JUSTICE WILLIAM J. BRENNAN, JR.
Appointed 1956

JUSTICE WILLIAM J. BRENNAN, JR.

*Elizabeth F. Defeis**

> For Mr. Justice Brennan the law is a living reality concerned with human beings, rather than a series of judicial declarations embalmed in judicial opinions. His enthusiasm is contagious and his ability to deal with judges and lawyers is outstanding. While he is keenly conscious of the fact that we live in a constantly changing world, he is equally aware of the fact that human nature changes very little. He is, therefore, instinctively inclined to preserve the essentials of all that is good in the past and to adapt them to the needs of the times.[1]

The tenure of Justice William J. Brennan, Jr. on the United States Supreme Court spans almost three decades.[2] Though often a dissenter, Justice Brennan is a recognized leader on the Court in many substantive areas such as church-state relations,[3] rights of the accused,[4] and first amendment guarantees.[5] His political acumen has been noted, and the positions he has taken on several controversial issues have prevailed. Indeed, he has emerged as a "bridge

* B.A., LL.B., St. John's University; LL.M. New York University; Dean, Seton Hall University School of Law. The author wishes to thank Robin D. Beam and Barbara Birdsall, who assisted in the research of this article.

1 Vanderbilt, *Mr. Justice Brennan*, in *New Members of the Supreme Court of the United States*, 43 A.B.A.J. 526, 526 (1957).

2 Justice Brennan took his oath of office on October 16, 1956. McQuade & Kardos, *Mr. Justice Brennan and His Legal Philosophy*, 33 NOTRE DAME LAW. 321, 321 (1958).

3 *See, e.g.*, Grand Rapids School District v. Ball, 105 S. Ct. 3216 (1985) (shared time and community education program held to advance religion, thereby violating establishment clause); Sherbert v. Verner, 374 U.S. 398 (1963) (employee in South Carolina can receive unemployment compensation benefits after being fired because of religious belief that prevented work on Saturdays).

4 *See, e.g.*, Dunaway v. New York, 442 U.S. 200 (1979) (probable cause necessary for station house detention accompanied by interrogation even if no formal arrest made); Davis v. Mississippi, 394 U.S. 721 (1969) (seizure of fingerprints disallowed as product of unlawful detention under fourth and fourteenth amendments); United States v. Wade, 388 U.S. 218 (1967) (after indictment, suspect has right to counsel at pretrial confrontation such as lineup); Miller v. United States, 357 U.S. 301 (1958) (articulated "Knock and Announce" rule prior to arrest).

5 *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965) (procedural safeguards necessary to protect first amendment rights in film licensing); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (established actual malice standard in defamation actions dealing with public officials and media defendants); NAACP v. Button, 371 U.S. 415 (1963) (recognizing first amendment protection for associational right to seek legal redress); Smith v. California, 361 U.S. 147 (1959) (ordinance establishing strict liability for possession of obscene books violated first amendment).

builder" between competing factions on the Court.[6]

This article will focus on several areas in which Justice Brennan appears to have drawn upon his experiences as a New Jersey lawyer and judge, such as the use of state constitutions and court management and reform. In addition, the article will examine two substantive areas—equal protection and federalism—that best illustrate the leadership role Justice Brennan enjoys on the Court today.

I. BIOGRAPHY

William J. Brennan, Jr., the son of Irish-Catholic immigrants, was born in Newark, New Jersey on April 25, 1906.[7] His father came to New Jersey in 1893 from Roscommon, Ireland, where he had been employed as a metal polisher and as a brewery worker.[8] In Newark, the elder Brennan quickly identified with the expanding labor union movement, and he eventually served as a member of the Essex County Trades and Labor Council.[9] Later in his career, he served three terms as Director of Public Safety.[10] The senior Brennan, who was widely known for his integrity and honesty, served the public until his death in 1930 at the age of 57.[11]

William, Jr. attended both parochial and public schools in Newark, worked part-time, and graduated from Barringer High School.[12] In 1928, he graduated with honors from the Wharton School of Finance and Commerce of the University of Pennsylvania, married Marjorie Leonard of East Orange, and entered Harvard Law School.[13] At the time of Brennan's graduation from the Harvard Law School, Pitney, Hardin & Skinner, a leading Newark firm headed by James Pitney, the son of Justice Mahlon Pitney, was searching for young talent to revitalize the firm. In a stroke of foresight and judgment, the firm extended offers to Brennan and Donald B. Kipp—both of whom would become future leaders of the bar in New Jersey.

In 1932, Brennan was admitted to the New Jersey Bar. He

---

6 Friedman, *William J. Brennan*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 2852 (L. Friedman & F. Israel eds. 1980).

7 McQuade & Kardos, *supra* note 2, at 321.

8 *Id.*

9 *Id.* at 321-22.

10 *Id.* at 322.

11 *Id.*

12 *Id.*

13 *Id.*

enthusiastically began to practice in New Jersey and soon gained a reputation as an astute, disciplined attorney.[14] As a specialist in labor law, Brennan represented management for such clients as Western Electric, New Jersey Bell Telephone, Phelps Dodge, and the Celanese Corporation.[15] He became a partner at Pitney, Hardin & Skinner in 1937.[16] With the outbreak of World War II, Brennan entered the Army and served in Washington, D.C., assisting Secretary of War Robert B. Patterson in labor matters.[17] He was discharged from the service at the end of the war with the rank of full colonel.[18] He then returned to the Pitney firm, which then became known as Pitney, Hardin, Ward & Brennan.[19]

During the period after the war, Brennan actively participated in the movement for judicial reform, and he was instrumental in effectuating the major changes embodied in the New Jersey Constitution of 1947.[20] The new constitution completely reorganized New Jersey's court system.[21] Shortly thereafter, in January of 1949, Republican Governor Alfred E. Driscoll appointed Brennan a judge of the Law Division of the New Jersey Superior Court.[22] He was subsequently designated as Assignment Judge for Hudson County.[23] Widely recognized throughout the state as an excellent supervisor and manager, Judge Brennan was appointed to the New Jersey Supreme Court's Committee on Pre-Trial Conferences and Calendar Control.[24] In this capacity, he engineered several highly successful procedural changes, which decreased docket congestion and minimized delays in the administration of justice.[25] In 1950, Judge Brennan was appointed to the Appellate Division of the New Jersey Superior Court, and in 1952, he was named to the New Jersey Supreme Court.[26]

Four years later, on September 29, 1956, Justice William J. Brennan was unexpectedly called to Washington, D.C. by Attor-

---

14 *Id.* at 323.
15 J. FRANK, THE WARREN COURT 117 (1964); *see* Vanderbilt, *supra* note 1, at 526.
16 McQuade & Kardos, *supra* note 2, at 323.
17 Vanderbilt, *supra* note 1, at 526.
18 McQuade & Kardos, *supra* note 2, at 323.
19 *Id.*
20 *Id.*
21 *See* N.J. CONST. art. VI.
22 Vanderbilt, *supra* note 1, at 526.
23 *Id.*
24 *Id.*
25 McQuade & Kardos, *supra* note 2, at 323-24.
26 *Id.* at 323.

ney General Herbert Brownell.[27] Republican President Dwight D. Eisenhower had nominated Brennan, a lifelong Democrat, as an Associate Justice of the United States Supreme Court.[28] With the exception of Senator Joseph McCarthy, public reaction was virtually unanimous in favor of the appointment.[29] New Jersey Governor Robert B. Meyner commented: "[Brennan] is very able indeed . . . a sound liberal of the highest personal character and with great intellectual drive. . . . But I suspect his opinions will not be quite as 'middle-of-the-road' as some Republicans seem to think."[30] Bernard Shanley, a leading New Jersey attorney, described Brennan as "extraordinarily brilliant; he has a tremendous personality; and he is genuine from top to toe."[31] *U.S. News and World Report* said: "In some decisions handed down by the New Jersey Supreme Court, Justice Brennan has been outspoken in defending the rights of citizens. As a lawyer, he advocated compulsory arbitration in strikes against public utilities—a procedure that since has been written into New Jersey law."[32] *Life* magazine also praised the appointment:

---

27 *Id.* at 321.

28 *Id.* Brennan filled the "Roman Catholic Seat" that had been empty since the death of Justice Frank Murphy in 1949. Four other men had occupied the traditionally Catholic seat: Roger B. Taney, Edward D. White, Joseph McKenna, and Pierce Butler. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 62-64 (2d ed. 1985).

