ARTICLES

JUSTICE WILLIAM J. BRENNAN AND THE WARREN COURT

Robert C. Post *

Justice William J. Brennan's eminent, if not pre-eminent, position in the annals of the Warren Court is now well established. The depth and clarity of his vision, the lucidity of its doctrinal expression, and his uncanny knack for creating crucial court majorities from the splinters of disparate perspectives have all been amply documented. In the words of one commentator, "To the extent that the Court over which Warren presided has any intellectual legacy that is accessible to those trained in doctrine and not in ethics, it is Brennan who is responsible."[1] In this essay I shall attempt to isolate and assess Brennan's distinct contribution to that legacy.

The immense influence of the Warren Court on American constitutional law can ultimately be traced to three discrete achievements: The reconstruction of constitutional law on individualist principles; the redesign of doctrine based upon a pragmatic conception of legal rules; and the vigorous articulation and revivification of egalitarian values. Although Justice William J. Brennan importantly participated in all three of these achievements, his work as a Justice was particularly decisive for the first two.

BRENNAN AND THE LOGIC OF INDIVIDUALISM

When Brennan was appointed in October, 1956, *Brown v. Board of Education*,[2] perhaps the most important decision of the Warren Court, had already been decided. The principle of equality, whose awesome power in our democracy had long ago been theorized by de Tocqueville, had been unleashed. Brennan concurred in

* Professor of Law, School of Law (Boalt Hall), University of California at Berkeley. This essay was originally delivered at a conference on The Warren Court: A Historical Perspective, sponsored in January 1990 by the Georgetown University Law Center.

1. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983).

2. 346 U.S. 483 (1954).

that principle. Indeed he has since remarked that "the equality principle . . . is the rock upon which our Constitution rests. . . . The judicial pursuit of equality is, in my view, properly regarded to be the noblest mission of judges; it has been the primary task of judges since the repudiation of economic substantive due process as our central constitutional concern."[3] During the Warren Court era Brennan strongly supported and developed the equality principle in major opinions like *Cooper v. Aaron*[4] and *Green v. County School Board*.[5] But in these efforts, as he himself recognized, he was ultimately carrying forward—albeit enthusiastically, creatively and forcefully—a task assumed before his appointment.

The importance of this task had been foreseen by de Tocqueville, who presciently argued that the people of the United States would evince "a more ardent and enduring love of equality than of liberty."[6] This point was astonishingly unappreciated by Herbert Wechsler when in 1959 he criticized *Brown* as not involving a question "of discrimination at all," but rather one of "freedom of association."[7] Precisely because in the end the Warren Court subordinated the latter to the former, it cannot strictly be called "libertarian" in sentiment.

It is more accurate to characterize the perspective of the Warren Court as "individualist." And "individualism," as de Tocqueville also explained, is not only compatible with, but directly implied by, the principle of equality. In fact de Tocqueville argued that "individualism is of democratic origin, and it threatens to spread in the same ratio as the equality of conditions."[8] Individualism and equality are linked because the institution of democracy creates pressure to measure equality in terms of individual persons.

By the end of the Warren Court, it is true, glimpses could be caught of a form of equality measured in terms of groups rather than individuals.[9] Brennan's own opinion in *Green* rejecting a "freedom-of-choice" school desegregation plan is a prime example. In the years after the Warren Court the difference between these

3. Brennan, *The Equality Principle: A Foundation of American Law*, 20 U.C. DAVIS L. REV. 673, 673-74 (1987).

4. 358 U.S. 1 (1958). On Brennan's role in the drafting of the *Cooper*, per curiam opinion, see B. SCHWARTZ, SUPER CHIEF 295-301 (1983). Schwartz concludes that the "chief credit" for *Cooper* "must go to Brennan." *Id.* at 301.

5. 391 U.S. 430 (1968).

6. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 99-103 (1945).

7. H. WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 46-47 (1960).

8. DE TOCQUEVILLE, *supra* note 6, at 104.

9. For a discussion of the difference between orienting law toward groups as compared to individuals, see Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 299-305 (1988).

two forms of equality would lead to heated debates over affirmative action,[10] debates in which Brennan chiefly supported a concept of equality rooted in groups.[11] But during the Warren Court this tension between equality and individualism remained largely latent, and among Brennan's most important contributions was to be the development and amplification of the logic of individualism.

