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INTRODUCTION

Justice William J. Brennan has been the senior associate Justice of the United States Supreme Court since the retirement of William O. Douglas in 1975. Appointed by President Eisenhower in 1956, Justice Brennan now has served on the Court longer than all but a handful of Justices.[1] His years of service span most of the Warren Court era and the entire Burger Court period. He has authored many of the Court's most significant opinions during these years.[2] His changing role in the Court's decision-making process highlights changes in the Court's orientation during his tenure. Once the "glue of the liberal majority"[3] during the late Warren Court, he became the Court's leading dissenter in the relatively conservative Burger Court.[4]

For many years Justice Brennan's contributions to the Court's out-

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1. Earlier Justices who served more than thirty years on the Court are Bushrod Washington (1798-1829), John Marshall (1801-1835), William Johnson (1804-1834), Joseph Story (1811-1845), John McLean (1829-1861), James M. Wayne (1835-1867), Stephen J. Field (1863-1897), John M. Harlan (1877-1911), Hugo L. Black (1937-1971), and William O. Douglas (1939-1975). CONGRESSIONAL QUARTERLY, INC., THE SUPREME COURT: JUSTICE AND THE LAW 166-67 (2d ed. 1977).

2. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); New York Times v. Sullivan, 376 U.S. 254 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969); Craig v. Boren, 429 U.S. 190 (1976). *See also* B. SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY 206 (1983).

3. Totenberg, *Conflict at the Court*, Washingtonian, Feb. 1974, *reprinted in* READINGS IN AMERICAN GOVERNMENT 75/76 at 162 (1965).

4. Heck, *Changing Voting Patterns in the Warren and Burger Courts*, in JUDICIAL CONFLICT AND CONSENSUS 80, 82 (S. Goldman & C. Lamb eds. 1986).

put received only sporadic attention.[5] More recently, his role as a coalition builder and as the driving intellectual force behind Warren Court decisions has been recognized by judges and scholars alike.[6] In a massive narrative documenting internal politics in the Warren Court on a case-by-case basis, Bernard Schwartz recognized Brennan as Chief Justice Warren's "most capable lieutenant"[7] and a "principal ally"[8] to whom "the Chief was to assign the opinions in some of the most important cases decided by the Warren Court."[9] Similarly, Warren biographer G. Edward White labeled Brennan "Warren's judicial technician"[10] and noted Brennan's talent for "supplying doctrinal rationales for decisions in which Warren strongly believed."[11] In a recent tribute, Judge John J. Gibbons described Justice Brennan's criminal justice opinions as "the most literate, technically proficient, historically sound, and persuasive" produced during the "golden years" of the Warren Court.[12] Analyses of the Supreme Court's work focusing on Brennan's importance have now begun to appear in newspapers and popular journals as well as in scholarly works.[13] As Justice Brennan completes his thirty-first year of service on the Court, the time is ripe for a careful assessment of his work on an issue-by-issue basis.

One area of constitutional interpretation in which Brennan has made a major contribution is the development of a theory of freedom of expression under the first amendment. In a tribute published in honor of Justice Brennan's completion of fifteen years of service on the Court, former Justice Arthur Goldberg noted that Brennan had emerged as the "principal architect" of the Court's freedom of expression doctrines.[14] Particularly significant is his opinion in *New*

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5. McKay, *Mr. Justice Brennan, and the Judicial Function*, 4 RUT.-CAM. L.J. 44 (1972); O'Neil, *Mr. Justice Brennan and the Condition of Unconstitutional Conditions*, 4 RUT.-CAM. L.J. 58 (1972); Heck, *Justice Brennan and the Heyday of Warren Court Liberalism*, 20 SANTA CLARA L. REV. 841 (1980); Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296 (1980).

6. Gibbons, *Tribute to Justice Brennan*, 36 RUTGERS L. REV. 729 (1984); G. WHITE, EARL WARREN: A PUBLIC LIFE 185-86 (1982); B. SCHWARTZ, *supra* note 2, at 205-06; Hutchinson, *Book Review*, 81 MICH. L. REV. 922 (1983).

7. B. SCWHARTZ, *supra* note 2, at 204.

8. *Id.* at 205.

9. *Id.* at 206.

10. G. WHITE, *supra* note 6, at 185.

11. *Id.*

12. Gibbons, *supra* note 6, at 736.

13. Markman & Regnery, *The Mind of Justice Brennan: A 25-Year Tribute*, NAT'L REV., May 18, 1984, at 30; Hager, *Brennan Now a Dissenter as High Court Edges Right*, L. A. Times, July 5, 1985, at 1, col. 1; Serrill, *The Power of William Brennan*, TIME, July 22, 1985, at 62; Taylor, *Brennan: 30 Years and the Thrill is Not Gone*, N.Y. Times, Apr. 16, 1986, at 18, col. 3; Hager, *Brennan, Near 80, Holds Firm to Court Post*, L. A. Times, Apr. 19, 1986, at 1, col. 3.

14. Goldberg, *Mr. Justice Brennan and the First Amendment*, 4 RUT.-CAM L.J. 8 (1972).

York Times v. Sullivan,[15] which embraces the idea that the protection of political speech is "the central meaning of the First Amendment."[16] Derived from the writings of Alexander Meiklejohn, this doctrine is premised on the need for absolute protection of speech about public officials and governmental policy in a democratic political system.[17] Murray Edelman has labeled this approach the "functional contract" theory of democracy[18] and has identified Brennan as the Warren Court Justice whose first amendment opinions most closely reflected Meiklejohn's views.[19]

The primacy of political speech clearly is one of the major themes running through Brennan's first amendment opinions during the Warren Court years. In *Roth v. United States*,[20] he noted that the first amendment "was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[21] While obscenity was not protected by the first amendment, cases involving speech on the issues of the day were to be decided in light "of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[22]

Among Brennan's Warren Court opinions that reflect this same emphasis on the primacy of political speech are *NAACP v. Button*,[23] in which Brennan indicated that interest group litigation is a form of

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15. 376 U.S. 254 (1964).

16. *Id.* at 273. Although Justice Brennan used the phrase, "the central meaning of the First Amendment," in his majority opinion in *New York Times*, it was Professor Harry Kalven who more clearly explicated the implications of this notion for first amendment theory. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. According to a more recent commentator, Kalven's commentary on *New York Times* is "one of those rare pieces of legal scholarship that adds content and definition to a decision while purporting to 'interpret' it." Bollinger, *Elitism, the Masses and the Idea of Self-Government: Ambivalence About the "Central Meaning of the First Amendment"*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 99 (R. Collins ed. 1980).

17. A. MEIKLEJOHN, FREE SPEECH AND SELF-GOVERNMENT (1948), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 1 (1960).

18. M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 211-44 (1984).

19. *Id.* at 217.

20. 354 U.S. 476 (1957).

21. *Id.* at 484.

22. *New York Times*, 376 U.S. at 270.

23. 371 U.S. 415 (1963).

political expression entitled to first amendment protection, and *Dombrowski v. Pfister*,[24] in which he wrote that federal courts might enjoin state criminal prosecutions, undertaken in bad faith or for purposes of harassment, in order to avoid chilling effects on protected expression. Never a first amendment absolutist in the tradition of Justices Black and Douglas, Brennan has recognized the need for balancing in first amendment cases. According to Justice Goldberg, Brennan rejected the "*ad hoc* balancing" approach of Justice Frankfurter in favor of "definitional balancing," which involved "a testing of societal need for a certain class of expression against the policy reasons advanced to curtail it."[25] Under such a balancing approach, the nature of the speech for which protection was sought was one of the factors to be weighed, with political speech clearly occupying a preferred position in the constitutional scheme. While a public official was required to prove "knowing or reckless falsity" in order to prevail in a libel suit against critics of his official conduct, he was not to be foreclosed entirely from recovering damages as Justices Black, Goldberg, and Douglas preferred.[26] A similar balancing approach may be seen in Brennan's efforts throughout the Warren Court years to locate "the vexatious line between freedom of artistic expression and proscribable obscenity."[27] Although Brennan is noted for liberalizing the law of obscenity,[28] he continued throughout the Warren years to distinguish between speech involving commercial exploitation of pornography and political speech.