29 *See* McQuade & Kardos, *supra* note 2, at 324-26. Senator McCarthy voted against Brennan's nomination based in part upon two speeches Brennan made while still on the New Jersey Supreme Court. *Id.* at 326. During the hearings on Brennan's nomination, Senator McCarthy attempted to obtain Brennan's view of the Senate's investigating committees on communism:

> Senator MCCARTHY. . . . And, Mr. Brennan, just so there is no doubt in your mind, I have been reading in the Daily Worker and in the — I don't intimate that you are even remotely a Communist or anything like that.
>
> Mr. BRENNAN. I have never read a copy of it.
>
> Senator MCCARTHY. I do. I read it. I have been reading in every left-wing paper, the same type of gobbledegook that I find in your speeches talking about the barbarism of committees, the same Salem witch hunts. I just wonder if a Supreme Court Justice can hide behind his robes and conduct a guerilla warfare against investigating committees and you talked about barbaric procedures.

Nomination of William Joseph Brennan, Jr.: Hearings Before the Senate Comm. on the Judiciary, 85th Cong., 1st Sess. 28 (statement of William J. Brennan, Jr., nominee, United States Supreme Court), *reprinted in* 103 CONG. REC. 3945 (1957).

30 Krock, *The Inspiring Background of the New Justice*, N.Y. Times, Oct. 2, 1956, at 34, col. 5.

31 *Id.*

32 *An Experienced Judge for the Supreme Court*, U.S. NEWS & WORLD REP., Oct. 12, 1956, at 70.

> Justice Brennan . . . brings to the Court one of the keenest, quickest judicial minds in the country. The opinions he has delivered in his seven years on the New Jersey Bench are clear, forceful and middle-of-the-road. . . . Brennan has been America's hardest working crusader for speedier trial procedure, having helped institute a pre-trial conference system that reduced his state's huge backlog of court cases to the point where it is now a national model.[33]

II. JUSTICE BRENNAN AND JUDICIAL REFORM

Justice Brennan's interest in judicial efficiency and court management might be traced in part to his participation in the movement for judicial reform in New Jersey.[34] Perhaps his training at the Wharton School of Business was also influential in furthering this interest. During his legal career in New Jersey and his early years on the Supreme Court, Justice Brennan authored several articles and speeches on the various subjects relating to court management and judicial efficiency.[35] In one article, he advocated the application of business principles to judicial administration.[36] He referred to New Jersey's "integrated court system," which, in his view, was organized "much as a business corporation under rules of practice, procedure and administration devised by the Supreme Court as the Board of Directors, and supervised by the Chief Justice as Executive Head, assisted by a presiding judge in each county functioning much like the branch head of any far-flung business."[37]

In 1973, Brennan stated that shortly after joining the United States Supreme Court, he had adopted a policy of extrajudicial silence because he had come "to appreciate the wisdom of some of [his] distinguished predecessors who believed that a Justice of the Supreme Court should speak only through his published opinions."[38] Having acknowledged that policy of silence, Bren-

---

33 *A Fine Judge Ready for His Biggest Job*, LIFE, Oct. 29, 1956, at 115, 116.

34 For Justice Brennan's views on judicial efficiency, see Brennan, *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 499 (1957); Brennan, *Pretrial Procedure in New Jersey—A Demonstration*, 28 N.Y. ST. B. BUL. 442 (1956); Brennan, *The Congested Calendars in Our Courts—The Problem Can Be Solved*, 38 CHI. B. REC. 103 (1956).

35 *See, e.g.*, *supra* note 34.

36 Brennan, *Does Business Have a Role in Improving Judicial Administration?*, 28 PA. B.A.Q. 238 (1957). Justice Brennan stated: "I have been preaching a long time to all who will listen that the intelligent application of the principles of business management . . . will cure most of the problems of organization, processes and management which are plaguing the courts of our land." *Id.* at 238.

37 *Id.* at 241.

38 Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473,

nan made an exception to it in an article opposing the creation of a National Court of Appeals.[39] That court was the controversial recommendation of the Freund Committee, which was formed to study the burgeoning workload of the United States Supreme Court.[40] The proposed court was to be composed of seven United States circuit court judges who would screen cases for Supreme Court review.[41]

In contrast to Chief Justice Warren Burger's position that creation of such a panel was not a radical departure from the present system, Justice Brennan argued that adoption of the proposal would constitute "a fundamental restructuring of the federal judiciary."[42] He observed that such a change would "rank in importance with the creation of the Circuit Courts of Appeals in 1891,"[43] and "would substantially impair [the Court's] ability to perform the responsibilities conferred [upon it] by the Constitution."[44] The screening process, in Brennan's view, was one of the Court's primary responsibilities and thus should not be delegated to a lower court.[45] In fact, he considered the screening function "vital to the effective performance of the Court's unique mission 'to define [. . .] the rights guaranteed by the Constitution, to assure the uniformity of federal law, and to maintain the constitutional distribution of powers in our federal union.' "[46]

---

473 (1973). Recently, Brennan has again come forward by speaking at Georgetown University and criticizing the current presidential administration's "call for judicial restraint." *See* Kirp, *Brennan Made Mistake of Sounding Like Meese*, Asbury Park Press, Oct. 23, 1985, at A19, col.1.

39 *See* Brennan, *supra* note 38, at 473.

40 *Id.* at 473-74.

41 *Id.* at 474.

42 *Id.*

43 *Id.* at 473.

44 *Id.* at 476.

45 *See id.* at 476-77. Mr. Justice Brennan noted that the screening process does not compromise the other main tasks of the Court, such as reading decisions and writing opinions on the merits. *See id.* He rejected the premise that the Supreme Court is overworked and stated that "my law clerks tell me each year that the burden on the District and Circuit Courts with which they served before coming to me is no less substantial than the burden on the Supreme Court." *Id.* at 476. Justice Brennan maintained that the screening process employed by the Supreme Court assured flexibility and gave individual Justices the opportunity to flag emergent issues through dissents to denials of writs of certiorari. *See id.* at 480. The creation of a National Court of Appeals to certify the 400 most worthy cases to the Supreme Court "would inevitably sacrifice this invaluable aid to constitutional adjudication by denying certification in cases that might otherwise afford appropriate vehicles for such dissents." *Id.* at 481.

46 *Id.* at 482 (quoting FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 1 (1972)).

Rather than characterizing the screening process as little more than a mechanical procedure, Brennan noted that it is a skill developed over a period of years by honing one's intuitive sense regarding the cases that deserve review.[47]

Thus, in Brennan's view, the screening process is an integral part of the responsibility of the Supreme Court, and the introduction of an intermediate National Court of Appeals would "rent a seamless web."[48] Although Justice Brennan's interest in court management and judicial efficiency led him to support several of the reforms proposed by the Freund Commission,[49] he stands firmly against reforms that would transcend judicial efficiency or court management and affect the judicial function itself.

III. JUSTICE BRENNAN'S TENURE ON THE UNITED STATES SUPREME COURT

A. An Overview

Justice Brennan's career on the Supreme Court encompasses several distinct periods.[50] During his first five years on the Court, he established himself as an intellectual leader and as a craftsman, becoming the "spokesman for a slowly emerging nationalistic coalition in favor of individual civil rights and of a meaningful national corpus juris."[51] At the same time, he was widely heralded as a successful "bridge builder," disregarding absolutes and doctrinaire posturing in order to encourage the Court to adopt creative resolutions to complex problems.[52]

For example, shortly after joining the Court, Justice Brennan authored the opinion in *Jencks v. United States*.[53] That case established the right of a criminal defendant to inspect documents re-

---

47 *Id.* at 478.

48 *Id.* at 484; *see also Brennan Scoffs at Retirement as He Nears 80*, Star-Ledger, Apr. 19, 1986, at 3, col. 1 (despite exhausting workload, Justice Brennan continues to oppose National Appeals Court).

49 Brennan, *supra* note 38, at 474. For example, Justice Brennan supported the proposal that the two separate methods of access to Supreme Court review—certiorari and appeal—be abolished. *Id.*

One might speculate as to Justice Brennan's view of the administrative reforms implemented by Chief Justice Robert N. Wilentz in our own New Jersey court system. Although the reforms have been criticized by some practicing attorneys and judges as burdensome, Justice Brennan's inquiry would likely focus on whether the new procedures enhance or diminish the constitutional responsibilities of the New Jersey court system.

