



Justice William J. Brennan Jr. and the 14th Amendment

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The U.S. Supreme Court has long withstood different periods characterized as originalist and living constitutionalist majority rule, which has helped define America not only through law precedents but the ideas they contained. Former Supreme Court Associate Justice William J. Brennan Jr. heavily influenced the future of progressivism in America through his belief in living constitutionalism through the Fourteenth Amendment, which helped define liberalism and correct social injustices. This

research analyzes Brennan's opinions concerning important and lasting cases involving the Fourteenth Amendment such as the Regents of the University of California v. Bakke, Plyler v. Doe, Near v. Minnesota, and New York Times Company v. Sullivan and how they have defined living constitutionalism and the First Amendment. These influential cases explore how Brennan's influence helped define the Court and progressivism concerning historical wrongdoings.

Former Associate Justice William J. Brennan Jr.'s long legacy of progressive decisions was derived from his employment of living constitutionalism and motivation for social change in the Supreme Court. Brennan served a 34-year tenure on the Court and relied heavily on the evolving legal ideas of the times as justification behind some of the most influential court cases regarding Fourteenth Amendment rights in America. Utilizing the Fourteenth Amendment which states, "no state shall make or enforces any law which shall abridge the privileges or immunities of citizens of the United States... nor deny to any person within its jurisdiction the equal protection of the laws,"¹ Brennan pushed to expand and protect civil rights. According to US Legal, living constitutionalism is "the Constitution's ability to change to meet the needs of each generation without major changes."² Living constitutionalism allowed Justice Brennan the legal ideology to employ judicial activism on the Court.

About Brennan

Brennan was appointed to the Supreme Court by President Eisenhower in 1956 as an effort to diversify the spirituality of the Court as a Roman Catholic and son of an immigrant from Ireland.³ Brennan's ideology closely correlated with his childhood and his father, "a progressive in the mold of the Catholic theologian John A. Ryan, a forceful advocate for social justice who would come to be dubbed as the New Deal's priest."⁴ Brennan's philosophical belief of protecting individual rights of all despite race, religious affiliation, or sex built upon the ideas established by progressives and in Roosevelt's New Deal.⁵ When Justice Brennan cites "'diversity' as a justification for affirmative action,"⁶ he utilizes the social ideas developed through his childhood and applies them by evoking living constitutionalism and judicial activism. Brennan's experiences allowed him to apply the Constitution to modern and changing standards and ideas of inequality in his eyes.

New Deal Liberalism

Brennan became a justice during the Warren Court, an era defined as a majority liberal Court utilizing judicial activism in which Earl Warren served as the Chief Justice between 1953 and 1969.⁷ Largely, the classification of his thinking as liberal or that of a living constitutionalist was greatly associated with "New Deal liberalism [which] subscribed to classical liberalism's objective of self-preservation with the optimum of individual freedom intact, but accepted a broader range of governmental action than was common in nineteenth-century liberal thought."⁸ In the evolving beliefs on liberalism of the time, Brennan's tenure on the Supreme Court marked progressive reform of laws and interpretations of the Fourteenth Amendment. Brennan utilized the Supreme Court as a corrective entity to solve or fix social injustices and flaws he saw within the system, and "to advance individual rights and personal dignity by correcting what deficiencies remained in liberal thought during the post-New Deal period."⁹ From the establishment of the Supreme Court upon the Founding, the power of the Court has increased throughout time and can thus be seen through Brennan's use of the evolving power to establish social reform and correct flaws he saw within the system.

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Affirmative Action: Regents of the University of California v. Bakke

Justice Brennan was well known to evoke the Fourteenth Amendment when it concerned the controversial legality of affirmative action as utilized by higher learning institutions to establish diversity on their campuses. Allen Bakke, a white man, was denied admission twice to the University of California Medical School at Davis. Bakke's test scores and GPA were higher than any of the minority students admitted the years he applied. He later found the program reserves 16 of the 100 yearly spots in the program for minority students and claimed the denial of his application was based on his race.¹⁰ In 1977, the Supreme Court heard the case of *Regents of the University of California v. Bakke* and nearly one-and-a-half years later relayed their 8-1 in favor of the Regents of the University of California decision. The singular message stated, "Universities were (relatively) free to take race and ethnic background into account in their admissions decisions but they were not free to maintain strict quotas absent a history of racial discrimination demanding a strong remedy."¹¹ Brennan relies heavily on wording in many of his arguments to uphold individual rights. In a 37-page narrative by Brennan concerning the case, Brennan and the other Justices were strongly divided on the issue and the message associated with the decision. In Brennan's narrative, he stated on the constitutionality claim for Bakke that the Court had already "settled the principle that not every remedial use of race is constitutionally forbidden," and "under any standard of Fourteenth Amendment review, other than one requiring absolute color-blindness, the Davis program passes muster."¹² In this instance, Brennan utilizes the Fourteenth Amendment's equal protection under the laws to justify Davis' quota of minorities in their program as remedial action.

