JUSTICE BRENNAN AND THE BURGER COURT: POLICY-MAKING IN THE JUDICIAL THICKET*

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I. INTRODUCTION

Of the Justices whose service predates the era of the Burger Court, none has contributed more compellingly or more effectively to the shaping of the Supreme Court's contemporary role than William Joseph Brennan, Jr. It is remarkable that a nominal Democrat, appointed by a Republican President during the McCarthy years, has come to exert such pervasive leadership in a persistently divided body. It is no less exceptional that Brennan's persuasiveness and direction succeeded so well not only during the era of the Warren Court, when his views were compatible with the majority outlook, but that his influence continued, albeit more often in dissent, in a Court less receptive to the emphatic activism of the past.

That a Chief Justice, by reason of temperament, ability, or interests, may not always place his distinctive imprint on the products of the Court over which he presides has come to be accepted lore. Hugo Black, more than Earl Warren, had a major impact upon judicial developments during the Warren years. Yet because of Black's intransigence and his insistence upon an "absolutist" construction of constitutional language, it fell to Justice Brennan, a comparative novice at the time, to serve as an intermediary between opposing blocs. More positively, it was Brennan, the proponent of pragmatic liberalism, who proved to be capable of attracting broadbased support in the fashioning of opinions.

What were the factors and events that molded this adept master of coalition-building? Were there elements in Brennan's background that gave rise to his unusual skill in the art of decisionmaking? How did he come upon a strategy, however make-

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shift or randomly planned, that projected an image of flexibility and reasonableness but that sometimes yielded little in terms of specific policy objectives and the means for their attainment? Wherein lay the clues to three decades of achievement in the implementation of goals that, in many ways, transformed the United States more significantly and more dramatically than the acts of better known politicians? When final judgments are made, will Justice Brennan be regarded less as an ideologue and a staunch advocate of social change than as an adroit jurist whose philosophy happened to coincide with the nation's avant-garde mood at an historically opportune time?

II. THE EARLY YEARS—A BRIEF RETROSPECTIVE

William Brennan was born in 1906 in Newark, New Jersey. He was the second of eight children of Irish immigrant parents. His father, Newark's Director of Public Safety and Police Commissioner, had campaigned for union reforms and served as business agent for several labor unions.[1] During the younger Brennan's early years, he attended parochial schools, but later transferred to the city's public schools. Thereafter, he was graduated from the Wharton School of the University of Pennsylvania with a degree in economics. Following attendance at the Harvard Law School on scholarship, he was awarded a law degree in 1931.

At this point, Brennan's career took on some of the attributes that prepared the way for his meteoric rise from comparative obscurity to a seat on the United States Supreme Court. A clerkship, dating from law school days, led to a post in one of New Jersey's leading law firms where the young practitioner specialized in the labor relations field. During World War II, Brennan served as an officer in charge of military procurement operations with responsibilities that once again included labor-related activities.[2]

A reform climate in post-war New Jersey prompted a continuation of efforts to revise an antiquated state constitution, especially its outmoded and cumbersome judicial article.[3] Brennan

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[1] Dorman, *Justice Brennan: The Individual and Labor Law*, 58 CHI.[-]KENT L. REV. 1003, 1004 (1982).

[2] For a brief review of Justice Brennan's early years see DeFeis, *Justice William Brennan: An Appraisal*, in NEW JERSEY AND THE CONSTITUTION (E. Ferrer ed. 1986).

[3] Friedelbaum, *Constitutional Law and Judicial Policy Making*, in POLITICS IN NEW JERSEY 199-200 (R. Lehne & A. Rosenthal eds. 1979).

appeared before the judiciary committee of the constitutional convention of 1947 in his capacity as an associate editor of the *New Jersey Law Journal*.[4] Indeed, Brennan's participation in the ensuing successful campaign for the adoption of the new constitution led to his first appointment to judicial office.

Having secured a seat on the superior court, a state-wide tribunal of original jurisdiction, Brennan was subsequently assigned to the appellate division, the state's intermediate court. In 1952, he became an associate justice of the Supreme Court of New Jersey. Brennan's interest in pretrial procedures designed to expedite the course of litigation, brought him to the attention of Chief Justice Arthur T. Vanderbilt, nationally renowned as a judicial administrator. It was Vanderbilt who had recommended Brennan's successive nominations, first to the superior court and then to the supreme court, by New Jersey's Republican Governor Alfred E. Driscoll.

When Associate Justice Sherman Minton resigned early in the fall of 1956, President Dwight D. Eisenhower selected Brennan as Minton's replacement on the United States Supreme Court. In part, the nomination was said to have resulted from a misplaced reliance on the contents of a "conservative" speech which, in fact, Brennan had not written but which he had agreed to deliver for an ailing Vanderbilt. All the same, the candidate met other conditions that the President and his Attorney General, Herbert Brownell, reportedly had set forth. Brennan was relatively young (50 at the time), with seven years experience at various levels in the revitalized New Jersey court system. Reports on the candidate by the American Bar Association and local bar groups were reassuringly favorable. Probably not lost on the President, then in the midst of a reelection campaign, were the political gains to be realized by a restoration of the Roman Catholic seat on the Court and the appointment of a nominal Democrat attractive to the Eastern Establishment. Eisenhower's Press Secretary, James B. Haggarty, noted that Brennan's acceptance of the nomination was exceptionally prompt and unmistakably positive; and Brennan's boyhood friendship with the White House Appointments Secretary, Bernard Shanley, assured continuing and enthusiastic support.[5]

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[4] IV CONSTITUTIONAL CONVENTION OF 1947 (State of New Jersey) 201-04.

[5] For a brief but revealing account of Brennan's candidacy see H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 262-65 (1985).

In any event, Eisenhower's misgivings over the possible consequences of a judicial stalemate because of an evenly divided Court caused him to ask Brennan to serve immediately on an interim basis. The practice proved to be awkward both to the Justice-designate and to the Senate since questions raised at the confirmation hearings touched upon issues in pending cases. As a result, Brennan's responses before the Senate Judiciary Committee in February of 1957 were notably vague. In addition, Senator Joseph McCarthy of Wisconsin, whose stridently anti-communist crusade was in decline by this time, harassed the candidate by introducing segments of his earlier speeches out of context and by making unfounded charges through innuendo.[6] Fortunately for Brennan, neither the committee nor the Senate itself was measurably impressed by McCarthy's diatribe; in the final Senate tally, McCarthy cast the only vote in opposition to Brennan's confirmation.

How, then, did the aggregate of these prior experiences affect Brennan's judicial outlook as he moved to the Supreme Court? Though causal relationships linking childhood and adult behavior are difficult to substantiate, the elder Brennan's union activities may have had some effect in creating ties to the field of labor-management relations. Much of Brennan's law practice, as well as his wartime posts, reflected a developing expertise in the area. It is possible that his treatment of labor issues before the Supreme Court was influenced, to some extent, by such early experiences, but labor law was peripheral to Brennan's long-term judicial interests.

A more persuasive case can be made for linkages between Brennan's service on the appellate courts of New Jersey and the usages that he found on the United States Supreme Court. The state supreme court, as it was constituted in 1948, developed a significant body of practices that closely paralleled those in the nation's highest court. The New Jersey Supreme Court is a collegial tribunal without panels and, to a great extent, its members determine its limited docket. More importantly, the state supreme court, under the leadership of Chief Justice Vanderbilt, developed an activist tradition, a penchant for public policy making, and a dedication to result orientation which, if anything, was more overt than that reflected in the products of the national Supreme Court. Brennan's effortless transition to his new post

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[6] *See Hearings on the Nomination of William Brennan, Jr. Before the Senate Comm. on the Judiciary*, 85th Cong., 1st Sess. 51 (1957).

may have been the result of his close association with Vanderbilt and his interaction with colleagues on the state court. Surely the conduct of judicial conferences and the search for consensus in the drafting of opinions in the United States Supreme Court were not alien to Brennan as, indeed, they have been to Court appointees not familiar with like procedures and conventions.[7]

While Justice Brennan's influence reached its zenith in the waning years of the Warren Court,[8] it predictably declined as the Nixon appointees (including the new Chief Justice) began to overcome the initial effects of "socialization" and to exercise more effective control over the Court's agenda. Yet it ought not to be assumed that most of the controversial precedents of the Warren era were abruptly swept aside or that innovative decisions no longer could be expected to result. The nature of the institution, its traditions, and the dynamism associated with incremental growth belie such facile generalizations. To the surprise of Court watchers, Justice Blackmun slowly but unmistakably moved toward the center and, at times, to the liberal wing of the Court. Justice Powell, though not a replica of the second Justice Harlan, maintained a steady course slightly to the right of the centrist position. Justice Stevens, the sole Ford appointee, revealed that he could be a maverick and, on more occasions than anticipated, he joined the liberal Justices.