50 Gibbons, *Tribute to Justice Brennan*, 36 RUTGERS L. REV. 729, 732 (1984).

51 *Id.*

52 *Id.*

53 353 U.S. 657 (1957).

lied upon by the Government in Federal criminal prosecutions.[54] The majority held that it was not sufficient for the trial judge to examine documents *in camera* and then provide the relevant material to the defendant.[55] Rather, the defendant himself must be permitted to review all the documents upon which the Government intends to rely.[56] In reaching this decision, Brennan stressed that "the interest of the United States in a criminal prosecution '. . . is not that it shall win a case, but that justice shall be done.' "[57]

This position is consistent with the views Justice Brennan expressed during his tenure on the New Jersey bench. In his first year on the New Jersey Supreme Court, he voiced his deep suspicion of governmental secrecy in criminal proceedings in *State v. Tune*,[58] which denied pretrial discovery of an accused murderer's own written confession.[59] In a dissenting opinion, Justice Brennan wrote, "[i]t shocks my sense of justice that . . . counsel for an accused facing a possible death sentence should be denied inspection of his confession which, were this a civil case, could not be denied."[60] Clearly, the position expressed in this dissent provided a foundation for his later opinions while on the United States Supreme Court. Indeed, during what has been characterized as "the 'Criminal Law Revolution' of the sixties—particularly as it affected the fairness of criminal proceedings in state courts—"[61] Brennan joined the majority in extending the Bill of Rights to the states.[62] According to Justice Brennan, "[i]t was in the years from 1962 to 1969 that the face of the law changed."[63]

The October, 1961 Term began this period, which Judge John Gibbons of the Third Circuit Court of Appeals has characterized as the "glory years" of Justice Brennan on the Supreme Court.[64] During these years, Justice Brennan addressed some of

---

54 *Id.* at 668-69.

55 *Id.* at 669.

56 *Id.*

57 *Id.* at 668 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

58 13 N.J. 203, 98 A.2d 881 (1953).

59 *Id.* at 225, 98 A.2d at 892-93.

60 *Id.* at 231, 98 A.2d at 896.

61 Lewin, *William J. Brennan*, in 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 250 (L. Friedman ed. 1978).

62 *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977).

63 *Id.*

64 Gibbons, *supra* note 50, at 734. The leadership and activist role that Justice Brennan assumed on the Court during these years was also consistent with his experiences as a member of the New Jersey judiciary. Following the reorganization of

the major issues facing contemporary society and led the Court in bold, new directions. For example, *Baker v. Carr*,[65] which held that improper apportionment of state legislatures could properly be addressed by the courts under the equal protection clause,[66] had a profound effect on the distribution of political power in this country. In fact, Justice Brennan himself recently stated that "[r]ecognition of the principle of 'one person, one vote' as a constitutional one redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process."[67] Similarly, *New York Times Co. v. Sullivan*[68] reaffirmed the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"[69] and held that the first and fourteenth amendments entitled the press to protection from the threat of unfounded libel actions by public officials.[70] Indeed, this case promoted spirited debate and a re-examination "of the central meaning of the First Amendment."[71]

In the criminal procedure area, the Court, under the leadership of Justice Brennan, firmly adopted selective incorporation of the various guarantees of the Bill of Rights. In the landmark case of *Malloy v. Hogan*,[72] Justice Brennan emphatically declared that the privilege against self-incrimination was applicable to state criminal proceedings.[73] He further held that the privilege was to be applied according to the same standards whether in Federal or

---

our state court system in 1948, the New Jersey Supreme Court blazed a trail for other courts in the area of policy-oriented decision making. *See* Rosen, *A Bold Court Forges Ahead*, Nat'l L.J., Nov. 5, 1984, at 1, col. 2. Although the New Jersey Supreme Court on which Justice Brennan sat was not primarily a constitutionally-oriented court, it frequently addressed major policy issues. *See generally* Fulda, *Labor Law: 1952-1954*, 9 RUTGERS L. REV. 127 (1954); Glasser, *Administrative Law*, 7 RUTGERS L. REV. 41 (1952); Heckel, *Constitutional Law*, 10 RUTGERS L. REV. 27 (1955); Knowlton, *Criminal Law and Procedure*, 8 RUTGERS L. REV. 78 (1953). Indeed, it was more functionally similar to the United States Supreme Court than many other courts. *See* Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PAC. L.J. 707, 714 (1979).

65 369 U.S. 186 (1962).

66 *See id.* at 237.

67 Brennan, The Constitution of the United States: Contemporary Ratification, Presentation at Georgetown University Text & Teaching Symposium 13 (Oct. 12, 1985) [hereinafter cited as Presentation].

68 376 U.S. 254 (1964).

69 *Id.* at 270.

70 *See id.* at 264.

71 *Id.* at 273. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 633-35 (1978).

72 378 U.S. 1 (1964).

73 *Id.* at 8.

state proceedings.[74] Indeed, Justice Brennan rejected the concept that the fourteenth amendment guarantees were " 'watered-down, subjective version[s] of the individual guarantees of the Bill of Rights.' "[75]

In addition, the Supreme Court of this era closely examined the issue of church-state separation. In *School District v. Schempp*,[76] for example, eight of the nine Justices held that Bible reading and prayer in the public schools offended the first amendment's establishment clause.[77] Justice Brennan, however, rejected a doctrinaire approach to the resolution of church-state issues and indicated in a concurring opinion that the Court was not advocating governmental hostility toward religion.[78] He wrote that the decision did not mean that the Court must "declare unconstitutional every vestige, however slight, of cooperation or accomodation between religion and government."[79]

A later case, *Shapiro v. Thompson*,[80] provoked a reevaluation of the entire substantive content of the equal protection clause. In invalidating a state's one-year residency requirement as a qualification for welfare benefits,[81] Justice Brennan, writing for the Court, held that although the state interest in limiting expenditures was legitimate, it was not compelling enough to "justify an otherwise invidious classification."[82] Furthermore, the requirement was "constitutionally impermissible" because it abridged the right of every citizen to travel freely from state to state.[83]

Justice Brennan's longstanding concern for the most needy members of our society was also exemplified in *Goldberg v. Kelly*,[84] where he held that due process required a hearing prior to the termination of welfare benefits.[85] Moreover, Justice Brennan recently stated that "[r]ecognition of so-called 'new property' rights in those receiving government entitlements affirms the essential dignity of the least fortunate among us by demanding that

---

74 *Id.* at 10.

75 *Id.* at 10-11 (quoting Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting)).

76 374 U.S. 203 (1963).

77 *Id.* at 225.

78 *See id.* at 230-304 (Brennan, J., concurring).

79 *Id.* at 294 (Brennan, J., concurring).

80 394 U.S. 618 (1969).

81 *See id.* at 622, 623.

82 *Id.* at 633.

83 *See id.* at 629-31.

84 397 U.S. 254 (1970).

85 *Id.* at 264.

government treat with decency, integrity and consistency those dependent on its benefits for their very survival."[86]

Since 1971, however, Justice Brennan has increasingly found himself urging a minority position, and for a time, his dissenting opinions became more strident and acerbic.[87] He has challenged the majority to respect the commands of decency and humanity, recalling the crucial role the judiciary traditionally has played in responding to those commands.[88] For example, in his dissenting opinion in *Rogers v. Bellei*,[89] he stated:

> Since the Court this Term has already downgraded citizens . . . having the misfortune to be illegitimate, . . . I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James* and *Labine*, the Court's opinion makes evident that its holding is contrary to earlier decisions.[90]

Notwithstanding this occasional stridency, the role of the dissenter is one that Justice Brennan has taken on with grace and responsibility. In a recent speech, he stated that "the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."[91] Although conceding that "[d]issent for its own sake has no value," Justice Brennan concluded that he and his fellow Justices had a duty to articulate "significant and deeply-held disagreement[s]."[92] Justice Brennan also sees a more direct and active role for dissenting opinions today—that of providing guidance for subsequent state court litigation. Referring to the current trend "of expanding state court protection of individual liberties," Justice Brennan stated that "dissents from federal courts may increasingly offer state courts legal theories that may be relevant to the interpretation of their own constitutions."[93]

B. Continuing Influence in New Jersey

During the past decade and a half, Justice Brennan has advocated an approach to the adjudication of individual rights that

---

86 Presentation, *supra* note 67, at 13.

87 Judge Gibbons has characterized Justice Brennan's new role as "keeper of the [Supreme] Court's conscience." Gibbons, *supra* note 50, at 738.

88 *Id.*

89 401 U.S. 815 (1971).

90 *Id.* at 845 (Brennan, J., dissenting).

91 Brennan, In Defense of Dissents, Mathew O. Tobriner Memorial Lecture at Hastings College of Law 4 (Nov. 18, 1985).

92 *Id.* at 10.