The major question addressed in this Article is how Justice Brennan dealt with freedom of expression issues during the Burger Court years. What kinds of first amendment claims was he most likely to support? What reasons for his decisions did he offer in his opinions? In light of his position that efforts wholly to suppress obscenity are no more justifiable than suppression of speech at the core of the first amendment's protection,[29] did he continue in the Burger Court years

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24. 380 U.S. 479 (1965).

25. Goldberg, *supra* note 14, at 9-10.

26. *Compare New York Times*, 376 U.S. at 279-80 (majority opinion) *with* Justice Black's concurrence, 376 U.S. at 293-97, *and with* Justice Goldberg's concurrence, 376 U.S. at 298.

27. H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 264 (2d ed. 1985).

28. Memoirs v. Massachusetts, 383 U.S. 413 (1966) (plurality opinion) (material cannot be deemed obscene unless it is "utterly without redeeming social value").

29. Only in 1973 did Brennan announce that he had rethought his earlier position that "obscenity" was unprotected by the first amendment. "I am convinced," Brennan declared, "that the approach [to reconciling obscenity statutes with the First Amendment] initiated 16 years ago in Roth v. United States and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting).

to focus on the "central meaning" of the first amendment? Has he continued to base his votes and opinions on the functional contract theory of democracy?[30] Or has he moved toward a broader natural rights theory emphasizing individual self-fulfillment?[31]

In investigating these questions, this Article examines both Justice Brennan's voting record and his opinions in first amendment cases decided since the appointment of Chief Justice Burger in 1969. Justice Brennan's votes in different types of first amendment cases initially are analyzed and then are compared to the voting records of his colleagues on the Burger Court.[32] In the opinion analysis, major themes running through his opinions are investigated in an effort to determine whether his votes are rooted in a coherent doctrine of freedom of expression and, if so, whether he has moved away from his earlier reliance on a functional view of the first amendment.[33]

THE VOTING DATA

The data set which is the basis for this analysis of the voting behavior of Justice Brennan and his colleagues consists of 204 plenary docket cases decided during the first sixteen years of the Burger Court (1969-70 through 1984-85 terms). The cases included in the data set are those in which a litigant (usually an individual or organization challenging governmental restrictions on expressive activity) explicitly raised, and the Court resolved, a first amendment freedom of speech, press, association, or assembly claim.[34] Also included were cases raising significant issues of access to a federal judicial forum for resolution of a substantive first amendment claim.[35] Only those

30. M. Edelman, *supra* note 18, at 211-44.

31. *Id.* at 171-208; T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

32. *See infra* text accompanying notes 34-53.

33. *See infra* text accompanying notes 54-205.

34. These freedoms are conceptualized as component parts of a broader notion of freedom of expression. The justices themselves have recognized that the explicitly guaranteed freedoms of speech, of the press, and of assembly and petition are closely intertwined. Richmond Newspapers v. Virginia, 448 U.S. 555, 575 (1980). Moreover, the Court has recognized that the implied "freedom to engage in association for the advancement of beliefs and ideas" is closely related to the explicit guarantees of the first amendment. NAACP v. Alabama, 357 U.S. 449, 460 (1958). Brennan's views on the interrelationships among the first amendment guarantees are developed in McDonald v. Smith, 472 U.S. 479, 485-490 (1985) (Brennan, J., concurring).

35. These "access" cases typically involve issues such as whether federal court abstention is required pending state court resolution of cases presenting first amendment questions. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971); Middlesex Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982).

cases in which a first amendment claim was resolved after oral argument are included.[36] An opinion resolving more than one case (multiple docket numbers) was treated as a single case except in a few instances when the Court resolved two or more distinct first amendment claims on different votes.[37]

Tables 1 and 2 below provide an overview of Justice Brennan's voting record in the first amendment cases of the Burger Court. Table 1 reports the first amendment support scores for each of the Burger Court justices as a percentage of the cases in which that justice supported the litigant asserting first amendment rights. Only Justice Douglas (91.7% first amendment support score) was more likely to support assertions of first amendment rights than Brennan (79.7%) during the Burger Court years. Others whose individual first amendment support rates exceed the average for the Court as a whole (44.1%) are Justices Marshall, Black, Stewart, Stevens, and Blackmun (though barely). Of the justices in this group who served through a substantial portion of the Burger years, only Brennan's close ally, Justice Marshall, comes close to matching Brennan's record of support for first amendment values. While Table 1 clearly provides support for the generally accepted view of Brennan as an outspoken supporter of civil liberties, a comparison of his voting record with that of Douglas should suffice to reject the hypothesis that Brennan has evolved into a first amendment absolutist.

36. Cases decided *per curiam* without oral argument are not plenary docket cases and were, therefore, excluded from the data set even if printed in the front section of the United States Reports. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970s*, 91 HARV. L. REV. 1709, 1724-25 (1978).

37. For example, the two cases decided on the basis of the *per curiam* opinion in Buckley v. Valeo, 424 U.S. 1 (1976), were counted separately, because the Court upheld the contribution limit provisions of the Federal Election Campaign Act (FECA) Amendments on a 6-2 vote, while striking down the expenditure provisions of the Act. Justice White voted to uphold all of the Act's limitations on spending, and Justice Marshall voted to uphold the provision limiting a candidate's expenditure of personal or family funds. Chief Justice Burger and Justice Blackmun would have struck down both the contribution and expenditure provisions on first amendment grounds. For similar rules for counting cases, see Spaeth & Altfeld, *Influence Relationships Within the Supreme Court: A Comparison of the Warren and Burger Courts*, 38 W. POL. Q. 70, 72 (1985).

Table 1

Support for First Amendment Claims, 1969-1985

	Percentage Support	No. of Cases
Douglas	91.7%	84
Brennan	79.7%	192
Marshall	75.4%	195
Black	70.8%	24
Stewart	61.4%	153
Stevens	57.7%	104
Blackmun	44.2%	197
COURT	44.1%	204
Powell	41.2%	165
White	39.3%	201
Burger	34.8%	201
Harlan	32.0%	25
O'Connor	31.3%	48
Rehnquist	23.1%	169

Just as Table 1 confirms widely-held beliefs about voting tendencies of the Justices, so Table 2 confirms that alliance patterns in first amendment cases resemble those found in other studies of judicial voting behavior.[38] Although Brennan frequently voted with Justices Douglas and Black during their last years on the Court, only Marshall has been a reliable ally throughout the Burger years. The Brennan-Marshall agreement rate of 94.2% clearly indicates a general identity of outlook in first amendment cases, even though they reached opposing conclusions in eleven cases, perhaps most notably because of Marshall's greater reluctance to apply the "knowing or reckless falsity" standard of Brennan's opinion in *New York Times*[39] in later libel cases.[40] Although not close allies of Brennan in the same sense as Justice Marshall, both Justices Stevens and Stewart

38. Scheb & Ailshie, *Justice Sandra Day O'Connor and the "Freshman Effect,"* 69 JUDICATURE 9, 11-12 (1985).

39. 376 U.S. at 279-80.

40. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979).

voted with Brennan in more than three-fourths of the first amendment cases in which they jointly participated. Among the other members of the Burger Court, Brennan's agreement scores range from 64.0% for Justice Harlan (in twenty-five cases) to a low of 38.8% with Justice Rehnquist. Noteworthy in light of its potential impact on opinion assignments[41] is Brennan's relatively low rate of agreement with Chief Justice Burger (49.7%).

Table 2

Agreement Rates with Justice Brennan:

First Amendment Cases, 1969-1985

	Percentage Agreement	No. of Cases
Marshall	94.2%	187
Black	87.5%	24
Douglas	83.4%	84
Stevens	77.9%	95
Stewart	76.5%	143
Harlan	64.0%	25
Blackmun	59.5%	185
Powell	58.5%	154
White	58.4%	190
O'Connor	57.5%	47
Burger	49.7%	189
Rehnquist	38.8%	157

An overview of Brennan's voting behavior in various types of first amendment cases reveals that he has been strongly supportive of first amendment claims in a wide variety of contexts. For example, he supported first amendment claims of public employees in fourteen of fourteen cases[42] and invariably supported litigants who asserted violation of their first amendment rights by military or Selective Service authorities.[43] In addition, he backed first amendment claims of the

41. *See infra* text accompanying notes 54-56.

