California Western Law Review

Volume 27
Number 2 *A Focus on Justice Brennan*

Article 2

1991

Introduction: Getting to the Root of Brennan's Justice

Frank Askin

CALIFORNIA WESTERN LAW REVIEW

VOLUME 27 1990-1991 NUMBER 2

INTRODUCTION

GETTING TO THE ROOT OF BRENNAN'S JUSTICE*

FRANK ASKIN**

With the possible exception of John Marshall, who set the original course, William J. Brennan Jr. has been the most influential of the 103 men and one woman who have sat on our nation's highest court over the past 200 years.

Brennan was to James Madison's Bill of Rights what Dr. Martin Luther King Jr. was to Lincoln's Emancipation Proclamation. Just as Dr. King's leadership led to substantial implementation of Lincoln's declaration of black freedom, Brennan was the architect of the Warren Court's brand of judicial activism which belatedly breathed life into the noble sentiments about personal liberty written into the United States Constitution 200 years before.

Brennan, of course, was not alone in rediscovering the Bill of Rights. During the two decades before he appeared on the Washington scene, the Roosevelt-era Court had begun a more vigorous enforcement of the first ten amendments, even employing them against state officials through the fourteenth amendment.

Inspired by the earlier writings of Holmes and Cardozo, Justices Murphy, Rutledge, Black, and Douglas, with help from pre-Roosevelt holdovers Hughes, Stone, and Brandeis, had already uncovered important protections for individual rights long buried in our national charter. Chief Justice Earl Warren himself

* This article is reprinted and edited with permission from the August 30, 1990 issue of the NEW JERSEY LAW JOURNAL.

** Professor at Rutgers Law School-Newark; General Counsel of the American Civil Liberties Union.

had molded the unanimous decision in *Brown v. Board of Education*,[1] which abolished racial segregation, even before Brennan's arrival.

But Justice Brennan shaped the activist doctrines that ultimately came to symbolize the Warren Court and that, for a time, transformed the federal judiciary from a passive instrument of the status quo into a dynamic force for social change.

I. WATERSHED FOR JUDICIAL ACTIVISM

Prior to the Warren era, Supreme Court jurisprudence exalted techniques for avoiding constitutional issues: abstention, comity, non-justiciability, immunity, exhaustion of remedies, and the political-question doctrine. Even progressive jurists such as Brandeis extolled such passive virtues.[2]

That is why many rank Brennan's opinion in *Baker v. Carr*,[3] as the watershed case for Warren Court activism. It was not *Baker's* enunciation of the one-person, one-vote principle that was revolutionary, but rather its holding that the issue was one that a federal court could decide. Prior precedent had held that the issue was a "political question" not subject to judicial resolution. Once Brennan had persuaded his colleagues that the courts should rule on the issue, the outcome was inevitable.

In case after case, Brennan led his colleagues in knocking down formerly impenetrable barriers to the judicial resolution of social issues by permitting citizens to bring lawsuits against public officials and governmental bureaucracies to enforce their constitutional rights. Under his guidance, the admonition that "you can't fight city hall" became an anachronism.

Justice Brennan found an expression of his judicial philosophy in a statement authored by a lower court judge that he picked up in a subsequent opinion: "We yet like to believe that wherever the Federal courts sit human rights under the Federal Constitution are always a proper subject for adjudication. . . ."[4]

In applying that principle, Brennan assembled majorities for landmark opinions that for the first time:

- Required federal officials to pay damages to citizens for violation of their constitutional rights.[5]

---

1. 347 U.S. 483 (1954).

2. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J. concurring). *See also* Bickel, *The Supreme Court 1960 Term–Foreward, The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

3. 369 U.S. 186 (1962).

4. Zwickler v. Koota, 389 U.S. 241, 248 (1967) (quoting Stapleton v. Mitchell, 60 F. Supp. 51, 55 (D. Kan. 1945)).

5. Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

- Authorized federal courts to issue injunctions to forbid state court prosecutions under laws that violated the First Amendment's protection of freedom of speech.[6]
- Permitted congressional employees to sue members of Congress for discriminatory treatment.[7]
- Made local governing bodies absolutely liable for damages caused by their employees' violations of citizens' constitutional rights.[8]
- Allowed litigants to bypass possibly hostile state courts and agencies and bring their claims for constitutional redress against local officials directly to federal court.[9]

Brennan's activist views also prodded the justices to invoke the remedial powers of a court of equity. This enabled them to compel foot-dragging state and local officials to comply swiftly with their desegregation rulings in order to eradicate, "root and branch," the vestiges of segregation[10]—an application of the ancient maxim that the relief available from a court of equity was to be measured by the size of the chancellor's shoe.