93 *Id.* at 4-5.

represents a departure from the analyses applied by the Warren Court.[94] Justice Brennan's new approach has directly influenced the development of state law in New Jersey, although in a very discreet way. In a 1977 *Harvard Law Review* article, Brennan noted that during the expansion of civil rights under the leadership of the Federal courts in the 1960's, state courts neglected to consider the protections that were guaranteed by their own constitutions.[95] In the 1970's, however, the Burger Court appeared to retreat from a liberal application of the Bill of Rights. Brennan thus noted with approval the trend of state courts, particularly the New Jersey Supreme Court, to look to their own constitutions in order to secure those rights previously protected by the Warren Court.[96] Brennan further suggested that state constitutions be used to continue the work of the Warren Court. He urged state and lower Federal courts to base their rulings on state constitutions in order to achieve a more liberal result than would be achieved under the Burger Court's interpretation of the Federal Constitution.[97]

Shortly before writing his *Harvard Law Review* article, Justice Brennan dissented from the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[98] which upheld a Texas public school financing system that was directly tied to real estate values in the local school districts.[99] Thus, parents in school districts with low real estate values could expect less revenue to be spent on their children's education on a per pupil basis than was spent on the education of children in districts with higher assessed valuations.[100] Despite an equal protection challenge based on the dual premises that poverty was a suspect classification and that education was a fundamental right,[101] the United States Supreme Court approved the Texas system of school financing.[102] The majority rejected the argument that

---

94 During his years of practice in New Jersey and his service in the New Jersey court system, Justice Brennan remained cognizant of federalism and of the prominent role played by the states before the Warren Court expanded Federal constitutional rights. *See* Brennan, *supra* note 62, at 490.

95 *Id.* at 495.

96 *Id.* at 495, 499.

97 *Id.* at 491.

98 411 U.S. 1 (1973).

99 *Id.* at 54-55.

100 *See id.* at 46-47.

101 *See id.* at 18.

102 *Id.* at 50-51. The Court stated:

> While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expend-

wealth was a suspect classification.[103] It also rejected the contention that education was a fundamental right, reasoning that such a right was not textually explicit in the Federal Constitution.[104] Justice Brennan dissented on several grounds.[105] He wrote that because education was so clearly linked to the political process and to free speech, it was a fundamental right.[106] Consequently, he believed a system that penalized those in poorer school districts should be scrutinized strictly by the Court.[107]

At the same time, the New Jersey Supreme Court was grappling with a similar issue concerning school financing, and while Chief Justice Weintraub was drafting his opinion in *Robinson v. Cahill*,[108] the *Rodriguez* opinion was published. The New Jersey court chose not to follow the result in *Rodriguez* and relied instead on the state's own constitution.[109] By relying on the New Jersey Constitution, the New Jersey Supreme Court thus began developing a constitutional analysis parallel to that subsequently articulated by Justice Brennan in his 1977 article.[110]

A similar development occurred in the area of first amendment rights. In the 1960's, the Warren Court balanced the right of free speech against the rights of owners of private property open to public use and tipped the scale in favor of first amendment values.[111] The Burger Court later retreated from this

---

itures for some districts than for others, the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system.

Id. (footnote omitted).

103 *Id.* at 27, 28. The Court stated that

[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the [poor are] not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28.

104 *Id.* at 35.

105 *See id.* at 62-63 (Brennan, J., dissenting).

106 *Id.* at 63 (Brennan, J., dissenting).

107 *Id.*

108 62 N.J. 473, 303 A.2d 273, *modified*, 63 N.J. 196, 306 A.2d 65, *cert. denied*, 414 U.S. 976 (1973).

109 *Id.* at 490, 303 A.2d at 282. Chief Justice Weintraub stated that in terms of equal protection guarantees, "a State Constitution could be more demanding." *Id.* The court based its holding, however, on the right to a "thorough and efficient" public education. *Id.* at 508-09, 303 A.2d at 292-93.

110 For a discussion of Justice Brennan's article on the use of state constitutions, see *supra* notes 95-97 and accompanying text.

111 *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza,

stance and held that the first amendment did not always apply to privately-owned property such as shopping centers.[112] In *PruneYard Shopping Center v. Robins*,[113] however, the Court took yet a different approach. It upheld the exercise of free speech rights on private property based upon California law.[114] Justice Rehnquist's opinion clearly recognized that a state's own laws may furnish an independent basis for protecting individual liberties not shielded by the Federal Constitution.[115]

Soon thereafter, the New Jersey Supreme Court relied on Justice Brennan's article and on *Robinson v. Cahill* in an opinion dealing with a similar first amendment issue.[116] In connection with an upcoming Newark mayoral election, Chris Schmid, a member of the American Labor Party, had distributed campaign materials on the Princeton University campus.[117] Because Schmid had entered the campus without permission, he was arrested for trespassing.[118] The court in *State v. Schmid*[119] indicated that Princeton could have excluded Schmid and the other campaign workers from the campus under Federal constitutional standards because alternative means of communication were readily available.[120] Justice Handler noted, however, that the provisions of the New Jersey Constitution with respect to freedom of speech are much broader than those found in its Federal counterpart.[121] According to the *Schmid* court, the New Jersey

---

Inc., 391 U.S. 308 (1968) (peaceful picketing in shopping mall protected by first amendment).

112 Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (first amendment allows shopping mall owner to prohibit distribution of handbills unrelated to mall's operation); *see also* Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (overruling Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)).

113 447 U.S. 74 (1980).

114 *Id.* at 81.

115 *Id.* Justice Rehnquist stated that "[the Court's] reasoning in *Lloyd* . . . does not *ex proprio vigore* limit the authority of the State to exercise . . . its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.*

116 *See* State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

117 *Id.* at 538-39, 423 A.2d at 616.

118 *Id.* at 541, 423 A.2d at 618. Members of the Labor Party had previously requested permission to distribute leaflets on the campus. *Id.* at 539, 423 A.2d at 617. The University had refused to allow such distribution, however. *Id.*

119 84 N.J. 535, 423 A.2d 615 (1980), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

120 *Id.* at 551, 423 A.2d at 623. These alternative means of communication included a nearby train station and a street that bisected the Princeton campus. *Id.*

121 *Id.* at 557, 423 A.2d at 626-27. The court noted that the New Jersey tradition of free political expression " 'allow[s] the widest room for discussion [and] the nar-

Constitution provided "a wellspring of individual rights and liberties,"[122] even to the extent of subjecting private property to public need when the constitution permits.[123]

Perhaps the greatest divergence between the United States Supreme Court and the New Jersey Supreme Court exists in the area of criminal procedure. In his *Harvard Law Review* article, Justice Brennan noted with approval decisions of the New Jersey Supreme Court that had departed from the prevailing Federal construction of the procedural rights of criminals and had achieved a different result based upon the New Jersey State Constitution.[124] A later criminal case, *State v. Hunt*,[125] presented perhaps the most searching analysis of New Jersey constitutional jurisprudence. In *Hunt*, several members of the state supreme court not only invoked Brennan's article and the principles embodied in *Robinson v. Cahill*, but also reflected on what standards ought to be used when departing from the minimal Federal protections.[126]

The defendants in *Hunt* were bookmakers who asserted a constitutionally protected interest in telephone toll billing records.[127] The New Jersey court departed from the United States Supreme Court, which would constitutionally protect only the telephone conversations themselves,[128] and prospectively held that criminal defendants have a reasonable expectation of privacy in their telephone bills.[129] In his concurrence, Justice Handler quoted Justice Brennan's observation that state courts,

---

rowest range for its restriction.' " *Id.* at 558, 423 A.2d at 627 (quoting State v. Miller, 83 N.J. 402, 412, 416 A.2d 821, 826 (1980)).

122 *Id.*

123 *Id.* at 562, 423 A.2d at 629. The court stated that "[s]ince it is our State Constitution which we are here expounding, it is also fitting that we look to our own strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property." *Id.*, 423 A.2d at 629-30. At the time Schmid sought to campaign, Princeton University's regulations for dissemination of political materials required that permission be obtained beforehand. *Id.* at 539, 423 A.2d at 617. Therefore, the court concluded that Princeton had unconstitutionally impaired Schmid's New Jersey rights of freedom of speech and assembly and invalidated Schmid's conviction for trespassing. *Id.* at 569, 423 A.2d at 633.

124 Brennan, *supra* note 62, at 499-500.

125 91 N.J. 338, 450 A.2d 952 (1982).

126 *See, e.g., id.* at 344-46, 450 A.2d at 955 (Justice Schreiber's majority opinion); *id.* at 353-58, 450 A.2d at 959-62 (Pashman, J., concurring); *id.* at 358-68, 450 A.2d at 962-67 (Handler, J., concurring).

127 *See id.* at 340-41, 450 A.2d at 952-53.

128 *See* Smith v. Maryland, 442 U.S. 735, 741-42 (1979).

129 *Hunt*, 91 N.J. at 348, 450 A.2d at 956-57.

rather than Federal courts, should ultimately resolve the vast majority of important constitutional issues.[130] Justice Brennan has thus evoked a strong response from the New Jersey Supreme Court to his call for state constitutional protection of individual rights. As a result, New Jersey has begun to develop a sophisticated body of state constitutional law.