42. *See, e.g.*, CSC v. Letter Carriers, 413 U.S. 548 (1973) (Hatch Act restrictions on partisan political activity do not violate first amendment rights of federal employees); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (state merit system act does not violate rights of state employees). Justice Brennan joined a dissenting opinion by Douglas in *Letter Carriers*, 413 U.S. at 595, and filed a dissent in *Broadrick*, 413 U.S. at 621.

43. Parker v. Levy, 417 U.S. 733 (1974) (officer's conduct in urging black enlisted men to refuse combat duty not protected by first amendment); Greer v. Spock, 424 U.S. 828 (1976) (regulation banning partisan political speeches on military base does not

press in all cases involving the free press-fair trial conflict[44] or a press claim of "special privilege."[45]

In order to compare Brennan's votes in different types of first amendment cases with the record of the Burger Court as a whole, the 204 cases in the data set were divided into ten broad categories, focusing on either the type of expression that gave rise to the litigation or the specific constitutional claim asserted by the litigant seeking judicial enforcement of first amendment rights. The results are reported in Table 3 below. Among the most striking features of this table is Brennan's strong support for first amendment claims across all ten issue areas. Brennan supported, without exception, the freedom of speech and freedom of association claims of public employees and was particularly solicitous of first amendment claims in the demonstrations, nonlabor picketing, and symbolic speech contexts (88.2% support). In addition, Brennan supported first amendment claims in at least eighty percent of the cases in the obscenity-pornography, freedom of the press, and commercial speech categories, as well as in the miscellaneous freedom of speech grouping.

violate first amendment); Brown v. Glines, 444 U.S. 348 (1980) (regulation requiring command approval prior to circulating petitions on base does not violate first amendment); Wayte v. United States, 470 U.S. 458 (1985) (selective prosecution of nonregistrants who publicly announced opposition to the draft does not violate first amendment); United States v. Albertini, 472 U.S. 675 (military base is not a public forum for first amendment purposes). Justice Brennan dissented in each of these cases.

44. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) ("gag order" violates first amendment); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (first amendment implies right of press and public to attend criminal trial).

45. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665 (1972) (newsman has no constitutional privilege to refuse to testify before grand jury).

Table 3

Support for Major Categories

of First Amendment Claims 1969-1985

	Brennan Court			
	Percent Supported	No. of Cases	Percent Supported	No. of Cases
Public Employment*	100.0%	14	42.9%	14
Picketing, Demonstrations, and Symbolic Speech (nonlabor)	88.2%	17	70.6%	17
Obscenity-Pornography	86.2%	29	33.3%	30
Freedom of Speech: Miscellaneous	85.7%	28	26.7%	30
Freedom of the Press	83.3%	36	50.0%	40
Commercial Speech (including lawyer solicitation)	80.0%	10	66.7%	12
Labor Speech**	71.4%	7	25.0%	8
Political Money & Corporate Speech***	66.7%	12	66.7%	12
Access to Federal Judicial Forum	61.5%	13	28.6%	14
Freedom of Association****	61.5%	26	44.4%	27
Totals	79.7%	192	44.2%	204*****

* Includes both freedom of speech and freedom of association claims of public employees.

** Includes freedom of association claims.

*** Includes all claims that raising or spending money constitutes protected expression.

**** Excludes labor and public employee cases.

***** Each case was placed in only one category. All cases are included.

Equally striking is the contrast between Brennan's votes and the position of the Court as a whole. Only in the political money and corporate speech area does the Court's record of support for first amendment claims match that of Justice Brennan (66.7% support rate). In all other categories, the differences between Brennan and the Court are substantial, most notably in areas in which the Burger Court has been most reluctant to recognize first amendment claims, such as obscenity-pornography, access to a federal judicial forum, and labor speech. Even in the freedom of association grouping, where Brennan's first amendment support rate reaches a low ebb (61.5%), he is noticeably more supportive of associational rights than the Court (44.4%).

The final question addressed in this analysis of voting patterns in first amendment cases is whether the decisions of Justice Brennan and his colleagues on the Burger Court are consistent with Brennan's earlier emphasis on the primacy of political speech. The first step in this stage of the analysis required separation of cases in which a litigant sought protection for political expression from those involving nonpolitical expression. In making this distinction, it was necessary to consider the nature of the message that gave rise to the litigation in each of the 204 cases in the data set, rather than simply combining categories of cases from Table 3. A case was considered a political speech case if the original message involved the kind of speech essential to ensure that "debate on public issues . . . will be uninhibited, robust, and wide-open."[46] Messages dealing explicitly with elections and the functioning of a representative system of government were readily classified as political speech cases. Like most dichotomous classification schemes, however, a division of all messages into "political" and "nonpolitical" has the potential to cause difficulties in application.[47] Particularly difficult are marginal cases in which the Justices themselves disagreed about whether the speech in question was political speech.[48] Because "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"[49] are crucial aspects of political speech in a democratic polity, the criterion adopted here classified as political speech

46. *New York Times*, 376 U.S. at 270.

47. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 326-27 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971).

48. Connick v. Myers, 461 U.S. 138 (1983). Compare the *Connick* majority opinion, 461 U.S. at 154, with Brennan's dissent, 461 U.S. at 163.

49. *New York Times*, 376 U.S. at 270.

cases all those in which the speaker's message criticized government policy directly or indirectly,[50] or raised questions about the performance of public officials[51] or the qualifications of candidates for public office. Also included in the political speech category are those cases involving access of press and public to information about the activities of all branches of government, that is, the "information necessary for the public to perform its function of holding government institutions accountable."[52] Finally, those cases involving a claim that the first amendment guaranteed a right to affiliate with others in support of candidates or policies, or a right to spend money in support of favored candidates or positions, were classified as political expression cases. Any remaining doubtful cases were classified as nonpolitical, as were cases in which a litigant sought first amendment protection for essentially commercial speech aimed primarily at enhancing the speaker's economic well-being.[53] Of the 204 first amendment cases in the data set, 106 were classified as political speech cases and 98 as involving nonpolitical expression.

If a Justice is, in fact, basing his or her decisions on the the notion of the primacy of political speech, it seems reasonable to anticipate that the Justice would be significantly more likely to support a first amendment claim in political speech cases than in those involving nonpolitical expression. Table 4 below compares the support scores of Brennan and his colleagues in political speech cases with their scores in cases that do not involve political speech. On the whole, the data provide limited support for the proposition that the Justices base their votes largely on the "central meaning of the first amendment." Brennan voted to support first amendment claims in 82 of the 101 political speech cases in which he participated (81.2%), but he was almost as likely to favor the freedom of expression claimant in the nonpolitical speech cases (78.0%). In short, Brennan supported freedom of expression claims across the board without any particularly strong preference for claims involving first amendment protection for political speech. Overall, ten of the thirteen Justices were more likely to favor judicial enforcement of first amendment guarantees in political speech than in nonpolitical speech cases, though generally the differences are quite small. Of the six Justices who voted in favor of the claimant in more than half of the cases in which they participated, only Brennan, Marshall, and Black appear to have

50. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971) (use of profanity in expressing opposition to the draft is protected by first and fourteenth amendments).

51. Thus, Connick v. Myers, 461 U.S. 138 (1983), was classified as a political speech case because an assistant district attorney's questionnaire concerning office practices reflected on the job performance of the elected district attorney.

52. Lewis, *A Right to Know about Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2.

53. A. MEIKLEJOHN, *supra* note 17, at 87.

leaned even slightly in the direction of special protection for political speech. Justices Douglas, Stewart, and Stevens actually supported first amendment claims at a higher rate in the nonpolitical expression cases, though the differences between the two types of cases are quite small. The more conservative members of the Court (particularly Chief Justice Burger and Justice Powell) have supported first amendment claims in political speech cases at a higher rate than in nonpolitical expression cases, but the fact that each of these Justices (including Justice Blackmun) voted against first amendment claims in a clear majority of the political speech cases suggests something less than a strong commitment to the primacy of political speech.