Living constitutionalism ideology and judicial activism as seen by Justice Brennan in cases such as *Bakke* allowed him to be a defining voice on the Court throughout his tenure. Brennan's

personalized focus around social justice stemmed from his experiences and beliefs growing up, in which he believed the law could fix the societal shortcomings in history.

Right to Education: Plyler v. Doe

In 1981, the Court heard the case of *Plyler v. Doe* which called a 1975 Texas law into question allowing school districts to refuse funding the free education of the children of undocumented immigrants as well as deny enrollment altogether.¹³ Texas argued the law was necessary in order to preserve funding for children "residing legally in the State."¹⁴ In a close 5-4 decision with Justice Brennan authoring the majority opinion, he wrote that the actions of the state did violate the Equal Protection Clause of the Fourteenth Amendment, which states "that no State shall deny 'any person within its jurisdiction equal protection of the laws.'"¹⁵ Brennan stated, "whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of the term," and "the phrase 'within its jurisdiction' guaranteed 'equal protection to within a state's boundaries, and to all upon whom the State would impose the obligations of its laws.'"¹⁶ Brennan also cited within the opinion that despite being defined by the term of undocumented, the children had no bearing or any way to influence their parents' decisions and Texas could not also prove the regulation served a "compelling state interest."¹⁷

Within his majority decision, Brennan was able to achieve social justice for those he believed to be disenfranchised and overturn a state law based on a Fourteenth Amendment violation. Perhaps beyond the purely Constitutional reach, Brennan also cites justice as a reason for the children to have access to education by stating, "in determining the rationality of [the statute], we may appropriately take into account its costs to the nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the statute] can hardly be considered rational unless it

further some substantial goal of the State.”¹⁸ He continually employed living constitutionalism in his decisions to apply the Constitution in different manners, which is directly seen in *Plyler v. Doe*, a historically controversial but standing case for all of America and within the Court.

As for his New Deal liberalism and social justice mindset, the Fourteenth Amendment allowed Justice Brennan to utilize the Constitution as a tool for advocacy. During a 1985 speech at Georgetown University, Justice Brennan spoke about the Constitution as a “sparkling vision of the supremacy of the human dignity in every individual... The vision of human dignity embodied there is timeless. If we are to be a shining city upon a hill, it will be because of our ceaseless pursuit of the ideal of human dignity.”¹⁹ Brennan’s belief that the Constitution should be used as a vessel for social change stems from the contested idea that the Founding Fathers intended it to be so. To preserve the society and moral government regime, the Founding Fathers were not ignorant to the eventual need for change and the evolution the Constitution must undergo to preserve the United States. This idea, furthered by living constitutionalism, allowed Justice Brennan to utilize the document and calculate his decisions according to the changing intentions of the Constitution and the Founding Fathers to maintain justice and liberty. Brennan utilized the Constitution as a vessel for change because “for William Brennan, at least, human dignity was the supreme and transcendent value of the

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Constitution, trumping even majoritarianism.”²⁰ Seen widely in *Plyler v. Doe* and *Regents of the University of California v. Bakke*, Brennan sought to maintain individual freedoms and correct the injustices he commonly saw. Utilizing his views on living constitutionalism and his

want to progress social change, he helped the Court affirm the right of education for children of undocumented immigrants and allow higher learning institutions to utilize affirmative action.