C. Justice Brennan's Influence on the Current Court

In recent years, a new and increasingly vigorous phase of Justice Brennan's Supreme Court career has emerged—a return to his original role of bridge builder, political strategist, and leader. For example, he was instrumental in developing the intermediate standard of review in equal protection analysis. The new standard provides a middle ground between the strict and rational basis tests previously developed by the Warren Court. His leadership on the Court is best exemplified, however, by the recent line of cases dealing with federalism. Indeed, the Supreme Court recently adopted Justice Brennan's view that the tenth amendment does not limit the power of the Federal Government to enact legislation pursuant to the commerce clause.

1. Equal Protection Analysis

When Justice Brennan joined the Court in 1956, Justice Warren was, and continued to be, the political leader. Justice Brennan, however, has since come to be recognized as the intellectual leader of the Court.[131] This is particularly true in the area of equal protection analysis, where he has demonstrated both intellectual leadership and an ability to reconcile divergent views.

Although Justice Brennan joined the Court after its landmark decision in *Brown v. Board of Education*,[132] he exerted a great deal of influence over the subsequent development of equal protection clause jurisprudence. During Justice Brennan's ten-

---

130 *Id.* at 361, 450 A.2d at 963 (Handler, J., concurring) (quoting Brennan, *Introduction: Chief Justice Hughes and Justice Mountain*, 10 SETON HALL L. REV. xii, xii (1979)).

131 *See* Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923 (1983).

132 347 U.S. 483 (1954). *Brown* marked the modern origin of the defense of individual rights through the equal protection clause. In *Brown*, the Court invalidated the "separate but equal" doctrine approved by it in Plessy v. Ferguson, 163 U.S. 537 (1896). *See Brown*, 347 U.S. at 494-95. The *Brown* case subsequently provoked an extensive reexamination of the substantive content of the equal protection clause. *See, e.g.*, Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

ure, the Court developed a two-tiered analysis for equal protection claims. If a suspect classification such as race,[133] alienage,[134] and in some instances illegitimacy[135] were involved, or if a fundamental right such as privacy,[136] interstate travel,[137] or the right to vote[138] were involved, the Court demanded that the state show a compelling need for its action in order to satisfy a "strict scrutiny" test.[139] In other cases, such as those involving economic or social legislation, the Court required only a rational relationship between a valid state purpose and the state's chosen course of action.[140]

While Justice Brennan contributed to the development of these new standards, his most significant, and in some respects most successful, contribution to equal protection analysis evolved in the area of gender-based classifications. Prior to 1971, the Court upheld all Federal and state legislation challenged as discriminatory on the basis of sex.[141] It sustained state legislation barring women from practicing law,[142] limiting the number of hours a woman could work,[143] and restricting the opportunities for women to serve on juries.[144]

---

133 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

134 *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372, 375 (1971).

135 *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968). During this period, Justice Brennan urged, with less success, that classifications such as those based on wealth should also be deemed suspect. *See* Boddie v. Connecticut, 401 U.S. 371, 388-89 (1971) (Brennan, J., concurring).

136 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

137 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969).

138 *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 554-55 (1964).

139 L. TRIBE, *supra* note 71, §§ 16-6 to -7. Because application of this test almost invariably results in invalidation of the challenged state action, it has been characterized as "fatal in fact." *Id.*; Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

140 L. TRIBE, *supra* note 71, § 16-2. In this area, the Court was reluctant to substitute its judgment for that of elected officials. *See* Note, *supra* note 132, at 1087. Consequently, the Court allowed wide latitude to state legislatures, and virtually every equal protection challenge to economic regulation failed. *Id.*

141 *See* Barnard, *The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved?*, 17 WAYNE L. REV. 25 (1971); Gilbertson, *Women and the Equal Protection Clause*, 20 CLEV. ST. L. REV. 351 (1971); Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968); Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970).

142 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

143 Muller v. Oregon, 208 U.S. 412 (1908).

144 Hoyt v. Florida, 368 U.S. 57 (1961). The earlier case of Goesaert v. Cleary,

In 1971, however, the Court departed from its prior practice of applying only minimum scrutiny to sex-based classifications.[145] In *Reed v. Reed*,[146] the Court unanimously struck down as arbitrary an Idaho law that gave preference to a male heir for purposes of estate administration in cases where both male and female heirs were otherwise equally qualified.[147] The State of Idaho sought to justify its mandatory preference scheme essentially upon the basis of administrative convenience.[148] Nevertheless, the Court found that the gender classification created by the Idaho statute represented "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause."[149] While not specifically articulating an intermediate standard of review, the Court applied a test that can be characterized as rational basis with a bite.[150] Thus, by focusing upon the arbitrary nature of the Idaho preference, the Court avoided adding gender to the category of suspect classifications.

Two years after *Reed*, however, the Court once again attempted to determine the appropriate standard to be applied when evaluating a gender classification.[151] In *Frontiero v. Richardson*,[152] the challenged Federal statute provided increased benefits to all wives of male service personnel, while husbands of female service personnel could qualify for such benefits only upon proof that the wife in fact provided over one-half of the husband's support.[153] In a plurality opinion, Justice Brennan took a broad ap-

---

335 U.S. 464 (1948), evidenced the degree of judicial deference given to sex-based classifications. Upholding a law that restricted the right of women to work as bartenders, Justice Frankfurter stated: "Since the line [the legislators] have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." *Id.* at 467.

145 *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

146 404 U.S. 71 (1971).

147 *Id.* at 76-77.

148 *See id.* at 76.

149 *Id.* The Court relied upon F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See Reed*, 404 U.S. at 76. *Royster* held that a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster*, 253 U.S. at 415.

150 *See Reed*, 404 U.S. at 76. Chief Justice Burger stated that a sex-based classification must "[bear] a rational relationship to a state objective that is sought to be advanced by the operation of [the statute at issue]." *Id.*; *see* Gunther, *supra* note 139, at 20, 36.

151 *See* Frontiero v. Richardson, 411 U.S. 677, 682-83 (1973) (Brennan, J., plurality opinion).

152 411 U.S. 677 (1973).

153 *Id.* at 678-79 (Brennan, J., plurality opinion).

proach and held that any classification based upon sex was suspect and required the highest standard of review—strict scrutiny.[154] He noted that partly because of the distinctive nature of sexual characteristics, women still faced pervasive discrimination in educational institutions, in the labor force, and in the political arena.[155] He commented that

> what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[156]

Despite Justice Brennan's opinion in *Frontiero*, the Court later retreated from applying the strict scrutiny standard to cases that clearly involved gender-based classifications, particularly in evaluating so-called benign or compensatory legislation.[157] Nonetheless, Justice Brennan held firm to his conviction that sex was a suspect classification requiring strict scrutiny by the Court regardless of whether women were benefited or disadvantaged.[158] Thus, in *Kahn v. Shevin*,[159] when the Court upheld a Florida statute granting widows but not widowers a property tax exemption,[160] Justice Brennan dissented.[161] Although he agreed that the Florida statute neither stigmatized nor denigrated widowers who were denied the exemption,[162] Justice Brennan nonetheless urged that according to *Fron-*

---

154 *Id.* at 688 (Brennan, J., plurality opinion).

155 *Id.* at 686 (Brennan, J., plurality opinion).

156 *Id.* at 686-87 (Brennan, J., plurality opinion) (footnote omitted). Although they concurred in the result, Justices Powell, Burger, and Blackmun departed from Justice Brennan's analysis, finding it unnecessary to deem gender a suspect classification. *Id.* at 691-92 (Powell, J., concurring). They also urged that the Court await the outcome of the equal rights amendment, which was then pending. *Id.* at 692 (Powell, J., concurring). Justice Rehnquist dissented. *Id.* at 691 (Rehnquist, J., dissenting). He adopted the reasoning of the district court that the statute satisfied the *Reed* test because it was a rational means to a legitimate legislative end—administrative convenience in the disbursement of dependency benefits. *Id.*; *see* Frontiero v. Laird, 341 F. Supp. 201, 207 (M.D. Ala. 1972), *rev'd sub nom.* Frontiero v. Richardson, 411 U.S. 677 (1973).

157 *See infra* notes 159-181 and accompanying text.

158 *See, e.g.*, Kahn v. Shevin, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

159 416 U.S. 351 (1974).

160 *Id.* at 352.

161 *See id.* at 357-60 (Brennan, J., dissenting).