Table 4

Support for First Amendment Claims in

Political and Nonpolitical Expression Cases, 1969-1985

	Political Expression		Nonpolitical Expression	
	Percent Support	No. of Cases	Percent Support	No. of Cases
Douglas	88.9%	45	94.9%	39
Brennan	81.2%	101	78.0%	91
Marshall	76.0%	100	74.7%	95
Black	75.0%	16	62.5%	8
Stewart	60.0%	80	63.0%	73
Stevens	56.9%	51	58.5%	53
COURT	50.0%	106	37.8%	98
Powell	47.6%	82	34.9%	83
Blackmun	44.6%	101	43.8%	96
White	41.9%	105	36.5%	96
Burger	41.3%	104	27.8%	97
Harlan	41.2%	17	12.5%	8
O'Connor	37.5%	24	25.0%	24
Rehnquist	26.2%	84	20.0%	85

While Justice Brennan's voting record sheds some light on his position in first amendment cases decided during the Burger years, it is necessary to examine his opinions as well in order to understand the constitutional theory underlying his votes. Thus, the next section of this Article analyzes Brennan's opinions in first amendment cases decided since 1969.

Opinion Analysis

Throughout most of the Warren Court years, Justice Brennan was the closest ally of the Chief Justice and frequently was assigned the task of writing the Court's opinions in major constitutional cases, including those involving interpretation of the first amendment.[54] During the Burger Court years, by contrast, Brennan frequently was at odds with the Chief Justice. In light of earlier findings that Burger rarely assigned opinions to Brennan in "important" cases,[55] it is not surprising that he did not write the Court's opinions in a large number of first amendment cases. In the first sixteen years of the Burger Court, Brennan was the author of majority or plurality opinions in only seventeen cases,[56] significantly fewer than the Chief Justice himself (thirty-six opinions) or such Burger allies as White (thirty prevailing opinions), Powell (twenty-five opinions), or Rehnquist (twenty-four opinions). In four of these seventeen cases, Brennan failed to win majority support for his opinion and, thus, spoke only for a plurality of the Justices participating.[57] Nonetheless, Justice Brennan's opinion output in first amendment cases since the ap-

54. Political scientists studying the opinion assignment practices of Chief Justices and senior associate Justices have noted a tendency to assign opinions to the Justice whose views are closest to those of the opinion assigner, particularly in the most significant cases before the Court. Rohde, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court*, 16 Midwest J. Pol. Sci. 652 (1972); Rathjen, *Policy Goals, Strategic Choice and Majority Opinion Assignments in the U.S. Supreme Court: A Replication*, 18 Am. J. Pol. Sci. 713, 720 (1974); D. Rohde & H. Spaeth, Supreme Court Decision Making 172-92 (1976); Slotnick, *Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger*, 23 Am. J. Pol. Sci. 60, 72-75 (1979).

55. Spaeth, *Distributive Justice: Majority Opinion Assignments in the Burger Court*, 67 Judicature 299, 303-04 (1984).

56. Bachellar v. Maryland, 397 U.S. 564 (1970); Blount v. Rizzi, 400 U.S. 410 (1971); Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (plurality opinion); Gooding v. Wilson, 405 U.S. 518 (1972); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Cousins v. Wigoda, 419 U.S. 477 (1975); Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (plurality opinion); Nixon v. Admin'r of Gen'l Serv., 433 U.S. 425 (1977); Carey v. Brown, 447 U.S. 455 (1980); Brown v. Hartlage, 456 U.S. 45 (1982); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion); F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

57. *See supra* note 56.

pointment of Chief Justice Burger in 1969 constitutes a considerable body of work. In addition to his signed opinions, he must be regarded as the co-author of the Court's *per curiam* opinion in *Buckley v. Valeo*.[58] Moreover, he frequently has amplified his position in separate opinions, writing lengthy concurring opinions or brief concurring statements in twenty-five cases and dissenting opinions or statements in no less than forty-two of the 204 first amendment cases decided during the first sixteen years of the Burger Court. Many of these dissents represent major statements of Justice Brennan's mature approach to first amendment issues, perhaps most notably in the 1973 obscenity cases.[59] Although it is hardly to be expected that these opinions would reflect a completely clear and coherent theory of constitutional interpretation, it should prove useful, nonetheless, to examine them for the light they shed on Justice Brennan's own explanation (or perhaps rationalization) of his voting behavior in first amendment cases.

On some first amendment issues, the basic thrust of Brennan's opinions is clear and straightforward. In obscenity cases decided since 1973, Brennan generally has taken the position that the statute under review was unconstitutionally overbroad under standards set out in his *Paris Adult Theatre I* dissent.[60] In the libel area, he has sought consistently to apply the *New York Times* standard of knowing or reckless falsity and extend it to new situations, even while the majority was curtailing its use.[61] In access cases, he views the federal courts as the primary guardians of constitutional rights and federal court abstention as appropriate only when the litigant has a fair opportunity to raise his first amendment claims in a pending state proceeding.[62] Some of Brennan's opinions are relatively narrow in scope. In two cases early in the Burger years, for example, Brennan wrote opinions striking down state or local laws prohibiting the use of of-

58. 424 U.S. 1 (1976). Brennan, Powell, and Stewart supported the entire majority opinion.

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

60. *Id.*

61. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 361 (1974) (Brennan, J., dissenting); Time, Inc. v. Firestone, 424 U.S. 448, 471 (1976) (Brennan, J., dissenting); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 774 (1985) (Brennan, J., concurring in part and dissenting in part).

62. Steffel v. Thompson, 415 U.S. 452 (1974) (federal court abstention not required in declaratory judgment case when state prosecution under allegedly unconstitutional statute is threatened); Perez v. Ledesma, 401 U.S. 82, 103-04 (1971) (Brennan, J., dissenting).

fensive words.[63] In *Blount v. Rizzi*,[64] Brennan simply built on the foundation of the procedural obscenity decisions of the Warren Court.[65] Yet, in reading the entire body of Brennan's first amendment opinions, a number of significant general themes appear that seem to point to a broader theory of constitutional intepretation. Among these are:

- The protection of political speech is the core value of the first amendment, but other types of expression also are entitled to vigorous protection by the Court.[66]
- Because the first amendment is not absolute, the Court must balance competing constitutional values in deciding first amendment cases.[67]
- Government restrictions on expressive activity are to be subjected to exacting scrutiny, usually through application of some version of the "compelling governmental interest" test.[68]
- A total ban on particular types of expression is more difficult to justify than governmental regulation of expressive activity.[69]

For concrete illustrations of each of these themes, selected opinions written by Justice Brennan during the Burger Court years will be examined.

POLITICAL SPEECH

Although Justice Brennan's voting record in the first amendment cases of the Burger Court seems to indicate only a slight tendency to differentiate between political and nonpolitical speech cases, the notion of the primacy of political speech remains a clear and explicit theme in the Justice's majority, concurring, and dissenting opinions. The source of the primacy of political speech notion as a principle of constitutional interpretation perhaps may be traced to Chief Justice Hughes' majority opinion in *Stromberg v. California*,[70] a decision

63. Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974). In both cases Brennan took the position that the challenged laws could not stand because, as interpreted by state courts, they could be applied to punish speech protected by the first amendment.

64. 400 U.S. 410 (1971) (impounding mail of alleged vendors of obscenity without requirement that government seek prompt judicial determination of obscenity violates the Constitution).

65. *See, e.g.*, Freedman v. Maryland, 380 U.S. 51 (1965).

66. *See infra* text accompanying notes 70-107.

67. *See infra* text accompanying notes 108-31.

68. *See infra* text accompanying notes 132-96.

69. *See infra* text accompanying notes 197-203.

70. 283 U.S. 359 (1931) (statute prohibiting display of a red flag as symbol of opposition to organized government is unconstitutional). In the majority opinion, Chief Justice Hughes declared: "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." *Id.* at 369.

frequently cited in Brennan's first amendment opinions.[71] More fully developed in the writings of Alexander Meiklejohn,[72] this approach received the Warren Court's stamp of approval in Brennan's *New York Times* opinion,[73] an opinion interpreted by Harry Kalven as embodying the principle that the "central meaning of the First Amendment" is the protection of political speech.[74] According to a recent commentator, "[t]his triumvirate of *New York Times v. Sullivan*, Harry Kalven, and Alexander Meiklejohn . . . spawned a way of thinking and talking about freedom of speech and press that quickly came to dominate public discourse and continues to do so today."[75] Without a doubt, this type of rhetoric continues to occupy a prominent place in Brennan's first amendment opinions.