Hand In Hand: The Fourteenth and First

The Fourteenth Amendment was ratified in 1868, and the Supreme Court found the “Privileges and Immunities Clause, the portion of it that, at least on its face, appeared most likely to incorporate the Bill of Rights against the states, did no such thing.”²¹ The Privileges and Immunities Clause sought to ensure citizens had the same rights no matter which state they were in and could not be discriminated against for being citizens of another state.²² It wasn’t until much later when the Supreme Court, “... determine[d] that most of the rights guaranteed in the Constitution’s initial amendments were part and parcel of the ‘liberty’ that the Fourteenth Amendment established.”²³ Because of this, it was concluded that liberty, “could not be denied by the states without ‘due process of law.’”²⁴ It was decided by the Court in 1925 that the “freedom of speech or the press” applied as such and in 1931 it held that the Fourteenth Amendment incorporated the First Amendment for states in *Near v. Minnesota*. In this case, a Minnesota newspaper accused officials of “being implicated with gangsters,”²⁵ in which those officials sought

a permanent injunction against the newspaper because it was “malicious, scandalous, and defamatory.”²⁶ The permanent injunction would essentially act as a “gag law” upon the newspaper, but the Supreme Court ruled that the government could not prevent something from being printed with few exceptions.²⁷

This decision, made long before Brennan was appointed to the Court, laid the groundwork for the incorporation of the Bill of Rights within the Fourteenth Amendment and therefore the basis for many important decisions. During Justice Brennan’s tenure on the Court, he made numerous

decisions concerning the First Amendment which were incorporated by the Fourteenth Amendment and are therefore forever intertwined and related.

In *New York Times Company v. Sullivan*, Public Safety Commissioner L.B. Sullivan filed a libel action suit against the New York Times after they published an ad calling for donations to defend Martin Luther King Jr. on perjury charges. Despite not being mentioned in the ad, Sullivan believed it reflected poorly on him and asked the Times to retract the ad, which they refused to do.²⁸ In Justice Brennan's majority opinion, he states that Sullivan's claim is that, "... he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of 'ringing' the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission."²⁹ Originally, a state court jury awarded Sullivan \$500,000 in damages and the state Supreme Court concurred.³⁰ The U.S. Supreme Court decided in favor of the Times and was able to apply First Amendment

fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones."³¹ Although it is characterized as a First Amendment case, Brennan and many Justices who utilize the First Amendment must also utilize the Fourteenth which grants equal protection to all citizens, and in turn, protection from the states.

Conclusion

When speaking of Brennan's dedication to the Equal Protection Clause in the Fourteenth Amendment, scholars of the Supreme Court have said that "he looked to the impact on the person or group subjected to discrimination. For him, whether lawmakers intended to discriminate is secondary, almost irrelevant. Instead, the Court's greatest responsibility lies in scrutinizing practices that disproportionately affect a class of persons who have been traditionally oppressed, such as racial and ethnic minorities, women, and illegitimate children."³² During his confirmation hearing with the Senate Judiciary Committee, Brennan's ability was questioned as to "the fitness of a Catholic to hold judicial office," and if he would "be bound by papal decrees or doctrines or the laws and precedents of this nation."³³ With his first-hand experiences of discrimination, Brennan did not have to dig deep to understand the rooted unequal beliefs of America and he sought to change it through the Fourteenth Amendment.

The Supreme Court has gone through noted periods of originalism and living constitutionalism majority rule, which expand upon the ideas of the time and allow the Court to ebb and flow between ideas of liberalism and conservatism. Justice William Brennan's approach on the Supreme Court allowed him to pursue judicial activism through his beliefs of living constitutionalism. During his 34-year tenure on

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rights to the states, allowing Brennan and the other justices to give concrete Constitutional support behind the decision. In a unanimous decision in favor of the Times, Justice Brennan wrote the opinion which required libel to include the idea of "actual malice," meaning intentionally falsifying or recklessly publishing information which may be untrue. In his majority opinion, Brennan cited Mr. Justice Brandeis' concurring opinion in *Whitney v. California*, 274 U.S. 357 as further justification stating, "...it is hazardous to discourage thought, hope and imagination; that

the Court, “Brennan did not come to the Court with his jurisprudence firmly fixed; rather, he grew into his beliefs.”³⁴ In his many decisions concerning the Fourteenth Amendment and through such, the First Amendment, Brennan was able to correct the perceived wrongs he saw within America. Many rights held important by millions of Americans today were heavily influenced by Brennan’s decision on the Supreme Court, such as the expansion of the First and Fourteenth Amendment protections for Americans and affirmative action.

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