It is always difficult to mark the exact location of a Justice on the Court's political scale regardless of the measures applied. What seems clear is the emergence of Justice Brennan as the leader of the liberal faction during the Burger era. In fact, Justice Brennan's dedication to "progressive" causes became more pronounced, perhaps by comparison with the attitudes of the Nixon appointees or perhaps because of a maturing of his own deeply held predilections. Regardless of the prevailing majority, Justice Brennan's brief but eventful tenure on the courts of New Jersey undoubtedly helped to mold his philosophy. If, in fact, the New

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[7] *See* Hall, *Mr. Justice Brennan—The Earlier Years*, 15 HARV. C.R.-C.L. L. REV. 288-89 (1980). For a thoughtful assessment of Justice Brennan's indoctrination to the Supreme Court, see Heck, *The Socialization of a Freshman Justice: The Early Years of Justice Brennan*, 10 PAC. L.J. 707 (1979). Interestingly enough, Brennan himself has rejected the notion that service on a state supreme court offers useful preparation for the nation's highest court. In 1973, he wrote: "I say categorically that no prior experience, including prior judicial experience, prepares one for the work of the Supreme Court." Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 484 (1973).

[8] *See* Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841, 841 (1980).

Jersey Supreme Court's record may be described as one of the most "progressive" in the nation, it is equally apparent that instances of its activism are selective. The court's major impact has been in the area of social reform, particularly its much-heralded initiatives with reference to exclusionary zoning and school finance.[9] During the past three decades, the range of Justice Brennan's exploits on the United States Supreme Court has been far broader, though his contributions and their pacing resemble, in spirit if not in substance, judicial performance in New Jersey.

III. EGALITARIAN ACTIVISM AND THE COURT

The most pervasive theme that extended through Justice Brennan's opinions during the Burger years was that of egalitarianism. A persistent quest for emphatic social reform seemed to derive from the same tradition that gave rise to such cases as *Robinson v. Cahill*[10] and *Southern Burlington County NAACP v. Township of Mount Laurel*[11] in the New Jersey Supreme Court. Admittedly, Brennan was not a member of the state court when these cases were decided and causal linkages cannot be substantiated. However, a comparison of the activist tradition of the New Jersey Supreme Court and that of Justice Brennan's reveals like origins and a doctrinal affinity that transcends linguistic differences or constitutional boundaries. For example, during the period of the Warren court, Justice Brennan had noted his long-term commitment to the philosophy of the positive state, intended to promote an affirmative role for government in meeting the needs of the deprived and oppressed in American society. He condemned the prevalence of prejudice and poverty and pledged to eradicate both as well as their myriad causes.[12]

In an effort to translate such goals into a workable design,

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9 *See* Friedelbaum, *supra* note 3, at 197-228.

10 62 N.J. 473, 303 A.2d 273 (1973). In *Robinson*, the New Jersey Supreme Court was called upon to decide the constitutionality of state statutes that established a system to finance state elementary and secondary schools with revenues derived from property taxes. *Id.* at 482, 303 A.2d at 276. In holding that statutory scheme unconstitutional, the court emphasized the state government's inherent power to enlist the aid of local governments to further the state's mandated responsibilities. *See id.* at 520, 303 A.2d at 298.

11 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (municipality must provide low and moderate income housing to those in need).

12 Justice Brennan referred to the meaning of the equal protection clause as "equal protection today." Brennan, *Constitutional Adjudication*, 40 NOTRE DAME LAW. 559, 567 (1965).

Brennan not only reacted to but also took advantage of the changing political currents of the 1960s. The turbulence of the decade was matched by a civil rights reawakening unparalleled in the nation's history. No longer were legal mores linked to vague notions of equal protection that had barely affected existing patterns of segregation and other vestiges of discrimination. Instead, new and more positive approaches to the protection of civil rights became evident in an imposing array of cases including but not limited to *Brown v. Board of Education*[13] and its progeny. For the first time since Reconstruction, there were stirrings in Congress that resulted in passage of the Civil Rights Act of 1964, one of the most significant and surely one of the most remarkable statutes of the twentieth century. It was within this context, complemented by additional legislation during the 1970s, by the proposed Equal Rights Amendment, and by ancillary laws and regulations along the road to sexual equality, that Brennan was prompted to write and to expand upon his long-held dedication to equality.

Like his colleagues, Brennan had embraced a color-blind conception of constitutional equal protection, long regarded as the ultimate achievement of the civil rights movement. This objective, never abandoned by those who advocated a utopian resolution of centuries of racial unrest, was superseded by affirmative action programs that recognized color-conscious alternatives, at least on an interim basis. Among his colleagues on the Court, Justice Brennan became conspicuous by his adherence to decisive state intervention to advance the cause of civil rights. A posture of neutrality no longer seemed to suffice. As Brennan envisioned it, nothing short of a resort to extraordinary measures could be expected to reverse decades of indifference, if not of open resistance, to an evasive equality that had never been brought to fruition.

Justice Brennan first gave effect to this view of affirmative action (apart from school integration precedents), in *United Steelworkers of America v. Weber*.[14] The case arose from a white production worker's challenge to a plan that had resulted in the selection of black employees for a craft training program in pref-

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[13] 347 U.S. 483 (1954). The issue in *Brown* was whether racial segregation in public schools deprived minority children of equal educational opportunities. *Id.* at 493. In holding that such segregation deprived the children of the equal protection of laws, the Court declared that "[s]eparate educational facilities are inherently unequal." *Id.* at 495.

[14] 443 U.S. 193 (1979).

erence to white employees with greater seniority.[15] A federal district court granted injunctive relief to the white worker, finding that applicable provisions of the Civil Rights Act of 1964 prohibited racial discrimination in employment,[16] and the Court of Appeals for the Fifth Circuit affirmed.[17] Though Justice Brennan's opinion for the Supreme Court sustained the validity of the plan,[18] he conceded at the outset that Weber's argument was "not without force."[19]

How was it possible for Brennan to have converted what two lower courts had found to be unambiguous language into a vehicle to accomplish goals that, if justifiable, were so only in policy terms? In many respects, Brennan's opinion represents an adroit exercise in the management of words and their meaning—an exercise designed to convey, by way of statutory construction, purposes that Congress had not overtly evinced. Brennan assumed a congressional intent to permit affirmative action if the employer could establish a palpable imbalance in "traditionally segregated job categories."[20] There was a rejection of literal interpretation; a superficial review of legislative history; a refusal to "define in detail the line of demarcation between permissible and impermissible affirmative action plans" though the plan in question was said to fall "on the permissible side of the line"; a claim that the "purposes of the plan mirror those of the statute"; and vague references to the plan as a "temporary measure" that did not unnecessarily "trammel" the interests of white employees nor create an "absolute bar" to their advancement.[21] Result orientation emerges as the dominant principle that led to these conclusions. It was difficult to refute the charge of Chief Justice Burger, in dissent, that Brennan had effectively amended the law to bring about a desirable result.[22]

Justice Brennan's performance lies within a tradition more closely associated with constitutional interpretation than with the construction of legislative acts. Notions of social progress permissibly may characterize the growth and development of a con-

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15 *See id.* at 199.

16 *Id.* at 200.

17 *Id.*

18 *Id.* at 209.

19 *Id.* at 201. However, the Court suggested that the affirmative action plan utilized by the company was voluntary and "adopted by private parties to eliminate traditional patterns of racial segregation." *Id.*

20 *Id.* at 209 (footnote omitted).

21 *Id.* at 201-09.

22 *See id.* at 216 (Burger, C.J., dissenting).

stitution, but they do not readily lend themselves to a periodic review of statutes. The latter, by their nature, are necessarily more limited in scope and less amenable to changing events and social currents. Even if the "plain meaning" rule be set aside as outmoded and, at times, self-servingly misleading, the search for legislative intent may not be dismissed cavalierly. Admittedly, judicial discretion is broad, if not at large, in determining the purposes of a congressional scheme. Yet it is difficult to accept Justice Blackmun's observation, in a concurring opinion, "that additional considerations, practical and equitable" support the Court's conclusions because the problems presented had been only partially perceived, if at all, by the enacting Congress.[23] It is less disconcerting to acquiesce in Justice Blackmun's closing comment that, "if the Court has misperceived the political will," Congress remains free to set a different course in a statutory context.[24] In any event, no matter how laudable the majority's motivations may have been, the means of attainment were notably controversial and open to criticism when analyzed as adjudicatory techniques.

Justice Brennan's selection of a modus operandi in *Weber* was akin to a choice that he had made in a comparably sensitive area. In the famous legislative districting case of *Baker v. Carr*,[25] decided almost two decades earlier, Justice Brennan had sought to overcome long-held barriers against judicial intervention grounded in the doctrine of political questions. Having crossed a thorny threshold by establishing jurisdiction, standing, and justiciability with respect to delicate issues, he proceeded with extreme caution in announcing a predicate of judgment.[26] His references to the fourteenth amendment's equal protection clause were so guarded and vague that Justice Frankfurter, in dissent, termed the Court's directions to trial courts "an odd—indeed an esoteric—conception of judicial propriety."[27] To like effect, the "narrowness" of the Court's inquiry in *Weber*[28] was the initial step in what has become a burgeoning series of affirmative action guidelines.

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23 *Id.* at 209 (Blackmun, J., concurring).