In an opinion striking down a state law interpreted as restricting a candidate's campaign rhetoric,[76] for example, Brennan referred to the "unequivocal protection that the Constitution affords to political speech,"[77] and noted that "[a]t the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."[78] Such emphasis on the protection of political speech was justifed on the grounds that free exchange of ideas "provides special vitality to the process traditionally at the heart of American constitutional democracy — the political campaign."[79] Crucial as elections are in the functional contract theory of democracy,[80] it is clear that Brennan's notion of political speech extends beyond the narrow electoral context, to embrace a wide range of communications about public policy and the performance of public officials. According to Brennan, a questionnaire circulated within the District Attorney's office by a disgruntled assistant district attorney constituted political speech "because it dis-

71. *See, e.g.*, Carey v. Brown, 447 U.S. at 467; *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment); *Hartlage*, 456 U.S. at 55; *Connick*, 461 U.S. at 161 (Brennan, J., dissenting).

72. *See* A. MEIKLEJOHN, *supra* note 17.

73. 376 U.S. at 254, 256 (1964).

74. Kalven, *supra* note 16, at 191. Justice Brennan later hinted that he agreed with Kalven's suggestion that Brennan's *New York Times* opinion was rooted in Meiklejohn's interpretation of the first amendment. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

75. Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 439 (1983).

76. Brown v. Hartlage, 456 U.S. 45 (1982).

77. *Id.* at 58.

78. *Id.* at 52.

79. *Id.* at 53.

80. M. EDELMAN, *supra* note 18, at 211-44.

cussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official . . . discharges his responsibilities."[81] In *Carey v. Brown*,[82] Justice Brennan cited Meiklejohn in support of the premise that "public-issue picketing . . . has always rested on the highest rung of the hierarchy of First Amendment values."[83] Concurring in a majority decision to strike down as unconstitutionally vague an ordinance requiring solicitors to obtain a permit, Brennan stressed the burden imposed on political expression, "the core conduct protected by the First Amendment,"[84] and quoted Meiklejohn at length in support of the primacy of political speech.[85]

A similar emphasis on expression related to the functioning of government runs through all of Brennan's opinions dealing with the free press/fair trial conflict. Concurring in *Nebraska Press Association v. Stuart*,[86] he declared that "[c]ommentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government."[87] When the Court explicitly recognized a first amendment right of press and public to attend criminal trials in *Richmond Newspapers v. Virginia*,[88] Brennan wrote separately to emphasize the "structural role" of the first amendment "in securing and fostering our republican system of self-government."[89] Writing for the Court in *Globe Newspaper Corporation v. Superior Court*,[90] he cited protection for the "free discussion of governmental affairs"[91] as a crucial purpose of the first amendment, and viewed public access to criminal trials as a providing an "essential component in our structure of self-government" by affording the public with a means of serving as a check on the judiciary.[92]

In Justice Brennan's view, freedom of political assocation occupies the same exalted place in the first amendment scheme as freedom of speech and of the press. The Court's *per curiam* opinion in *Buckley v. Valeo*[93] established the groundwork for striking down the expendi-

81. *Connick*, 461 U.S. at 163 (Brennan, J., dissenting).
82. 447 U.S. 455 (1980).
83. *Id.* at 466-67.
84. Hynes v. Mayor of Oradell, 425 U.S. 610, 626 (1976) (Brennan, J., concurring in part).
85. *Id.* at 626-28, 626 n.3.
86. 427 U.S. 539 (1976).
87. *Id.* at 587 (Brennan, J., concurring in the judgment).
88. 448 U.S. 555 (1980).
89. *Id.* at 587 (Brennan, J., concurring in the judgment).
90. 457 U.S. 596 (1982).
91. *Id.* at 604 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).
92. *Id.* at 606.
93. 424 U.S. 1 (1976).

ture limitations of the Federal Election Campaign Act (FECA) Amendments by declaring that the restrictions imposed by the act "operate in an area of the most fundamental First Amendment activities," that is "[d]iscussion of public issues and debate on the qualifications of candidates."[94] Repeatedly, the opinion emphasizes the special concern of the first amendment for political association, as well as political speech.[95] Most explicitly, in *Elrod v. Burns*,[96] Brennan asserted that "political belief and association constitute the core of those activities protected by the First Amendment"[97] and justified the Court's decision to declare patronage dismissals violative of the first amendment on the basis that a system that "compels or restrains beliefs and association . . . is 'at war with the deeper traditions of democracy embodied in the First Amendment.' "[98]

Even in cases involving first amendment protection for admittedly nonpolitical expression, Justice Brennan has been inclined to invoke the notion of the primacy of political speech. Protesting the majority's decision to uphold an FCC decision to impose sanctions on a broadcaster for airing "indecent" speech,[99] Brennan pointedly warned that extension of the Court's decision to political speech would be contrary to "rudimentary First Amendment principles."[100] Recently, in *Dun & Bradstreet v. Greenmoss Builders*,[101] Brennan admitted that protection of speech involving the commercial interests of the speaker is "not the central meaning of the First Amendment,"[102] yet insisted that the constitutional guarantees should be interpreted as prohibiting awards of punitive damages without proof of knowing or reckless falsity.[103] More generally, Brennan has indicated that important though the protection of politial speech may be in the constitutional scheme, the first amendment's protections also embrace a wide variety of other types of speech. In *Rosenbloom v. Metromedia*,[104] he clearly outlined an expansive view of the first

94. *Id.* at 14. *See* Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1.
95. Buckley v. Valeo, 424 U.S. at 14-15, 19, 39, 48-49.
96. 427 U.S. 347 (1976).
97. *Id.* at 356.
98. *Id.* at 357 (quoting Illinois State Employees Union v. Lewis, 473 F.2d 561, 576 (7th Cir. 1972)).
99. F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).
100. *Id.* at 772 n.6 (Brennan, J., dissenting).
101. 472 U.S. 749 (1985).
102. *Id.* at 775 (Brennan, J., disenting).
103. *Id.* at 796.
104. 403 U.S. 29 (1971) (plurality opinion).

amendment protections, citing Emerson[105] for the proposition that the underlying values of the first amendment include "individual self-fulfillment" as well as "participation in decision making by all members of society."[106] The same expansive view of first amendment freedoms, of course, underlies Brennan's position in obscenity cases, as well as his opinions in favor of first amendment protection for commerical speech.[107] While Brennan has not articulated the justifications for protecting nonpolitical speech as clearly as he has spelled out the "central meaning" of the first amendment, he has articulated a view of freedom of expression that goes far beyond a narrow concern with speech essential to the functioning of a democracy.

BALANCING

Just as Justice Brennan's rhetoric emphasizing the primacy of political speech suggests continuity with his earlier Warren Court opinions, so Brennan has continued in the Burger years to reject first amendment absolutism. "Of course, not even the right of political self-expression is completely unfettered," he declared in a dissenting opinion in 1974.[108] Given that the Constitution looks in two directions at once by granting power to government and limiting that power, the Court necessarily must balance competing constitutional values. Normally, the Court's task is to formulate "delicate accommodations"[109] between governmental interests and constitutional rights. On occasion, the Court may be called upon to balance competing first amendment values, as in the case of a clash between the rights of broadcasters to control the content of programs and the rights of listeners to receive a wide range of information and ideas.[110] As a general matter, however, the Court's task is to balance infringments on expression "against the asserted governmental interests" and to determine whether the government's action "contravenes the First Amendment."[111]

A reading of Justice Brennan's first amendment opinions reveals a wide range of governmental interests in restricting expression that Brennan is willing to recognize as legitimate — at least in the abstract. Among such legitimate governmental goals he has included

105. T. EMERSON, *supra* note 31.
106. *Id.* at 6-7.
107. *E.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (disciplinary rules prohibiting use of illustrations in attorney advertisements violates first amendment) (Brennan, J., concurring in part and dissenting in part).
108. Lehman v. City of Shaker Heights, 418 U.S. 298, 311 (1974) (Brennan, J., dissenting).
109. Clements v. Fashing, 457 U.S. 957, 977 (1982) (Brennan, J., dissenting).
110. C.B.S. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
111. Haig v. Agee, 453 U.S. 280, 320-21 (1981) (Brennan, J., dissenting).