162 *Id.* at 359 (Brennan, J., dissenting).

tiero, sex was a suspect classification.[163] The legislation was therefore subject to strict scrutiny whether the class benefited was male or female.[164] He noted that the statute was "plainly overinclusive, for the $500 property tax exemption may be obtained by a financially independent heiress as well as by an unemployed widow with dependent children."[165] Notwithstanding its legitimate interest in "alleviating the effects of past economic discrimination against women,"[166] Brennan argued that "the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by the use of feasible, less drastic means."[167]

Justice Brennan also dissented in *Schlesinger v. Ballard*,[168] where the Court was faced with a challenge to a Federal statute subjecting a male navy officer who twice failed to be selected for promotion to mandatory discharge regardless of the length of time he had been in active service.[169] Under a different statute, a female officer was subject to mandatory discharge only after thirteen years of active service without promotion.[170] In upholding the regulation, the Court first observed that because female officers were not assigned to combat duty and thus had less opportunity for advancement than male officers, the two groups were not similarly situated.[171] The Court thus viewed the classification as compensatory rather than discriminatory.[172] The majority observed that the "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.' "[173] Justice Brennan again argued that because a gender classification was involved, the scheme must be examined under the strict scrutiny standard.[174] He also noted that the legislative history failed to demonstrate a compensatory purpose with regard to female officers.[175] On the contrary, in Brennan's view "the legislative history [was] replete with indications of a decision *not* to give women

---

163 *Id.* at 357 (Brennan, J., dissenting).
164 *See id.* at 357-58 (Brennan, J., dissenting).
165 *Id.* at 360 (Brennan, J., dissenting).
166 *Id.* at 358 (Brennan, J., dissenting).
167 *Id.* at 360 (Brennan, J., dissenting).
168 419 U.S. 498 (1975).
169 *Id.* at 499 & n.1.
170 *Id.* at 499-500 & n.2.
171 *Id.* at 508.
172 *See id.*
173 *Id.* (quoting H.R. REP. No. 216, 90th Cong., 1st Sess. 5 (1967)).
174 *Id.* at 511 (Brennan, J., dissenting).
175 *Id.* at 514 (Brennan, J., dissenting).

any special advantage."[176]

Similarly, in *Geduldig v. Aiello*,[177] Brennan dissented from the Court's application of a mere rational basis test to the statutory exclusion of pregnancy benefits from California's disability insurance scheme.[178] The majority maintained that the statute involved not a gender-based classification, but a distinction between pregnant and nonpregnant persons.[179] In his dissent, Brennan stated that "by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation. . . . Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[180]

Because it had become apparent that a majority of the Court would not accept sex as a suspect classification, Justice Brennan took a different approach in 1975 when faced with the task of writing the opinion for the Court in a case involving a gender-based classification.[181] *Weinberger v. Wiesenfeld*[182] involved a provision of the Social Security Act that provided survivors' benefits to widows having minor children in their care.[183] In the case of a widower with minor children, however, such benefits were provided only to the children and not to the widower.[184]

The Court invalidated the statute because its distinction between men and women was indistinguishable from the legislative scheme disapproved in *Frontiero*.[185] Justice Brennan observed that both provisions assumed that the earnings of male workers were vital to a family while those of a female were not.[186] Rather than regarding the statute as discrimination against widowers, however, Justice Brennan viewed the scheme as "denigrat[ing] . . . the efforts of women who do work and whose earnings contribute significantly to their families' support."[187] He noted that the deceased wife "not only failed to receive for her family the same protection which a similarly situated male worker would have received, but she also was

176 *Id.* at 516 (Brennan, J., dissenting).
177 417 U.S. 484 (1974).
178 *See id.* at 498 (Brennan, J., dissenting).
179 *Id.* at 496 n.20.
180 *Id.* at 501 (Brennan, J., dissenting).
181 *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).
182 420 U.S. 636 (1975).
183 *Id.* at 637.
184 *Id.* at 637-38.
185 *Id.* at 642-43.
186 *Id.* at 643.
187 *Id.* at 645.

deprived of a portion of her own earnings in order to contribute to the fund out of which benefits would be paid to others."[188] In order to gain a consensus, Brennan carefully crafted his opinion and refrained from articulating the conclusion that sex was a suspect classification. While not abandoning his prior position, he built on the entire body of precedent and cited both *Reed* and *Frontiero*.[189]

Wiesenfeld highlighted the need for a higher standard of review in cases involving quasi-suspect classifications. In 1976, Justice Brennan responded to this need and developed a new standard for equal protection analysis in cases of gender-based discrimination.[190] Justice Brennan's new rule reflected a consensus of the various Justices' differing views.[191] In *Craig v. Boren*,[192] an Oklahoma statute that prohibited the sale of 3.2% beer to females under the age of eighteen and males under the age of twenty-one was declared unconstitutional on the ground that the gender classification impermissibly denied equal protection to males between the ages of eighteen and twenty-one.[193] Justice Brennan declared that "[t]o withstand a Constitutional challenge,. . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[194]

Justice Brennan noted that both *Reed* and *Frontiero* had rejected administrative convenience as a sufficiently important governmental objective to justify gender-based distinctions.[195] He distinguished *Craig* from *Kahn* and *Ballard*, which had upheld gender classifications designed to remedy past discrimination in economic and military contexts.[196] Although the Court agreed that public health and traffic safety were important governmental concerns, it determined that the statistics relied upon by Oklahoma did not support the conclusion that the gender-based classification was substantially related to the achievement of those objectives.[197] The Court thus concluded that under *Reed*, the statute could not withstand an equal protection

188 *Id.*

189 *See id.* at 642-53.

190 *See* Craig v. Boren, 429 U.S. 190, 197-99 (1976).

191 Prior to this time, the Court had used "a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

192 429 U.S. 190 (1976).

193 *See id.* at 204.

194 *Id.* at 197.

195 *Id.* at 198.

196 *Id.* at 198 n.6.

197 *Id.* at 199-200.

challenge.[198]

In the cases immediately following *Craig*, the Court successfully employed the intermediate standard of review and invalidated gender-based legislation that burdened economic rights or reinforced sexual discrimination.[199] For instance, in *Califano v. Goldfarb*,[200] Justice Brennan, writing for a plurality of the Court, invalidated a provision of the Social Security Act under which a widow was entitled to survivors' benefits based on the earnings of her deceased husband, but a widower was eligible for benefits only if he had received at least one-half of his support from his deceased spouse.[201] Justice Brennan viewed the system as discrimination against covered, wage-earning women who received less protection for their spouses than similarly situated men.[202] He concluded that

> [t]he only conceivable justification for writing the presumption of wives' dependency into the statute is . . . based simply on "archaic and overbroad" generalizations . . . that it would save the Government time, money, and effort simply to pay benefits to all widows, rather than to require proof of dependency of both sexes. . . . [S]uch assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits.[203]

Similarly, in *Orr v. Orr*,[204] the Court invalidated a state statute that permitted alimony for wives but not for husbands.[205] Once again, Justice Brennan wrote for the majority.[206] He rejected the proffered state objective of allocating primary responsibility for the family to the husband.[207] Brennan identified two possible objectives that might be considered sufficiently important to support a

---

198 *Id.* at 200. Justice Rehnquist's dissent, however, questioned the validity of the substantial relation test:

> 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? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation. . . .

Id. at 221 (Rehnquist, J., dissenting).

199 *See* Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977).

200 430 U.S. 199 (1977).

201 *Id.* at 201-02 (Brennan, J., plurality opinion).

202 *See id.* at 206-07 (Brennan, J., plurality opinion).

203 *Id.* at 217 (Brennan, J., plurality opinion) (citations omitted).

204 440 U.S. 268 (1979).

205 *Id.* at 270-71.

206 *Id.* at 270.