The nature of that logic and its connections to equality can perhaps best be seen in Brennan's opinion in *Baker v. Carr*,[12] which Earl Warren viewed as "the most important case of my tenure on the Court."[13] *Baker* concerned a lawsuit alleging that the gross malapportionment of the Tennessee legislature violated the Equal Protection Clause; the issue before the Court was whether such a lawsuit was justiciable, or whether it was, as prior precedents like *Colegrove v. Green*[14] construing the "Guaranty Clause" of the Constitution[15] had concluded, a "political question." Brennan's long and exegetical opinion in *Baker* conceded that suits based upon the Guaranty Clause were non-justiciable because the Clause did not offer "a repository of judicially manageable standards which a court could utilize."[16] But it insisted that, by contrast, "[j]udicial standards under the Equal Protection Clause are well developed and familiar,"[17] and hence "that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which [plaintiffs] are entitled to a trial and decision."[18]

Why did Brennan view the Equal Protection Clause as supplying the judicial standards missing from the Guaranty Clause? The plaintiffs in *Baker* had alleged in their Complaint that Tennessee malapportionment violated the Equal Protection Clause because of a "debasement of their votes."[19] But Justice Frankfurter trenchantly noted in dissent that "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."[20] Necessarily implicit in Bren-

10. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). *Compare* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281 n.8 (1986) (Opinion of Powell, J.), with *id.* at 309 (Marshall, J., dissenting).

11. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990).

12. 369 U.S. 186 (1962).

13. E. WARREN, THE MEMOIRS OF EARL WARREN 309 (1977).

14. 328 U.S. 549 (1946).

15. "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

16. 369 U.S. at 223.

17. *Id.* at 226.

18. *Id.* at 237.

19. *Id.* at 194.

20. *Id.* at 300 (Frankfurter, J., dissenting).

nan's conclusion, therefore, was the notion that the Equal Protection Clause required "if not the assurance of equal weight to every voter's vote, at least the basic conception that representation ought to be proportionate to population, a standard by reference to which the reasonableness of apportionment plans may be judged."[21]

That legislative apportionment ought constitutionally to be based upon population, rather than upon geography, is not an obvious proposition in a country whose national Senate has since the eighteenth century represented States instead of people. It is the proposition, however, that underlies Brennan's opinion in *Baker v. Carr*. It is the proposition that would subsequently form "the foundation," in Earl Warren's words, "upon which rest all subsequent decisions guaranteeing equal weight to the vote of every American citizen for representation in state and federal government."[22]

What lends the proposition its power and makes it exemplary of the Warren Court's jurisprudence, is its democratic, as distinct from republican, logic. If democracy is that form of regime in which *the people* ultimately choose their government, then equality must ultimately be measured in terms of persons. In this manner the Warren Court used the solvent of democracy to fuse equality with individualism. As Brennan would later remark, the Constitution "is a sparkling vision of the supreme dignity of every individual. This vision is reflected in the very choice of democratic self-governance: the supreme value of a democracy is the presumed worth of each individual."[23]

The most salient characteristic of individualism is its focus on the individual as the privileged unit of social action. This focus has the powerful effect of delegitimating forms of social organization that do not flow from processes of individual choice. Thus the individualism of *Baker v. Carr*, which would later find explicit expression in Warren's opinion in *Reynolds v. Sims*,[24] undermines forms of representation that depend upon geography or upon maintaining an urban/rural balance. These forms of representation are entailed by visions of social identity that cannot be reduced to individual choice. By disallowing them the Warren Court essentially turned its back, as Justice Harlan pointed out in his dissent, "on the regard which this Court has always shown for the judgment of state legisla-

21. *Id.*

22. Warren, *Mr Justice Brennan*, 80 HARV. L. REV. 1, 2 (1966).

23. Brennan, *My Encounters with the Constitution*, 26 JUDGES JOURNAL No. 3, 10 (Summer 1987). Brennan wrote of Warren that "[h]e strongly believed that individual human dignity was the primary value fostered and protected by the Constitution." Tribute to Chief Justice Earl Warren, Fairmont Hotel, San Francisco, California, April 8, 1989, at 3.

24. 377 U.S. 533 (1964).

tures and courts on matters of basically local concern."[25] Individualism, in other words, meant the death knell for federalism as a source of limitations on civil rights and liberties.