such worthy interests as the privacy of the home,[112] the integrity of electoral processes,[113] and the protection of minor victims of sex crimes from the further trauma of public testimony,[114] not to mention efficiency, effective government, and electoral accountability.[115] At the state and local level, Brennan has recognized as legitimate such diverse interests as traffic safety and aesthetics,[116] maintaining crowd control on state fairgrounds,[117] and eradicating sex discrimination.[118] Brennan has gone so far as to concede that the "morality of the community"[119] could be a legitimate matter of state concern, explaining his refusal to embrace the absolutism of Justices Black and Douglas in obscenity cases with the observation that such an approach would result in "stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests."[120] A careful assessment of such interests, notably the "special and compelling interest" in protecting young people[121] ultimately led Brennan to the conclusion that statutes designed to control "distribution to juveniles or obtrusive exposure to unconsenting adults"[122] might be upheld, but that laws prohibiting all dissemination of obscene materials were unconstitutionally overbroad.[123] Adoption of this approach, Brennan claimed, would "guarantee fuller freedom of expression while leaving room for the protection of legitimate government interests."[124]

At the national level, Brennan has recognized as legitimate not

112. Carey v. Brown, 447 U.S. 455 (1980).
113. Brown v. Hartlage, 456 U.S. 45 (1982).
114. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
115. Elrod v. Burns, 427 U.S. 347 (1976).
116. Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).
117. Heffron v. Int'l Soc'y for Krishna Consciousness Inc., 452 U.S. 640 (1981).
118. Roberts v. United States Jaycees, 468 U.S. 609 (1984).
119. *Paris Adult Theatre I*, 413 U.S. at 108 (Brennan, J., dissenting). Justice Brennan summarized his assessment of possible state interests in suppressing sexually-oriented expression as follows: "In short, while I cannot say that the interests of the State — apart from the question of juveniles and unconsenting adults — are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results from state efforts to bar the distribution even of unprotected material to consenting adults." *Id.* at 112-13.
120. *Id.* at 103.
121. New York v. Ferber, 458 U.S. 747, 776 (1982) (Brennan, J., concurring).
122. *Paris Adult Theatre I*, 413 U.S. at 113 (Brennan, J., dissenting).
123. *Id.*
124. *Id.* at 114.

only the government's interest in national security[125] and the "maintenance of military discipline, morale, and efficiency,"[126] but also such interests as protecting the mails,[127] as well as preserving the integrity of the currency and preventing counterfeiting.[128] Both spectrum scarcity and the governmental interest in ensuring adequate and balanced coverage of political issues have been invoked in Brennan's opinions as justification for government regulation of broadcasting.[129]

For Brennan, of course, recognition of legitimate governmental interests that might justify restrictions on expressive activity is only the first step in resolving freedom of expression questions. Dissenting from a majority opinion upholding a decision to prohibit partisan political speeches on a military base, Brennan declared that "the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security . . . . [T]he inquiry has been whether the exercise of First Amendment rights necessarily must be circumscribed in order to secure those interests."[130]

Brennan shares with his more conservative brethren a belief in the necessity of balancing.[131] He differs with them, however, on such vital questions as the weight properly attached to competing interests and the criteria to be used in striking the balance between competing constitutional values.

Strict Scrutiny and the Compelling Governmental Interest Test

Although state and federal governments have a number of legitimate governmental interests that might justify the regulation or even the suppression of expression, Justice Brennan consistently has taken the position that mere recitation of an important governmental interest is not sufficient. Clearly, he would place the burden of proof on

125. Haig v. Agee, 453 U.S. 280 (1981).
126. *Glines*, 444 U.S. at 365 (Brennan, J., dissenting).
127. United States Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981).
128. Regan v. Time, Inc., 468 U.S. 641 (1984).
129. *League of Women Voters of Cal.*, 468 U.S. at 375.
130. Greer v. Spock, 424 U.S. 828, 852-53 (1976) (Brennan, J., dissenting).
131. Justice Blackmun has expressed the "conservative" view in these words: "The First Amendment . . . is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the the cost of downgrading other provisions." *New York Times*, 403 U.S. 713, 761 (Blackmun, J., dissenting). Although Justice Brennan would apply the principle differently, he would agree with the basic sentiments expressed in Blackmun's opinion.

governmental litigants seeking to justify restrictions on speech.[132] While governmental interests are taken seriously, mere conclusory statements of the importance of interests as vital as national security[133] or protection of minor rape victims from trauma[134] are generally insufficient to persuade Brennan to approve government restrictions on speech. Even when asserted governmental interests are recognized as compelling, Justice Brennan is still likely to insist on use of the "least intrusive" means of achieving a legitimate end. On occasion, empirical proof of the necessity of restricting speech may be demanded.[135]

The basic notion of strict scrutiny clearly and explicitly appears in several of Brennan's seventeen prevailing opinions during the Burger years. While the precise language of the test varies from case to case, it is clear that the Justice's usual approach to balancing in first amendment cases is based on application of the "compelling governmental interest" test which Brennan developed and applied in such equal protection cases as *Shapiro v. Thompson*,[136] *Frontiero v. Richardson*,[137] *Kahn v. Shevin*,[138] and *Weinberger v. Wiesenfeld*.[139] Just as strategic considerations of internal political dynamics have forced him to retreat to an "intermediate scrutiny" position in equal protection cases,[140] so Brennan has adopted a position akin to intermediate scrutiny in some freedom of expression cases as well.[141] Yet, in the first amendment area he has continued to utilize the strict scrutiny approach in a wide variety of cases, and his version of intermediate scrutiny seems to be administered with a "bite" that makes it diffi-

132. *Elrod*, 427 U.S. at 362.
133. *Glines*, 444 U.S. at 369 (Brennan, J., dissenting).
134. *Globe Newspaper Co.* 457 U.S. at 607-09.
135. *Id.* at 609.
136. 394 U.S. 618 (1969) (one-year residency requirement for welfare recipients violates equal protection clause).
137. 411 U.S. 677 (1973) (plurality opinion) (military regulations requiring female officers to prove dependency of spouse to establish eligibility for benefits violates equal protection component of due process clause of fifth amendment).
138. 416 U.S. 351, 357 (1974) (Brennan, J., dissenting) (state law providing property tax exemption for widows but not widowers upheld).
139. 420 U.S. 636 (1975) (Social Security regulations denying survivors benefits to widowers violates due process clause of fifth amendment).
140. Craig v. Boren, 429 U.S. 190 (1976) (state law prohibiting purchase of 3.2% beer by males under age of 21 and females under age of 18 violates equal protection clause). Justice Brennan stated the "intermediate scrutiny" test in these words: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve *important governmental objectives* and must be *substantially related* to achievement of those objectives." 429 U.S. at 197 (emphasis added).
141. F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984).

cult to distinguish from strict scrutiny.[142]

Brennan's use of the general notion of heightened scrutiny in the first amendment cases of the Burger Court appears to have its origins in the *Paris Adult Theatre I* dissent,[143] in which the Justice indicated that he believed state interests in restricting expression must not only be substantial, but also must be scrutinized by the Court with care.[144] Less than a year later, the compelling governmental interest test made its appearance in a majority opinion by Justice White as well as in a vigorous dissenting opinion by Brennan in *Storer v. Brown*.[145] Upholding a California electoral code provision requiring an independent candidate to disaffiliate with a political party one year prior to filing as an independent, Justice White declared that the restriction promoted the "compelling" state interest in "the stability of its electoral system."[146] In dissent, Brennan applauded the majority's application of strict scrutiny,[147] but argued that the state had not carried its burden of proving that its legitimate ends could not be attained by "less burdensome means."[148]