24 *Id.* at 216 (Blackmun, J., concurring).

25 369 U.S. 186 (1962). In *Baker*, the plaintiffs brought suit alleging that the apportionment scheme established by the State of Tennessee debased their votes, thus depriving them of the equal protection of laws guaranteed by the fourteenth amendment. *Id.* at 187-88.

26 *See id.* at 197-98.

27 *Id.* at 268 (Frankfurter, J., dissenting).

28 *Weber*, 443 U.S. at 200.

Interestingly enough, subsequent efforts to overrule *Weber* have been unavailing. Three of the dissenting Justices in the 1987 gender-related promotion case, *Johnson v. Transportation Agency*,[29] sought to abandon *Weber* as the Court, again speaking through Justice Brennan, extended its affirmative action standards to encompass women in public employment.[30] Justice O'Connor, concurring in the judgment, made much of the need to adhere to the principle of stare decisis in applying the guidelines set forth in *Weber*.[31] Whether, in fact, a commitment to precedent controls or a quest for stability and order remains paramount in such civil rights cases is problematic. The majority referred to the fact that Congress had not amended the statute, as construed in *Weber*, to reflect disapproval of the Court's position.[32] In a lengthy footnote, the Court concluded that legislative inaction connoted, if not unreserved agreement, at least an indication that the majority's interpretation was correct.[33] The Court observed, "an invitation declined is as significant as one accepted."[34]

Apart from the debate over the significance of congressional failure to intercede, the Supreme Court remains steadfast in its adherence to strong affirmative action guidelines. Justice Brennan has continued in a position of leadership in this area, his reservoir of support virtually unaffected by personnel changes peculiar to the Burger Court and, for that matter, to the incoming Rehnquist Court. There is a determination to sustain the statutory markings, whether derived from provisions of the Civil Rights Act of 1964 or from more tenuous sources dating from Reconstruction. In any event, Brennan's ability to establish guidelines and measures, subsequently translated into results, coincided with the majority outlook. It is not clear whether his unorthodox approaches to statutory construction generally, and to findings of legislative intent in particular, reflected the views of all members of the prevailing coalition.

Justice Brennan's inclination to expand new-found standards of egalitarianism achieved considerable success in the legislative

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29 480 U.S. 616 (1987).

30 *Id.* at 641-42.

31 *Id.* at 648. (O'Connor, J., concurring) (citing United Steelworkers of America v. Weber, 443 U.S. 193 (1979)).

32 *Id.* at 629 n.7.

33 *Id.*

34 *Id.* In dissent, Justice Scalia responded that a presumed vindication premised on inaction was a "canard." *Id.* at 672 (Scalia, J., dissenting).

apportionment cases that followed in the wake of modest beginnings in *Baker*. Yet it was not always a stringently applied equal protection clause that served as the controlling catalyst in the decision-making process. If Justice Brennan sought to confine percentage deviations from the "one person, one vote" standard in state apportionment cases, he had to concede a degree of flexibility to legislative judgments tied to factors other than population equality. There was acknowledgment, however grudging, that a threshold, permitting a ten percent maximum deviation from equality, was tolerable. But all such deviations, even those considered de minimis, had to be justified by advancement of a rational state policy.[35]

Justice Brennan came closest to his ideal of equality in the congressional districting cases that, ironically, found no doctrinal support in the fourteenth amendment. In *Karcher v. Daggett*[36] he carried a narrowly divided Court (largely because of an unexpected vote by Justice O'Connor), linked to a contrived "equal representation" principle derived from article I, section 2 of the Constitution. The provision in question called for Representatives to be apportioned among the states according to population. It was this nondescript language that led Brennan to emphasize the Court's credence in the attainment of absolute population equality as a constitutional imperative for the apportionment of congressional districts.[37] The New Jersey Legislature's redistricting plan was set aside as unacceptable despite a maximum population variance of less than one percent[38]—trifling when compared with an expected undercount in census figures generally.

In an opinion marked by its literal attachment to a numerical standard that eluded any substantial foundation in article I, Justice Brennan referred to the "aspirations" of the clause that "absolute population equality be the paramount objective" in congressional districting.[39] Even minimal deviations were not acceptable without justification.[40] Thus, the onus of responsibility

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[35] *See, e.g.*, Brown v. Thompson, 462 U.S. 835, 850-61 (1983) (Brennan, J., dissenting).

[36] 462 U.S. 725 (1983).

[37] *Id.* at 732-33.

[38] *Id.* at 744.

[39] *Id.* at 732-33.

[40] *Id.* at 741. Specifically, the Court announced: "The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. . . . By necessity,

lay with the state in sustaining any differences "with particularity."[41] In effect, there existed a reverse presumption of validity akin to that in racial cases.

To the contrary, Justice White's dissent was critical of the majority for what he took to be an "unreasonable insistence on an unattainable perfection" in the equalization of districts.[42] The application of the one person, one vote principle, he concluded, was "sterile" and "mechanistic."[43] Nowhere was any effort made to address the problem of deliberate partisan gerrymandering.[44] Justice Powell echoed this view[45] as had Justice Stevens in a concurring opinion.[46]

If Justice Brennan found little to dissuade him from applying a rigorous definition of equality in cases affecting congressional representation, he encountered a disconcerting clash of values the following year. The promotion of civil rights, requiring state intervention for their realization, is distinguishable from traditional personal liberties that confine the reach of government and, if anything, require a negative presence to cordon off an individual sanctuary. It was such a preserve, protecting in this instance freedom of association, that seemed threatened in *Roberts v. United States Jaycees*.[47] Regular membership in the organization was limited to young men; women and older males could join but only on an associate basis that precluded them from voting or holding office.[48] When a state human rights law was used to end the exclusion of women from full membership, the national Jaycees sought to prevent enforcement of the act by invoking the first amendment.[49] The Jaycees contended that the state was infringing upon their freedom of association in an effort to achieve its objectives.[50]

It was this novel dilemma, posing a conflict between the maintenance of individual rights and measures to eliminate discriminatory behavior, that confronted the Court. How might a

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whether deviations are justified requires case-by-case attention to these factors." *Id.*

41 *Id.* at 739.
42 *Id.* at 766 (White, J., dissenting).
43 *Id.* at 774 (White, J., dissenting).
44 *Id.* at 776 (White, J., dissenting).
45 *See id.* at 787 (Powell, J., dissenting).
46 *Id.* at 750 (Stevens, J., concurring).
47 468 U.S. 609 (1984).
48 *Id.* at 613.
49 *Id.* at 614-15.
50 *Id.* at 618.

balance be struck when valued liberties, traditionally accorded high priorities in the constitutional scale, needed to be weighed and perhaps downgraded? Justice Brennan, writing for the Court, declined to underwrite sexual stereotyping though he did concede that the act would cause some "incidental abridgment" of protected speech.[51] Such incursions, he noted, were no greater than were necessary to achieve the state's legitimate purposes in combatting acts of invidious discrimination.[52] A compelling interest in assuring women equal access justified any impact that the law might have on the Jaycee members' freedom of expressive association.[53] Yet, for all of the rhetoric in the opinion, it was clear that Justice Brennan's choice was an unusually perplexing one—the product of a clash of values that could not readily be reconciled. The quest for egalitarianism, it seems, no longer may be treated by reference to unilateral objectives. At times, the effects upon cherished liberties must be taken into account. Whether Justice Brennan was willing to admit it or not, compromises had to be made if an accommodation of interests was to be reached.

IV. Traditional Liberties and Rights

The measure of Justice Brennan's espousal of first amendment rights has been difficult to gauge for more than three decades. Has he, for example, demonstrated a sufficient dedication to free speech guarantees as to place himself among such absolutists as Justices Black and Douglas? From his early years on the Court, Justice Brennan was not convinced that obscene materials ought to enjoy the protection of the first amendment. When, in 1957, the question was presented directly for the first time,[54] the Court held that obscenity lay beyond the bounds of constitutional safeguards.[55] However, Justice Brennan, writing for the majority, distinguished sex and obscenity within discrete categories.[56] Such distinction created a series of tests that began an era of unusual permissiveness in the portrayal and distribution of materials which, in an earlier time, would have been banned as

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51 *Id.* at 628.

52 *Id.* at 628-29.

53 *Id.* at 623.

54 *See* Roth v. United States, 354 U.S. 476 (1957).

55 *Id.* at 485. The Court noted that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Id.* at 484.