Federalism is a form of cultural pluralism that privileges the diversity of local cultures.[26] Individualism, on the other hand, privileges the diversity of persons, who are understood to choose or to create their cultures. From the perspective of individualism, it makes no sense to curtail individual freedom for the purpose of promoting local culture. Similarly, for Brennan and the dominant members of the Warren Court, it was incomprehensible to appeal to federalism as a reason not to protect individual rights. In their eyes the very purpose of federalism, as Brennan told the Conference of Chief Justices in 1964, was to secure "individual freedom"[27] a formulation that Justices Frankfurter and Harlan would no doubt have found most distasteful.

Brennan's disaffection with federalism was reinforced by his perception that "the rise of mass education and mass media of communication" had in the "two decades since the end of World War II" materially contributed to the creation of a cultural uniformity inconsistent with the premises of federalism.[28] He also perceived the most important social development of the time to be the growth of the state, creating the potential for "more and more collisions of the individual with his government."[29] And he conceived government not as a reflection of indigenous culture, but rather as an impersonal "bureaucracy," as a rational deployment of state power.[30] His primary concern, then, was the protection of persons in their conflict with government, and from this perspective it made no difference whether the government at issue was federal or state.

It is for this reason that Brennan viewed the incorporation decisions as "the most important of the Warren era."[31] These decisions, which applied the Bill of Rights against the States,[32] crushed federalism as an effective counter to the logic of individual liberty.

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25. 369 U.S. at 332.

26. *See* Post, *supra* note 9, at 301-05.

27. Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 954 (1964).

28. *Id.* at 960.

29. *Id.*

30. Brennan, *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 18-19 (1988).

31. 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, 535-36 (1986).

32. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment); Klopfer v. North Carolina, 386 U.S. 213 (1967) (sixth amendment); Parker v. Gladden, 385 U.S. 363 (1966) (sixth amendment);

Brennan viewed them as necessitated by the logic of both individualism and equality. The decisions were made possible by the fourteenth amendment, which thus " 'served as the legal instrument of the equalitarian revolution which has so transformed the contemporary American society,' protecting each of us from the employment of governmental authority in a manner contravening our national conceptions of human dignity and liberty."[33] By focusing on the individual as the privileged unit of legal and social analysis, the incorporation decisions eliminated local cultural variations. The decisions were egalitarian because they insisted that all individuals throughout the nation be treated equally. The nationalism which was so characteristic of Warren Court jurisprudence can thus be seen as implied by its evacuation of the space between individuals and the federal government.

The lengths to which Brennan was willing to take this nationalism was revealed in his important opinion in *Shapiro v. Thompson*,[34] from which even Earl Warren dissented. In *Shapiro* the Court invalidated regulations imposing one year residency requirements on welfare applicants. In Warren's view, the requirements had been approved by Congress, and, consistent with traditional New Deal nationalism, he was therefore prepared to hold that Congress need only "have a rational basis for finding that a chosen regulatory scheme is necessary to the furtherance of interstate commerce."[35] Brennan, on the other hand, revealing the distance he had traveled from the New Deal Court, concluded that the regulations impinged upon the "fundamental" right to interstate travel, and were therefore a violation of the Equal Protection Clause unless justified by "a *compelling* governmental interest."[36] State attempts to use residency requirements to partition off local cultures were therefore precluded. In this manner the Warren Court, under Brennan's lead, moved decisively to articulate a nationalism that went beyond notions of plenary congressional power, and derived instead

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Washington v. Texas, 388 U.S. 14 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment); Benton v. Maryland, 395 U.S. 704 (1969) (fifth amendment).

Of these opinions, only *Malloy* was written by Brennan himself. Brennan has recounted with pride, however, that *Malloy* was the first of these decisions to decide a case "in explicitly incorporationist terms": "The Court's opinion in Malloy made clear that the rights and prohibitions nationalized in the past were now considered to apply to the states with full federal regalia intact." Brennan, *supra* note 30, at 543-44.

33. Brennan, *supra* note 31, at 536 (quoting Schwartz, *The Amendment in Operation: A Historical Overview*, in THE FOURTEENTH AMENDMENT 29, 30 (B. Schwartz ed. 1970)).