The strict scrutiny approach in first amendment cases found its way into a majority opinion by Justice Brennan a year later. In *Cousins v. Wigoda*,[149] Brennan's point of departure was the view that "[t]he National Democratic Party and its adherents enjoy a constitutionally protected right of political association"[150] to be vindicated by giving the party's national convention ultimate control over the selection and qualifications of convention delegates. In this context, the state's interests in the integrity of the electoral process and the votes of its citizens could not be deemed sufficiently compelling to allow state courts to enjoin the seating of delegates approved by the convention's Credentials Committee.[151]

The turning point for the Court's application of strict scrutiny was doubtlessly *Buckley*.[152] According to the majority, application of strict scrutiny was appropriate because the FECA Amendments bur-

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142. *Id.* at 374-81.
143. 413 U.S. at 73 (Brennan, J., dissenting).
144. *Id.* at 103. Justice Brennan wrote:
Given [the] side effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.
Id.
145. 415 U.S. 724 (1974).
146. *Id.* at 736.
147. *Id.* at 755-56 (Brennan, J., dissenting).
148. *Id.* at 761 (Brennan, J., dissenting).
149. 419 U.S. 477 (1975).
150. *Id.* at 487.
151. *Id.* at 491.
152. 424 U.S. 1 (1976).

dened political speech and association.[153] Statutory limits on campaign spending could not survive strict scrutiny.[154] However, the purpose of limiting the "actuality and appearance of corruption resulting from large individual financial contributions" was held to provide a "constitutionally sufficient justification" for upholding the contribution limits imposed by the FECA Amendments.[155]

In the aftermath of *Buckley*, the strict scrutiny approach became a standard feature of Justice Brennan's first amendment opinions. In fact, strict scrutiny language appears in one form or another in seven of Brennan's nine prevailing opinions after *Buckley*.[156] Moreover, in one of the two remaining opinions Justice Brennan appears to use an intermediate-scrutiny-with-a-bite approach.[157]

Justice Brennan's strict scrutiny approach was more fully developed in *Elrod v. Burns*.[158] In *Elrod* he tackled the question of whether dismissals of employees of the Cook County sheriff's office on grounds of partisan affiliation violated the constitutionally protected freedoms of political belief and association. Concluding that patronage dismissals clearly interfered with the exercise of first amendment rights, Brennan cited *Buckley*[159] in support of the proposition that a merely legitimate state interest was inadequate to support such infringements on the rights of individuals.[160] Rather, "[t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."[161] While recognizing that state interests in electoral accountability and effective government were important, Brennan concluded that the state had not met its burden of showing that broad-based patronage dismissals (that is, those that extended be-

153. *Id.* at 25.
154. *Id.* at 44-45.
155. *Id.* at 26.
156. Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion); Carey v. Population Serv. Int'l., 431 U.S. 679 (1979) (plurality opinion); Nixon v. Admin'r of Gen'l Serv., 433 U.S. 425 (1977); Carey v. Brown, 447 U.S. 455 (1980); Brown v. Hartlage, 456 U.S. 45 (1982); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Roberts v. United States Jaycees, 468 U.S. 609 (1984).
157. F.C.C. v. League of Women Voters of Cal. 468 U.S. 364 (1984). The one first amendment opinion after *Buckley* in which Brennan appears not to rely on any theory of heightened scrutiny is Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion) (first amendment limits discretion of school board in removing books from school library).
158. 427 U.S. 347 (1976).
159. 424 U.S. 1 (1976).
160. *Elrod*, 427 U.S. at 362.
161. *Id.*

yond top policy-making positions) were absolutely necessary to further compelling state interests.[162]

In *Carey v. Population Services International*,[163] the Court struck down a state law imposing various restrictions on the distribution and advertising of contraceptives on due process and first amendment grounds. Only four Justices joined the section of Brennan's opinion applying the compelling governmental interest test to a statute interfering with the "right of privacy,"[164] but a majority agreed that the statute's prohibition of open display or advertising of contraceptives imposed an unconstitutional restriction on commercial speech.[165]

Perhaps Brennan's most controversial application of strict scrutiny may be found in a decision striking down a Massachusetts law requiring closure of a courtroom to the press and public during the testimony of a minor victim in a rape case.[166] Building on the first amendment values vindicated in *Richmond Newspapers*,[167] Brennan declared that the right to attend trials is not absolute, but that when "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest [citations omitted]."[168] Despite finding that protection of minor victims of sex crimes from the further trauma of public testimony was a compelling state interest,[169] Brennan concluded that a mandatory closure rule was not justified when the state interest also could be vindicated by a law allowing a trial judge to order closure on a case-by-case basis.[170] Nor was the state's interest in encouraging victims to come forward to testify sufficient, as the state presented no empirical evidence that automatic closure in fact, would, make victims more willing to testify.[171]

Two of Brennan's majority opinions resulted in rejection of first amendment claims despite the use of the analytical framework of strict scrutiny.[172] Among the issues raised in *Nixon v. Administrator of General Services* was the question of whether the provisions of the Presidential Recordings and Materials Preservation Act mandating archival screening and government control of some of former Presi-

162. *Id.* at 372-73.
163. 431 U.S. 678 (1977).
164. *Id.* at 691.
165. *Id.* at 701-02.
166. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
167. 448 U.S. 555 (1980).
168. *Globe Newspaper Co.*, 457 U.S. at 606-07.
169. *Id.* at 607.
170. *Id.* at 608-09.
171. *Id.* at 609.
172. Nixon v. Admin'r of Gen'l Serv., 433 U.S. 425 (1977); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

dent Nixon's tapes and presidential documents violated the former Chief Executive's first amendment rights.[173] Conceding that Nixon's involvement in partisan politics was protected by the Constitution,[174] Justice Brennan concluded, nonetheless, that a compelling public need for access to the materials outweighed the former President's claims and that the need could not be met by less restrictive means.[175]

In *Roberts v. United States Jaycees*,[176] the national Jaycee organization claimed that application of Minnesota's antidiscrimination statute to Jaycee chapters infringed on the first amendment associational rights of the organization and its members. While recognizing that both a freedom of "intimate association" and a freedom of "expressive association" potentially were involved, Brennan wrote an opinion upholding the statute against the Jaycees' first amendment challenge. Applying strict scrutiny, Brennan concluded that the state's interest in "eradicating discrimination against its female citizens"[177] was compelling. Nor did the statute infringe the right of intimate association, because the Jaycees, as a large and unselective group, were found to be outside of the category of relationsips "worthy of this kind of constitutional protection."[178] Taken together, *Nixon* and *Roberts* demonstrate that in Brennan's hands the analytical framework of strict scrutiny can be employed to justify a decision against first amendment claims, particularly when the constitutional guarantee is invoked by an "unworthy" litigant.[179] Still, it is clear that use of the compelling governmental interest framework normally spells doom for the challenged statute, as in Brennan's opinions striking down state laws imposing restrictions on political expression.[180]

In one recent first amendment opinion,[181] Brennan appears to have relaxed his normal level of strict scrutiny slightly. By a 5-4 vote, the Court struck down on first amendment grounds a statutory ban on

173. 433 U.S. at 425.
174. *Id.* at 467.
175. *Id.* at 467-68.
176. 468 U.S. 609 (1984).
177. *Id.* at 623.
178. *Id.* at 620.
179. Justice Brennan's approach in these cases seems to mirror Chief Justice Warren's view that the protections of the Bill of Rights should not be extended to "undeserving citizens," such as gamblers and pornographers. *See* G. WHITE, *supra* note 6, at 361.
180. Carey v. Brown, 447 U.S. 455 (1980); Brown v. Hartlage, 456 U.S. 45 (1982).
181. F.C.C. v. League of Women Voters of Cal., 468 U.S. 364 (1984).

editorializing by educational broadcasting stations that received grants from the Corporation for Public Broadcasting. While conceding the power of Congress to regulate educational broadcasting, Brennan declared that "the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area."[182] The test of whether a restriction violated broadcaster rights depended on whether the Court was "satisfied that the restriction is narrowly tailored to further a *substantial* governmental interest. . . ."[183] Balancing the first amendment rights of broadcasters against a governmental restriction that applied to political speech, Brennan concluded that "less restrictive means" were available to dispel fears of governmental control of public broadcasting.[184] Breaking away from her normal voting alliance with Justice Rehnquist,[185] Justice O'Connor not only voted to support the first amendment claim, but also provided the fifth vote necessary for formation of a majority opinion coalition. In all probability, Brennan's adoption of "intermediate scrutiny" was essential to this outcome, for in *Globe Newspaper Corporation v. Superior Court*[186] Justice O'Connor had joined the majority voting coalition, yet refused to endorse Brennan's opinion employing the compelling governmental interest test.[187]