207 *Id.* at 279-80.

gender-based classification: (1) providing help for needy spouses, and (2) atoning for past economic discrimination.[208] He determined that the statute under consideration in *Orr* promoted neither objective.[209] Because Alabama had a procedure for examining the financial circumstances of each party prior to entry of an alimony order, Justice Brennan concluded that the statute, rather than promoting administrative convenience, actually furthered sexual discrimination and was therefore unconstitutional.[210]

In *Personnel Administrator v. Feeney*,[211] however, Brennan once again assumed the role of dissenter.[212] The majority used a two-pronged inquiry in its assessment of a statute that was concededly gender-neutral on its face.[213] Because it gave preference to veterans over nonveterans in employment, the Court determined that the statute did not discriminate on the basis of gender.[214] Nevertheless, Justices Marshall and Brennan argued that the absolute veterans' preference system evinced purposeful, gender-based discrimination by "render[ing] desirable state civil service employment an almost exclusively male prerogative."[215] They applied the intermediate standard and argued that because the statutory scheme did not bear a substantial relationship to a legitimate governmental objective, it violated the equal protection clause.[216]

Justice Brennan again joined the dissent in *Rostker v. Goldberg*,[217] where the Court held that the Selective Service Act, which required draft registration of males but not females, did not violate the fifth amendment.[218] Because Congress had banned combat duty for women, the majority concluded that men and women were not similarly situated in terms of draft registration.[219] The majority further held that because the purpose of the draft was "to develop a pool of potential combat troops," Congress reasonably had exempted wo-

---

208 *Id.* at 280.
209 *Id.* at 281-82.
210 *See id.* at 281-83.
211 442 U.S. 256 (1979).
212 *See id.* at 281 (Marshall, J., dissenting). Justice Brennan joined in Justice Marshall's dissent. *Id.*
213 *See id.* at 274.
214 *Id.* at 274-75. The plaintiff argued that 98% of veterans were male and that the statute thus impacted adversely on the public employment opportunities of women. *See id.* at 270-71. Nonetheless, the Court held that the state law did not reflect invidious discrimination. *Id.* at 280-81.
215 *Id.* at 283 (Marshall, J., dissenting).
216 *Id.* at 286 (Marshall, J., dissenting).
217 453 U.S. 57 (1981).
218 *Id.* at 83.
219 *Id.* at 78.

men from the draft.[220] The dissent took issue with the majority's view of the legislative purpose.[221] It argued that the gender distinction constituted mere stereotyping and was not substantially calculated to further the governmental objective of raising armies.[222] Further, the dissenters emphasized that the Court, not Congress, should determine "whether there exists the constitutionally required 'close and substantial relationship' between the discriminatory means employed and the asserted governmental objective."[223]

Justice Brennan returned to the majority in *Mississippi University for Women v. Hogan*.[224] By a narrow five-to-four vote, the Court sustained an equal protection challenge brought by an otherwise qualified male nursing school applicant who was denied admission to the University because of his sex.[225] The state attempted to justify its gender preference by claiming that it compensated women for past discrimination in higher education.[226] The Court noted, however, that the labor force in fact reflected a predominance of females in the nursing field.[227] Instead of compensating for past discrimination, the University's "policy of excluding males from admission to the School of Nursing tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job."[228]

The "intermediate tier" standard of review first articulated by Justice Brennan in *Craig v. Boren* thus continues to be used by the Court in several contexts. In the gender classification area, however, Brennan has been less than satisfied with the results. Applying the very test he crafted, the Court has upheld classifications based upon sex, placing Justice Brennan once again in the minority. Ironically, after forging a coalition in this area, Justice Brennan once again finds himself in the position of the dissenter.

2. Federalism

In contrast to its application of his gender discrimination theory, the Court reaffirmed Justice Brennan's view of the proper balance of power between the states and the Federal Govern-

220 *Id.* at 79.
221 *See id.* at 97 (Marshall, J., dissenting).
222 *See id.* at 86, 111 (Marshall, J., dissenting).
223 *Id.* at 89-90 (Marshall, J., dissenting).
224 458 U.S. 718 (1982).
225 *See id.* at 720-21, 723.
226 *Id.* at 727.
227 *Id.* at 729.
228 *Id.* (footnote omitted).

ment in our federalist system last Term.[229] Justice Brennan has consistently taken the position that the tenth amendment does not affirmatively limit Federal power in the economic and social spheres.[230] Although the source of Federal power has been hotly debated over the years,[231] Justice Brennan has relied on the fourteenth amendment to uphold the National Government's predominance in these areas.

For example, in the landmark case of *Katzenbach v. Morgan*,[232] the Court struck down a state statute that required literacy in English as a prerequisite for voting in New York because it conflicted with the Federal Voting Rights Act, which proscribed the use of such tests.[233] Writing for the majority, Justice Brennan equated congressional power under section five of the fourteenth amendment to the powers contained in the necessary and proper clause,[234] which had been interpreted expansively by Chief Justice John Marshall in *McCulloch v. Maryland*.[235] Brennan described section five as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[236]

The dissent in *Morgan* argued that if Congress was permitted to expand and interpret the equal protection clause, it might similarly contract the protections of that clause.[237] Justice Brennan replied:

> We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or

---

229 *See* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005, 1021 (1985).

230 *See* National League of Cities v. Usery, 426 U.S. 833, 862, 875 (1976) (Brennan, J., dissenting).

231 *See, e.g., Discrimination in Public Accomodations Affecting Interstate Commerce: Hearings on S. 1732 Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess. 66-71 (1963) (statement of Robert F. Kennedy, United States Attorney General); *see also* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (Civil Rights Act of 1964 upheld on basis of commerce clause); United States v. Darby, 312 U.S. 100, 114 (1941) (commerce clause permits Federal regulation of interstate movement of goods deemed injurious to public welfare). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 160 (11th ed. 1985).

232 384 U.S. 641 (1966).

233 *See id.* at 646-47.

234 *Id.* at 650.

235 17 U.S. (4 Wheat.) 316 (1819); *see also* U.S. CONST. art. I, § 8, cl. 18 (necessary and proper clause).

236 *Morgan*, 384 U.S. at 651.

237 *Id.* at 668 (Harlan, J., dissenting).

> dilute these guarantees. Thus, for example, an enactment authorizing the State to establish racially segregated systems of education would not be—as required by § 5—a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.[238]

According to Justice Brennan, the Court was prohibited from reviewing Congress's resolution of the conflicting considerations involved in the legislation.[239] He stated that the Court need only "perceive a basis upon which the Congress might resolve the conflict as it did."[240] Thus, if the measure at issue is determined to be an appropriate enforcement of the commands of the fourteenth amendment, it is within Congress's broad power under section five to enact such legislation.[241]

This theory of Federal power espoused by Justice Brennan in *Morgan* was directly challenged in *National League of Cities v. Usery*,[242] where five Justices joined to invalidate amendments to the Fair Labor Standards Act that extended wage and overtime provisions to employees of state and local government entities.[243] Although the amendments were held to be within the grant of legislative authority contained in the commerce clause, the majority viewed the tenth amendment as an affirmative limitation upon the exercise of that authority.[244]

---

238 *Id.* at 651 n.10.

239 *Id.* at 653.

240 *Id.*

241 *See id.* at 650-51.

242 426 U.S. 833 (1976). For a discussion of *National League of Cities* and its progeny, see Matsumoto, *National League of Cities—From Footnote to Holding—State Immunity from Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35; Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165 (1977); Schwartz, National League of Cities v. Usery—*The Commerce Power and State Sovereignty Redivivus*, 46 FORDHAM L. REV. 1115 (1978).

243 *National League of Cities*, 426 U.S. at 851-52.

244 *See id.* at 842, 845. In formulating the tenth amendment principle, the majority distinguished congressional regulation of private-sector activities from regulation of state and local governmental activities. *Id.* at 845. Regulations affecting the private sector were held permissible and outside the operation of the tenth amendment because individual businesses are subject to both state and Federal sovereignty. *Id.* In contrast, the Court held, the tenth amendment prohibits Congress from impairing the attributes of state sovereignty by enacting legislation aimed at regulating certain state and local government activities. *Id.* Thus, Federal legislation that "directly displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions" was prohibited by the tenth amendment. *Id.* at 852. In a concurring opinion, Justice Blackmun, who supplied the majority's fifth vote, indicated that legislation that was otherwise invalid under the majority's test would be permissible "where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential." *Id.* at 856 (Blackmun, J., concurring).

Justice Brennan's scholarly and forceful dissenting opinion disagreed with the very premise upon which the majority based its position.[245] He observed at the outset that all of the Justices agreed that Congress had enacted the 1974 amendments pursuant to its plenary power " '[t]o regulate Commerce . . . among the several States.' "[246] Though laws enacted under the commerce power may not infringe on individual liberties protected by the Bill of Rights, Justice Brennan argued that "there is no restraint based on state sovereignty . . . anywhere . . . in the Constitution" that would prevent Congress from functioning in accordance with its delegated powers.[247] He found the majority's "ill-conceived abstraction" to be "a transparent cover for invalidating a congressional judgment with which they disagree."[248] He further chided the Court for failing to exercise judicial restraint, noting that "[i]t is unacceptable that the judicial process should be thought superior to the political process in this area."[249]

Justice Brennan also pointed out that the states are fully able to protect their own interests by exercising their political power through their representatives in Congress.[250] He observed that the nature of the political system of representation insures that Congress will be mindful of the states' concerns.[251] In a particularly

---

245 *See id.* at 856-58 (Brennan, J., dissenting). Justice Brennan traced the history of Supreme Court decisions that defined the scope of Congress's power under the commerce clause. *Id.* at 857-60 (Brennan, J., dissenting). He noted that the Court had consistently reaffirmed the view of Chief Justice John Marshall "that restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process." *Id.* at 857 (Brennan, J., dissenting).