34. 394 U.S. 618 (1969). On the fascinating genesis and history of the *Shapiro* opinion, *see* B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 304-93 (1985).

35. 394 U.S. at 651 (Warren, J., dissenting).

36. *Id.* at 634, 638.

from a vision of individuals uniformly equal before the Constitution.

The facts of *Shapiro* confirmed for Brennan his general analysis of contemporary society. The case concerned a contest between government, in its capacity as a large and unfeeling bureaucracy, and destitute welfare recipients, whose very necessities of life were being manipulated. The issue thus reduced to a conflict between individual freedom and the impersonal and administrative prerogatives of state power. For Brennan, the judiciary could assume a privileged role in this conflict. He believed that "the soul of a government of laws is the judicial function, and that function can only exist if adjudication is understood by our people to be, as it is, the essentially disinterested, rational and deliberate element of our society."[37] If the rationality of bureaucracy was for Brennan tainted with organizational self-interest, he viewed the reason of courts as in contrast detached and trustworthy. Courts were somehow distinct from government. Because they embodied disinterested reason, they could be trusted to mediate the conflict between government and individuals.[38]

The judicial application of disinterested reason was for Brennan immensely important. "I do not think there can be any challenge," he said, "to the proposition that the ultimate protection of individual freedom is found in court enforcement of . . . constitutional guarantees."[39] Public interest litigation was thus for Brennan "a form of political expression" designed to make manifest and effective the principles of equality and individualism.[40] Indeed, "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."[41]

These considerations prompted Brennan to give great priority to enlarging litigants' access to federal courts. He took the lead in the Warren Court in devising doctrinal strategies that would undo or circumvent prior restrictions on that access. He wrote the Court's opinion in *Fay v. Noia*,[42] for example, which radically revised the rules governing federal *habeas corpus* and made federal relief available in numerous instances where it heretofore would

37. Brennan, *Justice Thurgood Marshall: Advocate for Human Need in American Jurisprudence*, 40 MD. L. REV. 390, 395 (1981).

38. Seven years later Brennan would argue that courts could not rely on "reason alone," but must instead display "the passions that understand the pulse of life beneath the official version of events." Brennan, *supra* note 30, at 22.

39. Brennan, *supra* note 27, at 954.

40. NAACP v. Button, 371 U.S. 415, 429 (1963).

41. *Id.* at 430.

42. 372 U.S. 391 (1963).

have been barred. Brennan rested his conclusion on a recognition of "the unceasing contest between personal liberty and government oppression," and on the necessity that "in a civilized society, government must always be accountable to the judiciary for a man's imprisonment."[43] He specifically rejected "the exigencies of federalism" as a countervailing consideration, holding that these should not "be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[44] Other examples of Brennan's determination to open up the federal courts during the Warren Court era include *Dombrowski v. Pfister*,[45] which increased the availability of federal injunctive relief, *Henry v. Mississippi*,[46] which limited the adequate state grounds doctrine, and *England v. Medical Examiners*,[47] which limited the reach of federal court abstention.[48]

In this regard *Baker v. Carr* is of course exemplary. Although the decision is on the surface narrowly focused on a seemingly technical question of justiciability, in fact the question entails the whole issue of the enforceability of the substantive principles of individualism and equality. Because state courts could not be expected to adopt the nationalist perspectives implied by these principles, the substantive agenda of the Warren Court would simply lie fallow if litigants were not afforded meaningful access to the power and detached reason of federal courts.

The increasing authority with which Brennan's opinions have in retrospect come to stand as definitive of the Warren Court stems from the fact that Brennan, more than any other single justice, most fully assimilated the full jurisprudential consequences of the Warren Court's revolutionary new vision of the American polity. He

43. *Id.* at 401-02.
44. *Id.* at 415, 424.
45. 380 U.S. 479 (1965).
46. 379 U.S. 443 (1965).
47. 375 U.S. 411 (1964).
48. Brennan's concern with expanding access to federal courts persisted into the Burger Court era, in decisions like Steffel v. Thompson, 415 U.S. 452 (1973), which increased access to federal declaratory relief, and Bivens v. Six Unknown Named Agents, 403 U.S. 338 (1970), which pioneered the concept of the implied federal cause of action.