In addition to spelling out his support for strict scrutiny in majority opinions, Justice Brennan has used concurring and dissenting opinions to develop in more detail his theories of first amendment interpretation. Dissenting in *Brown v. Glines*,[188] he took the opportunity to declare that "prior censorship of expression can be justified only by the most compelling governmental interests" and that mere invocation of a governmental interest in military discipline was not necessarily sufficient to justify restrictions on expression.[189]

Similarly, Brennan felt that the majority had undervalued the first amendment interests at stake in *Members of City Council v. Taxpayers for Vincent*.[190] In the face of a first amendment challenge, the Court upheld a Los Angeles city ordinance prohibiting the posting of signs, including campaign signs, on public property. According to Justice Stevens, the ordinance was adequately justified by the public interest in controlling "visual blight."[191] Charging that "the Court's

182. *Id.* at 378.
183. *Id.* at 380 (emphasis added).
184. *Id.* at 395.
185. Scheb & Ailshie, *supra* note 38, at 11-12.
186. 457 U.S. 596 (1982).
187. *Id.* at 611 (O'Connor, J., concurring).
188. 444 U.S. 348 (1980).
189. *Id.* at 364 (Brennan, J., dissenting).
190. 466 U.S. 789 (1984).
191. *Id.* at 810.

lenient approach towards the restriction of speech for reasons of aesthetics threatens seriously to undermine the protections of the First Amendment,"[192] Justice Brennan dissented. Some form of heightened scrutiny was required, Brennan declared, because the city's effort to ban the use of an important medium of communication on aesthetic grounds "creates special dangers to our First Amendment freedoms."[193] An ordinance aimed at suppressing speech based on its content would require a "compelling state interest." Even a content-neutral restriction would require application of intermediate scrutiny.[194] Since Los Angeles had not shown that the ordinance was part of a comprehensive plan to pursue aesthetic goals,[195] Brennan concluded that the city had not carried its burden of demonstrating that "the goals pursued are substantial and that the manner in which they are pursued is no more restrictive of speech than is necessary."[196]

OTHER THEMES

Just as Justice Brennan suggested in *Taxpayers for Vincent* that heightened scrutiny was required when the government sought to ban the use of a particular medium of expression,[197] so the idea that a total ban on particular types of expression is more difficult to justify than governmental *regulation* of expression is a theme running through many of Brennan's first amendment opinions. In his *Paris Adult Theatre I* dissent, Brennan made clear that one major vice of most anti-obscenity laws was the effort wholly to suppress an entire class of expression.[198] Similarly, in *FCC v. League of Women Voters of California*,[199] Brennan indicated that while a total ban on editorializing by public broadcasting stations could not pass constitutional muster, such a carefully tailored regulation as a disclaimer requirement might well be upheld.[200] In *C.B.S. v. Democratic National Committee*,[201] Brennan argued that an FCC-approved network policy of refusing to sell advertising time to "groups or individuals wish-

192. *Id.* at 818 (Brennan, J., dissenting).
193. *Id.* at 828.
194. *Id.* at 821.
195. *Id.* at 829.
196. *Id.* at 830-31.
197. *See supra* text accompanying notes 190-95.
198. 413 U.S. at 113 (Brennan, J., dissenting).
199. 468 U.S. 364 (1984).
200. *Id.* at 395.
201. 412 U.S. 94 (1973).

ing to speak out on controversial issues of public importance"[202] ran afoul of first amendment values because the result was a total exclusion of virtually all citizens from the "most efficient and effective 'marketplace of ideas' ever devised."[203]

Finally, it should be noted that running through many of Brennan's first amendment opinions is a concern with the possible "chilling effects" of a vague statute on protected expression. According to Justice Brennan, a state law prohibiting the use of offensive words was unconstitutionally vague and overbroad because, as construed, it could be applied to punish protected speech, including political speech.[204] Likewise, in *Broadrick v. Oklahoma*,[205] he argued that Oklahoma's "Little Hatch Act" should be struck down on its face because it readily could be applied to prohibit expressive activity protected by the first amendment. Among the problems with obscenity statutes was the probability that any attempt to define obscenity would be intolerably vague.[206] In short, it was the duty of the Supreme Court to take special care to prevent unjustified governmental action that could chill the exercise of first amendment rights.

CONCLUSION

In the years since the retirement of Justice Douglas, Justice Brennan — with Justice Marshall as a loyal ally — has emerged as the Supreme Court Justice most strongly committed to judicial protection of freedom of expression. While the Court has voted to reject constitutional claims in more than half of the first amendment cases heard and decided during the Burger years, Brennan has supported claimants of first amendment rights in nearly eighty percent of the cases. Brennan's emphasis on the protection of political speech has remained a significant feature of his opinions since 1969. At least at the rhetorical level, he continues to stress the central meaning of the first amendment and to adhere to the idea that the protection of political speech is the "core" value of the first amendment. Yet, at the same time, he seems to have transcended the view of such conservative jurists as Robert Bork that *only* explictly political speech is entitled to first amendment protection.[207] Just as Meiklejohn himself expanded his notion of protected speech to include education, science, literature and the arts, as well as public discussion of public is-

202. *Id.* at 170 (Brennan, J., dissenting).
203. *Id.* at 195.
204. Gooding v. Wilson, 405 U.S. 518 (1972).
205. 413 U.S. 601, 621 (1973) (Brennan, J., dissenting).
206. *Paris Adult Theatre I*, 413 U.S. at 83 (Brennan, J., dissenting).
207. *See* Bork, *supra* note 47, at 20. For more recent development of Judge Bork's view on the "central meaning" of the First Amendment, see Ollman v. Evans, 750 F.2d 970, 993 (D.C. Cir., 1984) (Bork, J., concurring).

sues,[208] so Brennan has embraced the view that the values of the first amendment include "individual self-fulfillment" as well as "participation in decision making by all members of society."[209] While adhering to the "functional contract" theory of democracy as a basis for judicial protection of rights, he has superimposed on this position a point of view akin to Douglas' "liberal natural rights theory."[210]

Yet, the mature Brennan has not followed his predecessor down the path of first amendment absolutism. In his opinions, he seems to take seriously governmental interests asserted as justification for restrictions on expressive activity. The unavoidable necessity for the Court to balance competing interests remains a crucial feature of Brennan's doctrine of freedom of expression. Although his assessment of the weight to be attached to these interests clearly tips the scales to the side of the individual, he has shown a willingness to reject some first amendment claims, particularly those asserted by "unworthy" litigants[211] whose claims seemed to Brennan to "trivialize" constitutional guarantees.[212] Clearly, it makes a difference whose ox is gored.

The most striking feature of Brennan's doctrine of freedom of expression appears to be his consistent use of the analytical framework of "heightened scrutiny" as a tool to assist the Justices in balancing competing considerations. Just as he would have preferred to use the "compelling governmental interest" test in the equal protection context,[213] so he would subject restrictions on expression to the same standard of strict scrutiny in a wide variety of cases. Even when the compelling governmental interest test is inappropriate, Brennan insists on a version of intermediate scrutiny that places a heavy burden of justification on any governmental agency that seeks to restrict expression. Necessary though balancing may be, in Brennan's view the most vital task of the Court is nothing less than the vigorous protection of freedom of expression and other fundamental rights guaranteed by the Constitution.

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208. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257.

209. T. EMERSON, *supra* note 31, at 6-7.

210. M. EDELMAN, *supra* note 18.

211. *See supra* text accompanying notes 172-79.

212. In dissent, Chief Justice Burger called Brennan's opinion in Elrod v. Burns, 427 U.S. 347 (1976) a "classic example of trivializing constitutional adjudication." *Id.* at 375 (Burger, C.J., dissenting). Whatever one may think of the charge as applied to this case, the 39 Burger Court cases in which Brennan voted to reject first amendment claims make clear that there are definite limits to Brennan's willingness to endorse tenuous freedom of expression claims.

213. Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).