56 *Id.* at 487.

unacceptably explicit and salacious.[57]

In the early years of the Burger Court, a new obscenity policy was fashioned, substantially modifying *Roth* by substituting local standards in the judgment of sexual representations.[58] Justice Brennan, now writing in dissent, acknowledged that the tests articulated in *Roth* had been unable to stabilize the clash between first amendment protections and the state interest in suppressing obscene publications.[59] He proposed abandonment of a case-by-case approach to obscenity.[60] In its place, Brennan concluded, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults," the state and national governments should be precluded from suppressing "sexually oriented materials."[61] This solution, though hardly a "complete and infallible answer," was said to introduce elements of clarity, to reduce pressures on the courts, and to insure freedom of expression while protecting legitimate governmental interests.[62]

Among the first amendment issues that continue to confound the Court are those that raise questions of free speech by public employees. Justice Brennan, writing for the Court soon after the close of the McCarthy era, had declared that a state might not condition public employment upon a "surrender" of constitutional rights which could not be abrogated directly.[63] The following year in *Pickering v. Board of Education*[64] Justice Marshall, writing for the Court, noted the need to strike a balance between the employee's interests in commenting upon "matters of public concern" and the state's interest as employer to promote the effectiveness of public services that it provides.[65] The

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57 *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966). Here an action was commenced by the Attorney General of Massachusetts to have the book FANNY HILL declared obscene. *Id.* at 415. The Supreme Court reversed the Massachusetts Supreme Judicial Court based on the lower court's determination that the book possessed a "modicum of social value." *Id.* at 420. Justice Brennan, writing for the majority, declared that the book did not satisfy the *Roth* obscenity standard and thus granted it first amendment protection. *Id.* at 418-21.

58 *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Miller v. California, 413 U.S. 15 (1973).

59 *Paris Adult Theatre I*, 413 U.S. at 73 (Brennan, J., dissenting).

60 *Id.* at 103 (Brennan, J., dissenting). Justice Brennan concluded that post-*Roth* adjudication required a reconsideration of "a fundamental postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments." *Id.*

61 *Id.* at 113 (Brennan, J., dissenting).

62 *Id.* at 114 (Brennan, J., dissenting).

63 Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

64 391 U.S. 563 (1968).

65 *Id.* at 568.

test was diluted fifteen years later when the Court, speaking through Justice White, sustained the dismissal of an employee by reference to a content, form, and context formula that stressed the maintenance of discipline and morale in the workplace.[66] Justice Brennan filed a dissent, charging that the notion of public concern had been narrowed excessively and that claims regarding possible disruption deferred too strongly to the state.[67] Yet Brennan barely touched upon the permissible range of first amendment rights apart from the attenuated public concern test devised in *Pickering*.[68]

A latter-day variant, assessing the extent of free expression in the workplace, emerged from a much-noted case that had been denied plenary review by the Supreme Court. In a dissent from a denial of certiorari, Justice Brennan, joined only by Justice Marshall, considered the plight of a public high school guidance counselor who, by having revealed her bisexuality to fellow employees, set in motion a series of events that led to her dismissal.[69] Within a framework that, in Justice Brennan's opinion, condemned discrimination based upon sexual preference as violative of equal protection, he went on to examine the nature of the conduct being reproved.[70] A casual remark to a fellow employee concerning unconventional sexual behavior, without any effort to proselytize, in Justice Brennan's view, did not lay beyond the protection of the first amendment, especially in view of the nondisruptive nature of the speech.[71] Justice Brennan urged the Court to address "this issue of national importance, an issue that cannot any longer be ignored,"[72] but to no avail. Apparently the Court's aversion to considering questions of non-heterosexual autonomy, coupled with fears of interfering in public school operations, led to rejection of the employee's plea.

Justice Brennan's views of free expression by public employees, clearly not shared by a majority of his colleagues, carried

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66 Connick v. Myers, 461 U.S. 138, 147-48 (1983). The Court asserted that its decision was "grounded in [a] longstanding recognition that the first amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." *Id.* at 154.

67 *See id.* at 156 (Brennan, J., dissenting).

68 *See id.* at 166-68 (Brennan, J., dissenting).

69 Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) (Brennan, J., dissenting).

70 *Rowland*, 470 U.S. at 1009-11 (Brennan, J., dissenting).

71 *Id.* at 1011 (Brennan, J., dissenting).

72 *Id.* at 1018 (Brennan, J., dissenting).

over into other contexts as well. In 1982, a controversy arose over a school board's order to remove certain books from the shelves of a high school and junior high school libraries.[73] The volumes in question were said to be "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[74] In a suit for declaratory and injunctive relief, student readers challenged the board's action, alleging that their first amendment rights had been violated.[75] Justice Brennan, writing the plurality opinion in *Board of Education v. Pico*, emphasized that the board's discretion had to be exercised in a way that conformed to the "transcendent imperatives" of the first amendment.[76] Though the control of curriculum and the educational program generally were acknowledged to be beyond the purview of courts except in extraordinary circumstances, the school library occupied a unique position.[77] In relation to the latter, Brennan averred, a "regime of voluntary inquiry . . . holds sway."[78] The broad measure of discretion applicable to the "compulsory environment" of the classroom did not prevail.[79] Thus, the Court held that local school boards could not utilize their discretion to arbitrarily remove books from the school library.[80]

In dissent, Chief Justice Burger took issue with the special status that Brennan in his plurality opinion had accorded to school libraries in the educational scheme.[81] Chief Justice Burger rejected the view that decisions concerning the retention of books were subject to federal judicial review.[82] Nor was the Court privileged to constitute itself a "super censor" of school board determinations.[83]

In an even sharper rejoinder, Justice Rehnquist differentiated the role of government as educator from that of the state in

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73 Board of Educ. v. Pico, 457 U.S. 853 (1982).

74 *Id.* at 857 (plurality opinion).

75 *Id.* at 858-59 (plurality opinion).

76 *Id.* at 864 (plurality opinion).

77 *Id.* at 862 (plurality opinion).

78 *Id.* at 869 (plurality opinion).

79 *Id.*

80 *Id.* at 872 (plurality opinion).

81 *Id.* at 885 (Burger, C.J., dissenting).

82 *Id.*

83 *Id.* at 885 (Burger, C.J., dissenting). In conclusion, Chief Justice Burger "categorically reject[ed] this notion that the Constitution dictates that judges, rather than parents, teachers, and local school boards, must determine how the standards of morality and vulgarity are to be treated in the classroom." *Id.* at 893 (Burger, C.J., dissenting).

its sovereign capacity.[84] The actions of the former do not raise first amendment issues of comparable weight.[85] Instead, according to Justice Rehnquist, school board members proceed on the basis of their own "personal or moral" convictions or mirror those of the community.[86] Such decisions constitute a part of the board's responsibility in administering the operations of a school district.[87]

In *Perry Education Association v. Perry Local Educators' Association*,[88] respondents alleged that the preferential rights extended to the representative union in securing access to the internal mail system of a school violated the first amendment and equal protection rights of a rival union.[89] However, the Supreme Court found that the exclusive access granted to the incumbent union was consistent with the school district's interest in dedicating its property to the use for which it was intended and was a permissible labor practice in the public sector.[90] The Court rejected the argument that such action created untoward content discrimination contrary to the first amendment.[91] Since an exclusive bargaining agent had special responsibilities, the Court noted, the policy furthered a legitimate state purpose.[92] Thus, "the State may draw distinctions which relate to the special purpose for which the property is used."[93]

Justice Brennan, joined by Justices Marshall, Powell, and Stevens, dissented, citing first amendment interests that had been infringed by viewpoint discrimination.[94] The dissent claimed that the first amendment's central proscription against censorship had been disregarded by the Court's characterization of the distinction as an effort to preserve labor peace in the schools.[95] The state's interest in assuring labor stability was substantial, Brennan conceded, but it did not serve to afford exclusive access.[96] In view of Justice Brennan's strongly held views

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84 *See id.* at 908 (Rehnquist, J., dissenting).
85 *Id.*
86 *Id.* at 909 (Rehnquist, J., dissenting).
87 *Id.* at 909-10 (Rehnquist, J., dissenting).
88 460 U.S. 37 (1983).
89 *Id.* at 41.
90 *See id.* at 49-52.
91 *See id.* at 44.
92 *Id.* at 49-50.
93 *Id.* at 55. However, the Court emphasized that "[w]hen speakers and subjects are similarly situated, the state may not pick and choose." *Id.*
94 *Id.* at 55-56 (Brennan, J., dissenting).
95 *Id.* at 57 (Brennan, J., dissenting).
96 *See id.* at 65-71 (Brennan, J., dissenting).

concerning government protection of established union interests, the conflicting issue of constitutional infirmity in the sensitive area of protected speech had to have been of unusual magnitude in order to overshadow the labor issue.

Over the years, few questions have so persistently engaged Justice Brennan as those affecting the first amendment and the common law of defamation. His majority opinion in *New York Times v. Sullivan*,[97] extended to critics of public officials immunity from suits for damages unless proof of actual malice existed.[98] Thus libel was held to an exacting first amendment test that went beyond previous conceptions of freedom of expression. Subsequent Court decisions encompassed matters of public interest, not necessarily linked to political affairs, that traditionally had been the principal preserve of the first amendment.[99]

In *Gertz v. Robert Welch, Inc.*,[100] the Court struck a different note when a majority accorded greater recognition to protecting the reputational interests of private individuals.[101] Such persons were said to be "more vulnerable to injury than public officials and public figures . . . [and] more deserving of recovery."[102] Consequently, the vigorous requirements established in *New York Times* were relaxed.[103] The states were afforded greater discretion in defining an appropriate standard so long as liability was not imposed "without fault,"[104] or at least a showing of negligence, and any award of compensation was limited to actual injury.[105]

An even less demanding test was recently applied to information supplied by a credit reporting agency.[106] In effect, the

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97 376 U.S. 254 (1964).

