in negative freedom—freedom from unnecessary government intervention into one's essentially free state.
3. In order for a state to be liable for a due process violation, the injury must be traceable to direct state action.
4. The state caused no injury in fact; Randy DeShaney's actions caused the injury, and he is to be held liable in a civil suit.

*Blackmun's Abstract Principles:*

1. The state does have an affirmative obligation to protect citizens from private action once it intervenes on behalf of the person subject to injury.
2. Rejection of formalistic reasoning.

3. A broad and flexible reading of the Constitution is preferable to a narrow and restricted reading of it.

8 Step Eight: Interpretation

In this step, I combined all of the data from steps 1-7 to produce a comprehensive interpretation of Brennan's administrative law cases.

Interpretation of Brennan's values in *DeShaney v. Winnebago County Department of Social Services:*

| | | |
|---|---|---|
| *DeShaney v. Winnebago County Department of Social Services* 489 U.S. 189 (1989) | Freedom | Individuals must be free from arbitrary government action or inaction. |
| | Accountability | Administrators must be held accountable for negligent actions. |
| | Social Justice | Administrators have an affirmative obligation to protect those who cannot protect themselves. |