Under Brennan's guidance, equitable principles, permitting courts to shape remedies to ensure that justice was done, became more and more the hallmark of what would be known as the Warren Court. They opened the door to structural injunctions which allowed federal courts to supervise the restructuring not only of school systems, but also of prisons and other public institutions to meet court-decreed constitutional standards.

II. VIEWS FORGED IN NEW JERSEY

The constitutional revolution Brennan helped bring about may have come as a shock to Dwight Eisenhower, the conservative president who enabled Brennan to work his constitutional will. But in hindsight, legal historians will find Brennan's Supreme Court years not at all surprising.

There can be little doubt that the federal jurisprudence of Justice Brennan was largely shaped by his experience with the state judiciary in New Jersey. Like Cardozo and Holmes before him, Brennan received his judicial nurturing in a progressive state court system that produced strong common law judges accustomed to refreshing ancient doctrine with modern wisdom born of experience. Brennan not only served on both the New Jersey Superior Court and Supreme Court before being called to Washington, but had been a participant in the creation of the state's highly regarded modern legal system.

---

6. Dombrowski v. Pfister, 380 U.S. 479 (1965).
7. Davis v. Passman, 442 U.S. 228 (1979).
8. Owen v. City of Independence, 445 U.S. 622 (1980).
9. Zwickler v. Koota, 389 U.S. 241 (1967).
10. Green v. County School Board, 391 U.S. 430, 437-38 (1968).

Most significantly, Brennan received his judicial baptism in the intellectual crucible from which sprang the 1948 New Jersey Constitution. As an associate editor, Brennan represented the *New Jersey Law Journal* in the debate surrounding the adoption of the new Constitution's judicial article. At the heart of that debate was the proposal to merge New Jersey's then separate law and equity courts, each with a tradition as a strong and dominating judicial body. The most telling comments on the anticipated consequences of that merger were made by the eminent Dean Roscoe Pound on the morning before Brennan himself appeared before the judiciary committee of the constitutional convention. Pound's remarks provide a remarkable insight into the judicial philosophy of his former Harvard Law School student who was soon to wear judicial robes. Explaining why the merger of law and equity would advance, not retard, the dispensing of justice in New Jersey, Dean Pound said:

> Equity, after all, is a great supplement to the common law. It deals with everything all over the whole domain of the common law. It is a remedial system, really, a great system of remedies where the common law is not equal to maintaining the legal rights which it developed and which it recognizes.... After all, it is not merely that equity follows the law. Equity, in a sense, is administering the law, but it is administering it by different kinds of remedies and within a different atmosphere, you might say, by application of those remedies.[11]

Those memorable words must have been ringing still in young Judge Brennan's ears when, a year later, he ascended to the bench of New Jersey's newly fashioned Chancery Division.

III. BEDROCK OF THE WARREN COURT

In 1956, Brennan took with him to Washington the unique and powerful idea of utilizing the expansive powers of a court of equity to enforce and implement Constitutional rights. It became the bedrock of the Warren Court jurisprudence.

The void left by Brennan's retirement from the Court is inestimable. However, the reformation of the practice of constitutional law in this country—indeed, in the world, where many other judicial systems have been inspired by Warren Court doctrine—cannot be obliterated, although it has already been severely blunted.

Brennan's progeny are legion. As a result of the Warren Court, there now exists a flourishing public interest law movement which will not let the Brennan legacy atrophy. Brennan has succeeded Pound as the inspiration of American legal education. And even where specific doctrines he championed have been

11. STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, VOL. IV, COMMITTEE ON THE JUDICIARY RECORD 108 (1949).

overruled, legislative bodies, made more democratic and more responsive to populist sentiments as a result of his *Baker v. Carr* decision, will enact many of his holdings into statutory law.