98 *Id.* at 283.

99 *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The issue in *Rosenbloom* was whether the standard set forth in *New York Times* "applies in a state civil libel action brought not by a 'public official' or a 'public figure' but by a private individual for a defamatory falsehood uttered in a [radio] news broadcast . . . ." *Id.* at 31. Although the Court recognized that public figures "will be better able to respond through the media than private individuals" who find themselves the subject of unwanted publicity, the Court asserted that the public/private distinction had no place in first amendment analysis. *Id.* at 45-47.

100 418 U.S. 323 (1974).

101 *Id.* at 344.

102 *Id.* at 345.

103 *Id.* at 348.

104 *Id.* at 347.

105 *Id.* at 349.

106 *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (actual malice not necessary in private matters).

Court placed reduced constitutional emphasis on speech related to issues of *private* concern.[107] Justice Brennan, in dissent, would have applied the *Gertz* rule regardless of the public/private dichotomy. Yet he expressed satisfaction that a lack of consensus in treating "idiosyncratic facts" did not obscure the Court's "solid allegiance" to the *New York Times* principles.[108] Whether, in fact, case-by-case determinations, premised upon a variety of preferences, may be taken to connote the virtual unanimity of support to which Justice Brennan referred remains problematic and perhaps hyperbolic.

Apart from first amendment issues, the abolition of capital punishment has come to occupy a central position in Justice Brennan's list of unfulfilled accomplishments. A Warren Court majority was never persuaded to find the death penalty invalid as "cruel and unusual punishment" prohibited by the eighth and fourteenth amendments.[109] From time to time, there were indications that constitutional scruples had been placed in jeopardy by a continued resort to such sentences. Nevertheless, a judicial holding of unconstitutionality did not come to pass despite an increasing awareness of new-found community values. And, it appeared, changing standards of what constituted appropriate punishments did not suggest remedies comparable to those associated with other segments of the Bill of Rights. What emerged were guidelines that linked the eighth amendment to "evolving standards of decency that mark the progress of a maturing society";[110] but these vague criteria, suggested by Chief Justice Warren, referred to an egregious instance of loss of citizenship not to the excesses of a criminal sentence.[111]

A turning point occurred in 1972 when, in *Furman v. Georgia*,[112] the Court, by way of a per curiam opinion, set aside death sentences in one murder case and in two rape cases. The vote was five to four, with each Justice writing an individual opinion in seriatim fashion. Justice Brennan's contribution lay in an explicit renunciation of capital punishment as beyond the state's power to inflict.[113] In support of this conclusion, he reviewed at length

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107 *Id.* at 759-60.

108 *Id.* at 776 (Brennan, J., dissenting).

109 The eighth amendment was made applicable to the states in Robinson v. California, 370 U.S. 660, 667 (1962).

110 Trop v. Dulles, 356 U.S. 86, 101 (1958).

111 *Id.*

112 408 U.S. 238 (1972).

113 *Id.* at 257 (Brennan, J., concurring).

the origins and development of the "cruel and unusual punishment" clause. The deliberate infliction of death, he contended, does not comport with human dignity; sentence is often imposed arbitrarily and selectively; such drastic punishment has been largely rejected by contemporary society; and the practice has little deterrent effect upon those who would commit unlawful acts. Death as a punishment for crime stands condemned, he insisted, as "fatally offensive to human dignity."[114]

In an effort to meet the objections of several Justices in *Furman*, a number of states revised their capital punishment laws more adequately to reflect notions of fairness and to follow newly established guidelines governing jury determinations. Such changes resulted in supportive rulings by the Supreme Court since capital punishment itself was held to be constitutional.[115] Although Justice Brennan dissented in these cases, he joined the Court in cases where state laws, providing automatic sentences of death, had been set aside.[116] To Justice Brennan, whether a bifurcated trial was required, flagrant disproportionality of the sentence to the crime was condemned,[117] or other criteria were imposed in the particular circumstances of individual cases did not affect the proposition that capital punishment was cruel and unusual punishment—a theme that he had set forth in *Furman* and to which he continued to adhere without deviation.

The depth of Justice Brennan's opposition to the death penalty (and his apparent lack of success in achieving its abolition by judicial fiat), led him to select the topic for one of the lectures in a celebration of Harvard University's 350th anniversary.[118] In it, Brennan revealed his own personal commitment to ending capital punishment whenever convictions are judged against what he takes to be the unrelenting rigor of the eighth and fourteenth amendments. There are glimpses of debates over the issues raised in the Court's judicial conferences, insights into the changing positions of the Justices, and a view of the often unrewarding outcomes when speculative notions had to be translated into the

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114 *Id.* at 305 (Brennan, J., concurring).

115 *See, e.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

116 *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

117 *See* Enmund v. Florida, 458 U.S. 782 (1982). *But see* Pulley v. Harris, 465 U.S. 37 (1984) (rejecting any invariable rule that comparative proportionality review is required in capital cases).

118 Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986).

realities of the decision-making calculus. Justice Brennan acknowledged the novelty of capital punishment as a major civil liberties question since, he admits, even so fervent an advocate as the American Civil Liberties Union did not recognize it as such until 1965.[119] In the remainder of the essay and perhaps its most pejoratively effective section, Justice Brennan took exception to counter-arguments that the Framers did not consider the death penalty to be cruel and unusual. He refused to tie the clause to a fixed meaning "frozen in time" and confined to the dogmas of the eighteenth century.[120] Instead, he urged the pursuit of a constitutional relativism, marked by flexible and enlightened standards of justice based upon reason and insight. The law, he advised earnestly, can be a "vital engine not merely of change but of other civilizing change."[121]

What preceded Justice Brennan's impassioned plea at the Harvard convocation was an unusual dissent from a denial of certiorari in *Glass v. Louisiana*.[122] Beyond the customary reaffirmation of the death penalty as cruel and unusual punishment in all circumstances, Justice Brennan's opinion denounced the death penalty and described the process and the results of electrocution in graphic terms.[123] In unsparing language, Justice Brennan invited his colleagues to share with him the progression of violence, of gruesome deeds, and of pain and indignities that accompany the state's efforts to extinguish human life.[124] He denied that electrocution, or indeed other methods such as lethal gas or barbiturates, could ever be looked upon as humane. Justice Brennan called for an end to these torturesome procedures and officially sponsored executions as incompatible with human dignity. Singling out electrocution as particularly odious, Justice Brennan characterized it as "nothing less than the contemporary technological equivalent of burning people at the stake."[125]

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119 *Id.* at 314-23.

120 *Id.* at 327. He explained:

> Indeed, if it were possible to find answers to all constitutional questions by reference to historical practices, we would not need judges. Courts could be staffed by professional historians who could be instructed to compile a comprehensive master list of life in 1791. Cases could be decided based on whether a challenged practice or rule or procedure could be located on that great list.

Id. at 326.

121 *Id.* at 331.

122 471 U.S. 1080 (1985).

123 *Id.* at 1086-88.

124 *Id.* at 1088-93.

125 *Id.* at 1094.

If the perpetuation of capital punishment proved to be repulsive to Justice Brennan, the Burger Court's attitudes in the area of the criminal law were almost equally repugnant. So devoted a disciple of Earl Warren as William Brennan had difficulty in accepting a narrowing of *Miranda*[126] safeguards and other "police practices" decisions that had contributed much to the legacy of the Warren years. Nonetheless, the Burger Court displayed far greater moderation than most critics had predicted. The Court was often said to be in a semi-permanent state of transition because the much-awaited retreat and abandonment never fully materialized. In fact, a student of selected aspects of criminal procedure during the Burger years found that the work of the Warren Court was never dismantled and that such reports were "considerably exaggerated."[127]

V. THE SEVERAL IMAGES OF FEDERALISM

Regardless of the Burger Court's tempered performance in the exposition of the criminal law, Justice Brennan embarked upon a venture in state constitutionalism intended to counteract what he foresaw as a retrenchment of major proportions.[128] Doubtless the activism that he had experienced as a member of the New Jersey Supreme Court set the pattern and persuaded him to look to judicial federalism and even to an experiment in benevolent parochialism as an antidote to Burger Court "backsliding." Interestingly enough, Justice Brennan encountered little or no opposition from his colleagues, many of whom embraced the "new federalism" for a variety of reasons unrelated to the Court's "illiberal" holdings.[129]

It is significant that one of Justice Brennan's early references to state alternatives lay in a case that was said to have diluted *Miranda* requirements concerning custodial interrogation. In a five to four decision in *Michigan v. Mosley*,[130] the Court sustained a second police interrogation of a suspect after he had invoked

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126 Miranda v. Arizona, 384 U.S. 436 (1966) (procedures necessary to ensure that an individual is not required to incriminate himself).