246 *Id.* at 856-57 (Brennan, J., dissenting) (quoting U.S. CONST. art. I, § 8, cl. 3).

247 *Id.* at 858 (Brennan, J., dissenting). Justice Brennan analogized the majority's restrictive view of Federal power to the view that prevailed during the Great Depression. *Id.* at 868 (Brennan, J., dissenting). The Court's invalidation of New Deal legislation prompted President Roosevelt to propose his Court-packing plan. *See id.* According to Justice Brennan, the Court's abandonment of an overly restrictive construction of the commerce power led to defeat of the Court-packing plan. *Id.* He noted, however, that even the dissenters in the New Deal era cases had failed to draw a distinction between the states and private parties because "in their view, what was not commerce for one was commerce for no one." *Id.* at 869 n.9 (Brennan, J., dissenting).

248 *Id.* at 867 (Brennan, J., dissenting) (footnote omitted).

249 *Id.* at 876 (Brennan, J., dissenting).

250 *Id.* at 877-78 (Brennan, J., dissenting).

251 *See id.* at 877 (Brennan, J., dissenting). Justice Brennan then pointed to the Federal budget as an illustration of the states' political powers. *Id.* at 878 (Brennan, J., dissenting). He noted that substantial Federal assistance is available to the States for meeting costs in such areas as fire and police protection and summer youth programs. *See id.* He concluded that "this demonstrated ability to obtain funds from the Federal Government for needed State services [establishes] that the

provocative comment, illustrative of the bitter dissents that characterized this period, Justice Brennan implied that the Court was not equally solicitous of the concerns of the individual whose political voice was not as strong as that of the states.[252] To the contrary, he wrote, the Court "frequently remand[s] powerless individuals to the political process by invoking doctrines of standing, justiciability, and remedies," while "those entities with perhaps the greatest representation in the political process" are welcomed by a Court that "embraces their political cause, and overrides Congress' political decision."[253]

Soon after *National League of Cities* was decided, a unanimous Court held in *Hodel v. Virginia Surface Mining & Reclamation Association*[254] that the tenth amendment does not limit congressional power to preempt or displace state regulation of coal mining, a private activity.[255] Although Justice Brennan did not write the majority opinion in *Hodel*, it clearly incorporated the views expressed in his *National League of Cities* dissent.[256] Even where Federal legislation might be impermissible under the *National League of Cities* test, the Court stated, the legislation will not necessarily fall if the Federal interest outweighs the competing state interest.[257] Thus, the *Hodel* Court limited the scope of the holding in *National League of Cities* by concluding that when an activity affects interstate commerce, the courts need only determine whether Congress could have had a rational basis for enacting the challenged statute.[258]

In *National League of Cities*, Justice Brennan also asked, "Can the States engage in businesses competing with the private sector and then come to the courts arguing that withdrawing the employees of those businesses from the private sector evades the power of the federal government to regulate commerce?"[259] His question was answered in *United Transportation Union v. Long Island Rail Road*,[260] where a unanimous Court noted that "there is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas

States' influence in the political process is adequate to safeguard their sovereignty." *Id.* at 878 (footnote omitted).

252 *See id.* at 878 n.14 (Brennan, J., dissenting).

253 *Id.* at 878-79 n.14 (Brennan, J., dissenting).

254 452 U.S. 264 (1981).

255 *Id.* at 290-91.

256 *See id.* at 283-93.

257 *Id.* at 288 n.29.

258 *See id.* at 291.

259 *National League of Cities*, 426 U.S. at 872 (Brennan, J., dissenting).

260 455 U.S. 678 (1982).

traditionally subject to federal statutory regulation."[261] The Court therefore held the challenged Railway Labor Act constitutional because it was within congressional authority to regulate labor relations in the railroad industry, and because the statute did not directly diminish the states' "ability 'to structure integral operations in areas of traditional governmental functions.' "[262]

The Court continued to erode the *National League of Cities* rationale in *Federal Energy Regulatory Commission v. Mississippi*.[263] In that case, a sharply divided Court determined not only that regulation of public utilities was within Congress's commerce clause power,[264] but also that Congress was free to preempt the field of energy regulation entirely.[265] Justice Brennan joined the majority opinion, which held that Congress could also espouse "a less intrusive scheme" and afford a limited regulatory role to the states.[266] The Court concluded that "because the . . . challenged [statute] simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals, [it did] not threaten the States' 'separate and independent existence.' "[267]

Justice Brennan contributed to the further erosion of *National League of Cities* in *EEOC v. Wyoming*.[268] In that case, the Court upheld, by a five-to-four vote, the Age Discrimination in Employment Act of 1967 (ADEA) as it applied to state and local governments.[269] Specifically, the Court held that state-employed game wardens were protected by the ADEA's provision prohibiting age discrimination.[270] Justice Brennan's majority opinion noted that because the Act was clearly within Congress's commerce clause power, it was unnecessary to decide whether the statute could also be upheld under section five of the fourteenth amendment.[271] Applying the *National League of Cities* test, the Court found that the ADEA did not " 'directly impair' the State's ability to 'structure integral operations in areas of traditional governmental functions' "[272] because Wyoming

---

261 *Id.* at 687.
262 *Id.* at 684-85 (quoting *Hodel*, 452 U.S. at 288).
263 456 U.S. 742 (1982).
264 *Id.* at 757.
265 *Id.* at 759.
266 *Id.* at 765. The majority viewed Congress's regulatory scheme as a plan of "cooperative federalism," which would enable the states to administer their own programs in order to meet particular local needs. *Id.* at 767.
267 *Id.* at 765 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).
268 460 U.S. 226 (1983).
269 *Id.* at 243.
270 *Id.* at 238-39.
271 *Id.* at 243.
272 *Id.* at 239.

could meet its goal of assuring the physical preparedness of its game wardens in ways other than through a blanket mandatory retirement age.[273] Justice Brennan distinguished *National League of Cities* by stating that the ADEA would not have "a direct or an obvious negative effect on state finances."[274]

Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[275] the Court overruled *National League of Cities*[276] and explicitly adopted Justice Brennan's view of federalism. *Garcia* held that Congress violated no affirmative limitation on its commerce power by extending the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) to metropolitan transit employees.[277] Justice Blackmun, who had cast the swing vote in *National League of Cities*, wrote the opinion, which reiterated and built on Justice Brennan's earlier observations concerning the nature of our political system.[278] He found the "traditional governmental functions" prong of the *National League of Cities* test to be unworkable and inconsistent with established principles of federalism.[279] The Court held that the states' continued role in the federal system is guaranteed not by limits on the commerce clause power, but by the structure of the Federal Government itself: "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated."[280] Thus, at least for the moment, Justice Brennan's view of our political system prevails.[281]

V. CONCLUSION

Despite an unprecedented forty-one dissenting votes during the 1985 Term, Justice Brennan's views with respect to some of the country's most important and highly-publicized issues, such

---

273 *Id.*

274 *Id.* at 241.

275 105 S. Ct. 1005 (1985).

276 *Id.* at 1021. *See generally* Lynch, Garcia v. San Antonio Metropolitan Transit Authority: *An Alternate Opinion*, 16 SETON HALL L. REV. 74 (1986).

277 *Garcia*, 105 S. Ct. at 1020.

278 *See id.* at 1010-16.

279 *Id.* at 1016.

280 *Id.* at 1020.

281 *Compare id.* (*Garcia* majority's view of federalism) *with National League of Cities*, 426 U.S. at 876-78 (Brennan, J., dissenting) (Justice Brennan's view of our political system). For a recognition that the *National League of Cities* rationale may someday be revived, see Lynch, *supra* note 276, at 75.

as church-state relations and federalism, guided the Court in its attempts to apply the Constitution to a society whose problems and values are constantly changing.[282] Justice Brennan's effectiveness on the Court is attributable not only to his intellect and charismatic personality, but also to the negotiating skills he first developed while a labor attorney in New Jersey.[283] These traits have led to his characterization "as the master strategist of the Burger Court."[284] Although Justice Brennan's tenure on the Court has not ended, history will certainly view him as a compassionate Justice, committed to individual liberties and careful of both procedural and substantive safeguards. Indeed, he is a child of New Jersey of whom we can all be proud.

---

282 *See* Greenhouse, *Rulings of High Court's Term Reaffirm Church-State Barriers*, N.Y. Times, July 8, 1985, at B5, col. 1.

283 Serrill, *The Power of William Brennan*, TIME, July 22, 1985, at 62.

284 *Id.*