It should be noted that in this respect, more than in any other, the Burger and Rehnquist Courts have been successful in undoing Brennan's work. Although the concept of federalism has not yet been resurrected as an argument to limit the interpretation of substantive federal rights, *see* Sandalow, *Federalism and Social Change*, 43 LAW & CONTEMP. PROBS. 29 (1980), the Court after the Warren era has used the concept to limit access to federal fora. Exemplary is Younger v. Harris, 401 U.S. 37 (1971), which used the notion of "Our Federalism" sharply to limit *Dombrowski*, and Teague v. Lane, 109 S. Ct. 1060, 1074-75 (1989), which determined that a deference to the finality of state decisionmaking processes ought to seal the demise of Fay v. Noia.

grasped, with comprehensive clarity and coherence, the relationship between individualism and equality, the bureaucratization of government, and the correspondingly augmented functions of the federal judiciary. He firmly discerned that individualism required opposition both to the communitarianism of traditional federalism and to the statism that has since come to dominate the Court through the opinions of Chief Justice Rehnquist and Justice Scalia.[49] He was able, with what seemed almost effortless ease, to create apt and convincing doctrinal structures to express these new understandings.

One can, of course, disagree with the substantive vision that underlies and supports these doctrinal structures. One can question, for example, whether it too hastily denies the possibility of meaningful forms of social life intermediate between individuals and the bureaucratic state. One can also question the extent to which courts truly embody the "disinterested" reason which for Brennan grounds their legitimacy. But there can be no disagreement with the lucid and consistent manner in which Brennan's opinions unfolded this vision and revealed its legal implications.

BRENNAN AND THE PRAGMATIC CONCEPT OF LAW

If Brennan's contribution to the logic of individualism ultimately lay in his ability to perfect the more inchoate perceptions of his colleagues, his contribution to the distinctively pragmatic conception of constitutional law that emerged from the Warren Court was of an entirely different magnitude. Brennan came to the Court from a career as a state judge in New Jersey, where he had acquired national prominence as an expert in judicial administration. His concern was to reform the actual functioning of the law. This focus affected his entire approach to law, and led him to formulate a constitutional jurisprudence based upon process rather than power. This jurisprudence has become one of the most important legacies of the Warren Court.

The jurisprudence is most clearly displayed in Brennan's interpretation of the first amendment. At the time Brennan joined the Court, its members were embroiled in a vigorous but ultimately unproductive debate as to whether first amendment freedoms were "absolutes" or whether they should be "weighed" against competing government interests in regulation.[50] Both sides of the debate viewed government interests and individual rights as locked in an

49. For a recent example, particularly pertinent to Brennan's constitutional legacy, see Employment Div., Dept. of Human Res. v. Smith, 110 S. Ct. 1597 (1990).

50. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 50-51 (1961).

indissoluble and paralyzing tension. Both sides viewed the question as one of ultimate government power. Brennan's distinctive and momentous contribution was to push the Court beyond this debate by introducing an entirely different focus on legal processes and procedures.

The origins of this perspective can be precisely attributed to Brennan's opinion in *Speiser v. Randall*,[51] which for this reason can be said to "stand among the most important constitutional cases of modern times."[52] *Speiser*, written during Brennan's second term on the Court, concerned a property tax exemption that California granted to those World War II veterans who executed a loyalty oath that they did not "advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."[53] Significantly, Brennan did not approach the case in terms of California's constitutional power to proscribe the advocacy of violent revolution; he was willing to assume the existence of this power.

Instead Brennan focused his analysis on the procedures used by California to distinguish between veterans who would and would not receive the tax exemption. He interpreted California law as placing upon veterans the burden of demonstrating that they had not engaged in unlawful speech. Brennan concluded that this was unconstitutional because it created too great a danger that lawful speech would be adversely affected:

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the unlawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position.[54]

It is no exaggeration to observe that this paragraph marks a major innovation in American constitutional law, one which would lastingly reshape the very landscape of first amendment jurisprudence.

By focusing attention on the way in which California law actually operated, rather than upon the abstract power that could be said to sustain it, *Speiser* required the Court to conceive law as a

51. 357 U.S. 513 (1958).

52. Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 701 (1978). *See also* Anastaplo, *Justice Brennan, Due Process and the Freedom of Speech: A Celebration of Speiser v. Randall*, 20 J. MARSHALL L. REV. 7 (1986).

53. 357 U.S. at 515.