127 Kamisar, *The Warren Court (Was It Really so Defense Minded?), the Burger Court (Is It Really so Prosecution-Oriented?), and Police Investigatory Practices*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 68 (V. Blasi ed. 1983).

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

129 For a series of case studies emphasizing the cooperative and creative aspects of judicial federalism see Friedelbaum, *Reactive Responses: The Complementary Role of Federal and State Courts*, 17 PUBLIUS: THE J. OF FEDERALISM 33 (1987).

130 423 U.S. 96 (1975).

his right to remain silent but apparently on charges not related to those that had been the subject of the first inquiry.[131] In dissent, Justice Brennan perceived that the erosion of *Miranda* guidelines and the ultimate overruling of *Miranda*, if not imminent, was likely.[132] Justice Brennan advised state courts to impose higher standards than those required by the Constitution—standards premised upon independent and adequate state grounds. He urged such action because, he claimed, protections once provided by federal law had been "increasingly depreciated" by decisions of the Burger Court.[133]

To like effect, Justice Brennan cautioned counsel to be wary of ignoring state-law questions in cases to which they might apply. During the Warren years, he averred, a dependence on federal constitutional issues might have sufficed and, in fact, the nationalization of the Bill of Rights had just reached fruition. By contrast, an exclusive reliance on the Federal Constitution in subsequent proceedings was said to open advocates to risks that were "increasingly substantial."[134] Justice Brennan's fears of a diminution of *Miranda*-related safeguards extended with equal force to the fourth amendment's right of privacy. In what can only be described as a candor bordering upon disparagement, Justice Marshall, joining Justice Brennan in dissent, referred to the majority's performance in sharp language: "I wash my hands of today's extended redundancy by the Court."[135]

Whether such a characterization was warranted is not clear. Nor was it particularly significant within the context of the case itself. The emotionalism of the Court's minority seemed to have intensified, and a return to the state courts appeared to have taken on an urgency that heretofore had not existed. Even when Justice Brennan agreed with the majority in affirming an invocation of the privilege against self-incrimination, he took pains to assure that state rights, once having been asserted, would not be

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131 *Id.* at 106-07.

132 *Id.* at 112 (Brennan, J., dissenting).

133 *Id.* at 120-21 (Brennan, J., dissenting). With respect to the double jeopardy clause, see Justice Brennan's concurring opinion in Oregon v. Kennedy, 456 U.S. 667, 680 (1982) (Brennan, J., concurring). While Justice Brennan often reiterates his support of state-derived rights and liberties, he has also stressed the need for a "double source" of security. He warns that the "revitalization of state constitutional law is no excuse for the weakening of federal protections and prohibitions." Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986).

134 United States v. Miller, 425 U.S. 435, 454 n.4 (1976) (Brennan, J., dissenting).

135 *Id.* at 456 (Marshall, J., dissenting).

overlooked, especially when the state privilege was derived from or rested upon independent and adequate state grounds.[136] It is ironic that Brennan, a staunch nationalist despite his state judicial roots, had become so strong an advocate of the products of the state courts. But a changing Court, linked to less expansive views and different results, offered few viable alternatives.

If a selective revival of state constitutional predicates appealed to Justice Brennan as a means of counteracting what he perceived to be the conservative initiatives and general tenor of the Burger Court, he never faltered in espousing Rooseveltian principles in regard to economic and social programs. The notion that vital functions could be returned to the states held little allure for one who had experienced near-poverty and the Great Depression of the 1930s. It was evident to Justice Brennan that the centripetal forces in the economy had to prevail in an age of national, if not of international, commercial and industrial systems. Centralized planning had been the order of the day for many decades, and political slogans and dogmas about a "new" federalism changed little except nomenclature and peripheral minutiae. Brennan was equally convinced that any effort to restrict police powers under the commerce or taxation clauses would provoke a judicial crisis that might threaten the institutional integrity of the Court as it had in the late 1930s.

Unlike Justices Douglas and Black, Brennan was not so unalterably opposed to meaningful review of regulatory programs, state or federal, as to favor a policy of judicial non-intervention. The perils of Social Darwinism and of the Court acting as a "superlegislature" held less dread for him; consequently, without moving overtly to revive substantive due process in the classic sense, Justice Brennan did embrace "procedural" guidelines that came surprisingly close to crossing the boundary that set apart the old substantive areas of conflict. There was a peculiar coloration to his emphasis on the rights of the underprivileged and the substitution of a property right of "welfare entitlement" for a promise of charity.[137] Justice Black denounced what he termed an "ambulatory power to declare laws unconstitutional"[138] and a view of due process that threatened to "swallow up all other parts of the Constitution."[139] To like effect, if not as dramatic in

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136 New Jersey v. Portash, 440 U.S. 450, 460-61 (1979) (Brennan, J., concurring).
137 Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).
138 *Id.* at 276-77 (Black, J., dissenting).
139 *Id.* at 277 (Black, J., dissenting).

its impact, equal protection analysis began to take on less of an aura of unrestricted judicial validation. Justice Brennan was among the Court's pacesetters when, in a federal railroad retirement benefits case,[140] he undertook an inquiry into the legislative record, the objectives of the statute, and the extent to which the challenged classification had achieved these aims.[141] No longer was a perfunctory rational basis test the criterion of review.

All the same, Justice Brennan's forays into heightened scrutiny were not remotely reminiscent of the levels of pre-1937 interventionism. When more compelling tests of judicial activism arose—tests that served to reinstitute searching examinations of legislative products—Justice Brennan's responses were condemning in what he regarded as an assault upon the doctrine of deference. Any effort to resuscitate the tenth amendment to diminish, however minimally, the commerce powers of Congress, or to reinvigorate the contract clause as a negative restraint on state powers met with Brennan's disapproval. His dissenting opinions sometimes conveyed such outrage as to recall the demeanor of Justice Black, always a compelling partisan in his persistent and extravagant expressions of antagonism to any suggestions of a return to the "mischief" of pre-1937 judicial decisionmaking.

Few constitutional clauses have exhibited the versatility and adaptability associated with the commerce clause. Since the judicial debacle of 1937-1938, the clause has served as the single most important source of federal police power. Legislative reliance on the commerce power, often not mentioned explicitly, has been legion, ranging from the Civil Rights Act of 1964 to agricultural controls affecting so trivial an event as the wheat produced by a farmer for home use.[142] Like its range, the durability of the clause has been extraordinary and, for almost four decades, no federal statute tied to it had ever been held unconstitutional. It was noteworthy, if not wholly unexpected, when in 1976 the Court invalidated a series of amendments to the Fair Labor Standards Act in *National League of Cities v. Usery*.[143] In the view of a

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140 United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).

141 *Id.* at 187 (Brennan, J., dissenting).

142 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

143 426 U.S. 833 (1976). It was alleged in *National League of Cities* that "when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution." *Id.* at 841.

narrow majority led by Justice Rehnquist, the provisions at issue invaded state sovereignty preserved by the tenth amendment which, in turn, limited the breadth of Congress' commerce powers.[144] There were indications of a new-found stress on dual federalism and the rejection of legislative attempts to displace state powers "to structure integral operations in areas of traditional governmental functions."[145]

Justice Brennan assumed an accustomed position of leadership as he moved deftly and sharply to impugn the Court's opinion in *National League of Cities*. The language that he employed reflected an acerbic style reserved for particularly distasteful occasions. There was, Justice Brennan reported, a "catastrophic judicial body blow" to Congress' power, a "patent usurpation" of the role of the political process, an "ill-conceived abstraction" with "profoundly pernicious consequences," a "roughshod" disregard of precedents, in sum, "an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision."[146] Yet the Court's findings were neither sweeping nor particularly novel when judged by long-term cyclical developments. And, Justice Brennan admitted, Congress could readily have restored its minimum wage and overtime standards by conditioning grants upon compliance by state and local employers. His display of pique seemed to go to a dramatic doctrinal turnabout that replaced the ambiguous political safeguards of federalism by more demanding constitutional standards.

A transitional case, *Equal Employment Opportunity Commission v. Wyoming*[147] provided an opportunity for the dissenters to regroup in preparation for their forthcoming effort to overrule *National League of Cities*. With the transfer of Justice Blackmun's vote, Justice Brennan wrote for what became the Court's new majority in the *Wyoming* case. A state fish and game supervisor had been involuntarily retired at age fifty-five contrary to provisions of the federal age discrimination act that Congress had extended to include employees of state and local governments.[148] At issue in *National League of Cities* had been a like application to state and local governments but of the wage and hour sections of the Fair Labor Standards Act. How was it possible for the Court to sustain the age discrimination provisions when the wage and hour

144 *Id.* at 851-52.
145 *Id.* at 852.
146 *Id.* at 858-59, 875-78 (Brennan, J., dissenting).
147 460 U.S. 226 (1983).
148 *Id.* at 234.

requirements had been struck down under authority of the same commerce clause? Might the two laws be distinguished regardless of striking parallels? Did the cases lack comparability because the statutes sought to remedy disparate problems?