54. *Id.* at 525-26.

real, pragmatic instrument for social ordering instead of a transparently ideal set of commands or regulations. In *Speiser* Brennan succeeded in bringing his colleagues to understand the material effects of the California regulatory scheme on speech that all conceded was legitimate and constitutionally protected. This perception of law as concretely embedded in particular procedural settings was nothing less than revolutionary.

In the years following *Speiser* Brennan rapidly harvested the implications of his insight, and in the process created the framework of first amendment doctrine as we now know it. Brennan's focus in many of these decisions was narrowly on the procedural aspects of adjudication. In *Freedman v. Maryland*,[55] for example, he explored the consequences for prior restraint doctrine of the timing and burden of proof at judicial hearings. In *Marcus v. Search Warrants*[56] he explored these same issues in the context of the procedures for issuing search warrants. But in other ultimately more significant decisions, Brennan took the radical step of using the theory of *Speiser* to generate substantive law.

Only two years after *Speiser*, for example, in *Smith v. California*,[57] Brennan considered the constitutionality of a Los Angeles ordinance that imposed criminal penalties on booksellers for the mere possession of obscene writings. Although he invalidated the ordinance, Brennan assumed that obscene speech could be proscribed. He argued, however, that the absence of a scienter provision would have the effect of inhibiting the sale of "books that were not obscene," for "if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."[58]

In *NAACP v. Button*[59] Brennan generalized the point, arguing that the logic of *Speiser* required that "[p]recision of regulation must be the touchstone"[60] in the regulation of speech. In a passage of immense influence, he coined the term "overbreadth" to describe an important way in which statutes could have the unacceptable consequence of inhibiting freedom of speech:

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legis-

55. 380 U.S. 51 (1964).
56. 367 U.S. 717 (1961).
57. 361 U.S. 147 (1959).
58. *Id.* at 152-53.
59. 371 U.S. 415 (1963).
60. *Id.* at 438.

> lative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application .... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith v. California*, [ ]; *Speiser v. Randall* .... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specifity.[61]

The logic of *Speiser* also led Brennan to develop a full-blown theory of first amendment vagueness. Like all his colleagues, Brennan had earlier understood vagueness to be a relatively toothless standard located in the prerequisites of due process. Indeed, in *Roth v. United States*[62] he had argued that a "lack of precision" in the definition of obscenity was not "offensive to the requirements of due process" because "all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .' "[63] But the insights of *Speiser* would soon lead Brennan to a very different account of vagueness. In *Keyishian v. Board of Regents*,[64] for example, he would argue "the defect of vagueness"[65] was intolerable in the context of the regulation of speech, for "[w]hen one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone . . . .' *Speiser v. Randall*."[66]

The most important of *Speiser*'s progeny is of course *New York Times Co. v. Sullivan*.[67] At issue in *Sullivan* was the Alabama law of libel, which permitted a public official to recover damages for defamatory statements unless the speaker could prove that the statements were true. Reasoning from the premises of *Speiser* and *Button*, Brennan had little difficulty concluding that Alabama's allocation of the burden of proof was unconstitutional, because it "dampens the vigor and limits the variety of public debate" by inducing "self-censorship."[68] In *Sullivan*, however, Brennan took the unusual step of crafting a constitutional standard that would permit unprotected speech to be regulated, while ensuring that "freedoms of expression" will "have the 'breathing space' that they 'need to survive.' "[69] He concluded that defendants could not be liable for damages for defamatory speech about public officials unless a plain-

61. *Id.* at 432-33.
62. 354 U.S. 476 (1957).
63. *Id.* at 491 (quoting United States v. Petrillo, 332 U.S. 1, 7-8).
64. 385 U.S. 589 (1967).
65. *Id.* at 599.
66. *Id.* at 604.
67. 376 U.S. 254 (1964).
68. *Id.* at 279.
69. *Id.* at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

tiff could prove with "convincing clarity" that the defamation had been "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[70]

The "actual malice" standard makes no pretense of distinguishing constitutionally valuable from constitutionally valueless speech. It is instead "designed solely as an instrument of policy, to attain the specific end of minimizing the chill on legitimate speech."[71] As such, the standard epitomizes the pragmatic conception of constitutional law, a conception whose articulation and development can authoritatively be traced to Brennan.[72]

That conception, of course, has its disadvantages. It severs the connection between law and cultural norms.[73] It rests on psychological assumptions about the relationship between law and behavior that are difficult to predict or to verify,[74] and that as a consequence are also subject to strategic manipulation. The attraction of the pragmatic focus introduced by Brennan was in part due to its apparent accommodation of governmental interests in regulation, for by sidestepping issues of ultimate power it appeared to invite states to reformulate their laws with more precision and accuracy. This posture of accommodation offered distinct advantages for an activist Court, but at root the posture was illusory. Because the empirical predicates of the "chilling effect" are always vague, the exact degree of constitutionally mandated precision and clarity can never be specified, and the constitutional test can therefore without explicit justification be loosened to uphold some government regulations and tightened to strike down others.

These disadvantages having been noted, however, it remains true that the pragmatic focus introduced by Brennan to the Warren Court has forever altered the face of American constitutional law. The most significant aspect of this change is the understanding of law as a process, rather than merely as an abstract command of power. The implications of this understanding extend well beyond

70. *Id.* at 279-80, 285-86.

71. Post, *Review Essay: Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539, 553.

72. The other Warren Court opinion to epitomize the pragmatic conception of law is Miranda v. Arizona, 384 U.S. 436 (1966), authored by Chief Justice Warren. On Brennan's assistance to Warren in clarifying the logic of pragmatic law in Miranda, *see* B. SCHWARTZ, *supra* note 4, at 590-91.

73. *See* Post, *supra* note 71, at 554.

74. Recent empirical evidence suggests, for example, that, rather than protecting defendants from unwarranted litigation, the "actual malice" rule may paradoxically "encourage plaintiffs to sue for libel and provide an ironic sanctuary even for frivolous claims." Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 (1985).

the confines of first amendment jurisprudence. To pick only one outstanding example, Brennan's focus on the actual process of law enabled him to undermine fatally the right-privilege distinction.

The Warren Court, at the time Brennan joined it, was still using this distinction to decide cases.[75] In *Speiser*, therefore, California had argued that the tax exemption was a "privilege" bestowed at the pleasure of the state, and it could for this reason also be withdrawn by the state for any reason.[76] But Brennan could effectively brush aside this argument because the focus of his analysis was not California's *power* to enact the tax exemption, but rather the *manner* in which it had chosen to do so.

In *Sherbert v. Verner*[77] Brennan consolidated this implication of *Speiser*. In *Sherbert* the Court considered a South Carolina law that was interpreted to deny unemployment compensation benefits to a Seventh-day Adventist who refused for religious reasons to work on Saturday. The State claimed that the benefits were not a " 'right' but merely a 'privilege.' "[78] Brennan rejected this argument, and, citing *Speiser*, concluded "that conditions on public benefits cannot be sustained if they so operate, whatever their purpose, to inhibit or deter the exercise of First Amendment freedoms."[79] In this way Brennan's focus on the actual *operation* of the law enabled him to undercut the right-privilege distinction, and to make possible such important non-first amendment decisions as *Shapiro v. Thompson*[80] and *Goldberg v. Kelly*.[81]

Brennan's pragmatic conception of law had yet another, and perhaps even more important consequence. It provided a natural and doctrinally legitimate avenue through which such values as empathy, compassion, and justice could influence the practice of constitutional law. By scrutinizing the actual operation of the law, Brennan could make visible and give legal significance to the misery and suffering caused by the welfare regulations at issue in *Shapiro* and *Goldberg*. The pragmatic conception of law thus allowed the Warren Court to give legal recognition "to the concrete human realities at stake" in a case.[82]

The human acknowledgment of these realities stands, of course, as one of the Warren Court's great achievements. If it has

75. *See* Barsky v. Board of Regents, 347 U.S. 442 (1954).
76. 357 U.S. at 518.
77. 374 U.S. 398 (1963).
78. *Id.* at 404.
79. *Id.* at 405.
80. 394 U.S. 618 (1968).
81. 397 U.S. 254 (1969).
82. Brennan, *supra* note 30, at 20.

proved tragically ephemeral, as recent decisions such as *Employment Division, Oregon Department of Human Resources v. Smith*[83] suggest, it has nevertheless remained as the ghost at the constitutional banquet of the Burger and Rehnquist Courts. It has called us to our consciences.

83. 110 S. Ct. 1595 (1990).