Writing the opinion of the Court, Justice Brennan prepared an adroit, if not convincing, revision of *National League of Cities*' teachings in *Wyoming*. Perhaps the timing for a direct overruling was inappropriate or more was required to convince Justice Blackmun of his errant conduct seven years earlier. In any event, Justice Brennan claimed a lesser degree of federal intrusion in the *Wyoming* than in *National League of Cities*. He accepted the need to ensure the continuing existence of states as distinct entities by protecting against federal interference in "core" state functions. At the same time, Justice Brennan asserted that the principle of immunity was a functional one, not intended to create a "sacred province of state autonomy."[149] If the state law regulated the states as states and treated matters conventionally left to the states, there still was no impairment of the state's ability to "structure integral operations" in traditional areas.[150] Contrary to the minimum wage and overtime rate requirements set aside in *National League of Cities*, Justice Brennan posited, the age act had neither a direct nor an obvious negative impact on state finances.[151]

Whether the prevailing opinion in the *Wyoming* case may be characterized as valid constitutional reasoning, an exercise in eroding rather than overruling recent precedents, or little more than specious declamation in the service of a deferring or "holding" operation, *National League of Cities* was overruled by the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.[152] For the same majority that prevailed in the *Wyoming* case, Justice Blackmun reaffirmed the plenary nature of the commerce clause and returned the tenth amendment to its previously moribund state. The preservation of state sovereignty was recommitted to the political process.[153] A vacuous symmetry was

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149 *Id.* at 236.

150 *Id.* at 239.

151 *Id.* at 243-44.

152 469 U.S. 528 (1985).

153 *Id.* at 552-57. The Court was convinced that:

> [T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for

restored in the sense that it could be asserted once again that no act of Congress had been held unconstitutional under the commerce power. In its essentials, Justice Blackmun's opinion incorporated the principles that Justice Brennan had articulated in his *National League of Cities* dissent. The integrity of the doctrine of deference was no longer in jeopardy. Yet these results may be illusory if, as Justices Rehnquist and O'Connor confidently predict in their dissenting opinions, the *Garcia* holding will be short-lived.

By comparison with the dramatic turnabout in relation to the commerce power, Justice Brennan's efforts to prevent a resurgence of the contract clause have been notably less successful. In *United States Trust Co. v. New Jersey*,[154] the Court, speaking through Justice Blackmun, determined that the repeal of a bondholder covenant constituted state impairment. Such action could only be justified if it was "reasonable and necessary" to serve an important public purpose.[155] In dissent, Justice Brennan responded with much of the same fervor and bluntness that characterized his dissent in *National League of Cities*. He branded the majority's view of the contract clause "wooden" and the reasonableness test as "schizophrenic" and a "most unusual hybrid."[156] But this reproof did not result in a reversal of course; instead, elements of moderation were gradually introduced into the decisional equation.

Within a few years following Justice Stewart's reminder in *Allied Structural Steel Co. v. Spannaus*[157] that the contract clause was "not a dead letter,"[158] the Court began to adopt a more deferential attitude[159] as the threat of direct impairment and disavowals of the state's own contractual obligations started to recede. Admittedly, the clause had not returned to a semi-dormant state. Nonetheless, Justice Brennan's strong objections to the strict standard of *United States Trust Co.* no longer obtained as the Court moved to modify the reach of the controversial reasonableness

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possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).

154 431 U.S. 1 (1977).

155 *Id.* at 29.

156 *Id.* at 54 n.17 (Brennan, J., dissenting).

157 438 U.S. 234 (1978).

158 *Id.* at 241.

159 *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).

and necessity test.[160]

VI. The Review Process, Interpretivism, and the Constitution

If Justice Brennan's opinions have consistently recognized the indispensability of result orientation, his dedication to constitutional relativism has been the subject of increasingly vociferous commentaries. Debates over activism and restraint, and over judicial review itself, date from the early years of the Republic. Nowhere in the constitutional text is there explicit mention of any authority to review, much less to annul, acts of Congress. Neither the supremacy clause of article VI nor Justice Marshall's masterly statement in *Marbury v. Madison*[161] serve other than as a functional justification for the invocation of this awesome power by courts. Yet judicial review has become a part of the nation's heritage much as Alexander Hamilton had sought to make it so when he wrote and circulated *The Federalist Papers*.[162]

Like most of his predecessors on the Supreme Court, Justice Brennan has accepted these traditional warrants for review and has applied them in the explication of the Constitution's phrases of studied ambiguity. Indeed, he has never failed to acknowledge the close affinity that exists between questions of constitutionality and public policy or, stated categorically, between the role of law and political realism.

Over the years, critics and scholars have examined the right of the "least accountable" branch of government to review legislative decisions in a variety of settings. The opening decades of the twentieth century bore witness to the Court's espousal of Social Darwinism and the consequent role of the majority sitting as a "superlegislature." Searching inquiries ensued concerning the legitimacy of judicial review and the conviction of some that usurpation had been a factor.[163] During the McCarthy era of the 1950s, broadside attacks upon the Court, appearing in the public press, were countered by "academic" critics who, while generally approving the end-products of the adjudicatory process, took ex-

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160 *Energy Reserves Group, Inc.*, 459 U.S. at 412 n.14.

161 5 U.S. (1 Cranch) 137 (1803).

162 *See* The Federalist No. 78 (A. Hamilton) (J. Cooke ed. 1961).

163 *See, e.g.*, L. Boudin, Government by Judiciary (1932); Cohen, *Is Judicial Review Necessary?*, 19 New Leader 5 (1936). An obscure state case, and the dissenting opinion in particular, was cited in the 1920s and 1930s for the proposition that John Marshall's logic in *Marbury v. Madison* was fatally flawed. *See* Eakin v. Raub, 12 Serge & Rawle 330 (Pa. 1825).

ception to the means by which the results had been achieved. There were calls for "neutral principles,"[164] for a return to the "passive virtues,"[165] and for an end to blatant result orientation. More recently, a renewed emphasis on constitutional theory has posed elusive issues of intentionalism, interpretivism, and the appropriate province of the courts.[166] The current focus is on constitutional policy-making and the permissible discretion of judges in moving beyond a narrow review of the Constitution and the "intent" of the Framers in articulating its provisions.

It is the latter emphasis on interpretive versus noninterpretive scrutiny that had occasioned a protracted conflict between former Attorney General Edwin Meese and Justice Brennan. Neither of the protagonists has ever mentioned the other by name, but little doubt exists concerning their identities. Such an exchange is virtually unprecedented; even the Court-packing episode of New Deal days never gave rise to a response comparable in intensity to that which came from Justice Brennan as a member of the Court. Indeed, a traditional sense of detachment and propriety seems to have been cast aside as the rhetorical war of words reached new heights.

The initial salvo originated with Mr. Meese when, in an address before the American Bar Association in July 1985, he castigated "too many" of the Court's opinions as "more policy choices than articulations of constitutional principle," revealing a greater fidelity to judicial conceptions of public policy than a "defense to what the Constitution—its text and intention—may demand." He extolled a "[j]urisprudence of [o]riginal [i]ntention," charging that any other standard risked "pouring new meaning into old words."[167] The Attorney General went on to describe the "administration's approach" to constitutional in-

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164 *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

165 *See* Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

166 *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

167 THE FEDERALIST SOCIETY, THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9-10 (1986). In an address at the University of San Diego Law School, Judge Robert H. Bork of the United States Court of Appeals for the District of Columbia, put Mr. Meese's argument within a different framework by stating that "only by limiting themselves to the historic intentions underlying each clause of the Constitution can judges avoid becoming legislators, avoid enforcing their own moral predilections, and ensure that the Constitution is law." *Id.* at 52.

terpretation as one tied to "first principles"; he assailed judicial activism as a "chameleon jurisprudence, changing color and form in each era."[168] It was clear that the object of Mr. Meese's diatribes was to prevent any return to the "radical egalitarianism and expansive civil libertarianism" of the Warren Court.[169]

If previous attacks upon the Court afford any clues to past practices, the Attorney General's critique should have been permitted to languish and, ultimately, to vanish from serious consideration. However, Justice Brennan decided to reply to Mr. Meese's accusations with vigor and in a manner intended to discredit the "administration's approach" to the adjudicatory process. Justice Brennan referred to the "majestic generalities," the "ennobling pronouncements," and the ambiguity of a Constitution that has served as the "lodestar for our aspirations."[170] He noted the propensity of Americans to cast significant political, economic, social, and philosophical questions in the form of law suits.[171] In blunt terms, Justice Brennan portrayed Meese's intentionalism as one that "feigns self-effacing deference" to the Framers but, in reality, "is little more than arrogance cloaked as humility."[172] Justice Brennan reminded critics that Justices read the Constitution as twentieth century Americans, that the Court is required to play a "unique interpretive role," that stare decisis ought to be a flexible device, and that constitutional explication must not fall captive to the "anachronistic views of long-gone generations."[173] In sum, for him the evolutionary process emerged as the "true interpretive genius" of the text.[174]

Little more than a week following Justice Brennan's presentation, Justice Stevens joined the debate. He limited his inquiries to the Bill of Rights and the course of its extension to the states. What troubled Justice Stevens was the Attorney General's references to a "founding generation," his concentration on original intentions, and his apparent rejection of the theory of incorporation or absorption. Justice Stevens characterized Meese's arguments as "somewhat incomplete" and unmindful of the effects of

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168 *Id.* at 40.

169 *Id.* at 9.

170 Brennan, *The Constitution of the United States: Contemporary Ratification*, 1 Text and Teaching Symposium, Georgetown University, Washington, D.C. (Oct. 12, 1985).

171 *Id.* at 2.

172 *Id.* at 4.

173 *Id.* at 15.

174 *Id.* at 16.

the Reconstruction amendments.[175] Most striking was Stevens' allusion to the Attorney General's failure to recognize that "no Justice who has sat on the Supreme Court during the past sixty years" has ever questioned the first amendment's applicability to the states.[176] Justice Stevens reminded Mr. Meese that any effort to discover original intent necessitated an assessment of the views of a varied group—one that described a "rather broad and diverse class."[177]

What, then, emerges from these unprecedented exchanges between sitting members of the Court, especially Justice Brennan, and the Attorney General? Judicial review, often referred to as one of America's major contributions to statecraft, is as controversial today as it has been during the past two centuries. In the clash over intentionalism, interpretivism, and noninterpretivism, a resort to historicism as a serious tool of construction may be little more than an exercise in semantics, of questionable value to Justices who seek to apply the document to present-day events.[178] Constitutional relativism remains essential in the development of a vibrant charter, but it is difficult to set aside criticisms of an "imperial judiciary"—one that reflects a fundamental distrust of the American democratic process and of popularly elected legislators. As the debate over judicial review continues, neither the exaggerated activism of Justice Brennan nor Attorney General Meese's excessive reliance on the past seems likely to endure. The nation has long been committed to a pragmatic, centrist philosophy and to a jurisprudence that reflects it in spirit as well as in the treatment of diverse thematic issues. A moderately directed Court need not be a passive tribunal; it may and should demonstrate respect for principle and history as well as for contemporary currents and trends.

VII. Conclusion: A Summing Up and Appraisal

William Brennan, long the senior Associate Justice, has participated actively and effectively in the decision-making process, often from a position of leadership, for more than three decades. On the occasion of his thirtieth year on the Court and in the course of an interview with a former law clerk, he provided a pro-

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175 Address by Justice John Paul Stevens, Luncheon Meeting of the Federal Bar Association, Chicago, Illinois 7-9 (Oct. 23, 1985).

176 *Id.* at 9.

177 *Id.* at 10.

178 *See generally* C. Miller, The Supreme Court and the Uses of History (1969); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119.

vocative self-image of his service.[179] Justice Brennan made clear from the outset that he considered himself neither "on the extreme left" of the Court nor of the country, and he revealed his own impression that one day he would be known as "Brennan the right-winger."[180] He claimed that Justices Black and Douglas were far more intense and doctrinaire in their absolutist approaches to such first amendment issues as obscenity, libel law, and the religion clauses.[181]

In a departure from charges often made in his dissenting opinions, Justice Brennan characterized the Burger Court as one that had not "unraveled the work of the Warren Court" but that had, in fact, produced the abortion decision, the first case to strike down the death penalty in a number of states, and the affirmative action rulings. If change had been inevitable with the advent of the Burger era, there was, as he phrased it, still "room for the old dog."[182] Justice Brennan apparently has never lost faith that, in an ordered society, problems are "redressable somehow by law."[183] Despite his remarkable record of consensus building in a disparate succession of cases and in a Court beset by a plethora of personnel shifts, Brennan does not look upon his role as that of "play-maker."[184] But, engrossing though this observation and other self-styled appraisals may be, evaluations ought not to be left solely to Justice Brennan. Indeed, whether many of his characterizations offer more than impressionistic assessments must remain problematic and subject to the imponderables generally associated with highly personal, subjective accounts.

Justice Brennan has become the foremost social reformer and critic on the Court, an astute and avid advocate who has been responsible for an unusual progression of precedents in a moderate, sometimes conservative tribunal. If any section of the Constitution has served as his guide in spirit as well as in substance, it has been the fourteenth amendment's equal protection clause. Justice Brennan's attempts to advance the cause of the underprivileged, of those who seek representational equality, of proponents of affirmative action, and of victims of discrimination have

179 Leeds, *A Life on the Court: A Conversation with Justice Brennan*, N.Y. Times, Oct. 5, 1986, § 6 (Magazine), at 25.
180 *Id.* at 26.
181 *Id.* at 75-76.
182 *Id.* at 77.
183 *Id.* at 79.
184 *Id.* at 74-75.

been legion. His unrelenting opposition to capital punishment is a part of the same social agenda, designed to ameliorate the effects of poverty and injustice. In a commencement address, Justice Brennan's views were expressed with exceptional candor as he challenged the "establishment" to make sacrifices to eliminate the "legal inequities" in society—to demonstrate real efforts rather than "meaningless tinkerings which do little more than salve our own consciences." To do otherwise, he warned, might cause the disadvantaged to be tempted by the "apostles of violence and revolution."[185]

Justice Brennan has been a strong supporter of traditional rights and liberties, and his decisional record is an exemplary one by any standard. However, at times he is prone to make concessions and to seek out mid-spectrum positions[186] as he was wont to do in the libel law cases. By his own admission, he has never been a literalist or as impervious to persuasion as were Justices Black and Douglas in their defenses of the exacting provisions of the first amendment. Brennan has been inclined to negotiate and, wherever possible, to join in opinions acceptable to a majority of his colleagues. If he has not been willing to set aside fundamental principles, his ardor in the social cases is not likely to be as conspicuous when old-style historic liberties are at issue.

Since the early years of the Burger Court, Justice Brennan has advocated an increasingly significant role for state judges proceeding under their own state constitutions. In fact, he has never been a stranger to the work of the state courts in view of his New Jersey experiences and his own predilections. But current displays of activism have been limited to specific aspects of judicial federalism, notably those extending state bills of rights beyond the scope of the National Bill of Rights. Justice Brennan's recent motivations have never been difficult to discern tied, as they are, to the Supreme Court's turn to a less venturesome

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185 *Id.*, May 18, 1987, at B6, col. 5.

186 Justice Brennan's opinions in religion clause cases have not been treated in this essay. For his decisions in such cases, see Aguilar v. Felton, 473 U.S. 402 (1985); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985). Justice Brennan's contributions do not provide striking departures from existing norms, and their value as precedents is unsettled. If his espousal of personal autonomy is more innovative than in the religion cases, it has never proceeded to the point of an explicit adherence to substantive due process. Such a predicate would permit a major expansion of judicial discretion in the area of personal autonomy, but Justice Brennan has not elected to pursue this course. Indeed, he has been accused of "tiptoeing around" the "central issue" of liberty. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 857-58 (1977) (Stewart, J., concurring).

adjudicatory mode. Justice Brennan had been a leading exponent of the nationalization of the Bill of Rights throughout the Warren years. Consequently, he must have looked upon any sustained and serious reliance on state constitutionalism during this period as remote and ancillary, if at all feasible. It is plain that Justice Brennan's espousal of an "enlightened" provincialism in the Burger era arose out of necessity, not merely by choice—the product of altered and far less receptive conditions for the promotion of human rights.

Apart from a new-found emphasis on the virtues of state judicial initiatives, Justice Brennan has been firmly committed to vigorous central control, especially in the exercise of the federal regulatory power. He has opposed attempts to restore the tenth amendment as a viable constitutional predicate. He has also sought to preclude any negative results that might flow from a revival, even in limited form, of the contract clause or of any diminution of Congress' commerce power. If he does not always accept the notion of sweeping judicial self-denial linked to the excesses of deferential review, he is equally unwilling to approve any significant interjection of judicial discretion in the formulation of economic policy.

A thirty-year veteran of judicial maneuvering and conflict, Justice Brennan has developed an expansive view of the positive state that has served as his lodestar. He has never wavered in his vision of a just society and in his willingness, indeed his zeal, to resort to the courts as instruments in effecting it. Striving for reform within the framework of a remarkably adaptive charter, Justice Brennan regards attention to social conditions as obligatory in the interpretation of its ambiguous and, at times, arcane phraseology. The genius of the Constitution, as Justice Brennan perceives it, lies in the accommodation and application of its great principles to current needs and problems. Since his appointment to the Court, Justice Brennan has never recoiled from pursuing a myriad of doctrinal routes toward the achievement of imposing and sometimes eminent goals. That he has so often succeeded in advancing these goals, in a Court not always responsive to an assertive egalitarianism, is a tribute to his personal qualities—his cogency and persuasiveness, his collegiality, his buoyant spirit and, perhaps most important, his political acumen. The annals of the Court amply reflect the auspicious confluence of such qualities. Perhaps Judge Abner J. Mikva of the Court of Appeals for the District of Columbia Circuit best captures the

spirit as well as the cumulative impact of Justice Brennan's long years of service: "His footprints are everywhere."[187]

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[187] Leeds, *supra*, note 179, at 26.