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Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty

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JUSTICE WILLIAM J. BRENNAN, JR., JAMES WILSON, AND THE PURSUIT OF EQUALITY AND LIBERTY

DEBORAH A. ROY*

ABSTRACT

This Article analyzes the jurisprudence of one of the most transformative Supreme Court Justices, William J. Brennan, Jr., from the perspective of his vision that the United States Constitution is founded on Human Dignity. Justice Brennan expressed this principle in his opinions that advanced the realization of individual rights for each and every American. The principle of human dignity invokes the values of equality and liberty. The article shows that Justice Brennan traced the principle of human dignity back to the Founding Fathers and the constitutional government that they established. Rather than being unhinged from the Constitution as his critics allege, Justice Brennan's jurisprudence is firmly grounded in the Constitution. The Article demonstrates this by examining the constitutional principles held by James Wilson who signed both the Declaration of Independence and the Constitution. This Article analyzes Justice Brennan's leading decisions in the areas of criminal procedure, equal protection, freedom of speech, and a right to privacy as expressions of the values of equality and liberty. The Article concludes with a consideration of how a Constitution based on human dignity informs contemporary issues including Same-Sex Marriage, Affirmative Action, and Campaign Finance Regulation. Justice Brennan's advancement of human dignity through the law is a remarkable achievement that should remain relevant to current American jurisprudence.

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* Trial Attorney, Antitrust Division, United States Department of Justice. The views expressed are not purported to reflect those of the United States Department of Justice. The author thanks U.S. Magistrate Judge Patricia A. Hemann (Ret.), Thomas J. Horton, Hugh Brennan, Carl Stern, Laura Silber, and Carl Willner for their helpful comments.

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I. INTRODUCTION

Justice William J. Brennan, Jr.,¹ is one of the most transformative justices to sit on the United States Supreme Court.² His opinions upholding the values of equality

¹ William Joseph Brennan, Jr. served as an Associate Justice of the United States Supreme Court for 34 years. During his lengthy tenure he authored 1,573 opinions: 533 opinions for the Court, 694 dissents, and 346 concurrences. Justice Brennan was born on April 25, 1906 to parents who had emigrated from Ireland, the second of eight children. He received his undergraduate degree from the University of Pennsylvania's Wharton School of Finance and Commerce and his law degree from Harvard Law School. Justice Brennan practiced labor law at a firm in Newark, New Jersey, served in the United States Army during World War II, and became a judge in the New Jersey state courts, eventually joining the New Jersey Supreme Court. President Eisenhower appointed Justice Brennan to the Supreme Court in 1956. *Justice Brennan Memorials*, BRENNAN CTR. FOR JUSTICE, <http://www.brennancenter.org/justice-brennan-memorials> (last visited Aug. 24, 2013). For a recent biography of Justice Brennan, see SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010).

² Even those who disagree with Justice Brennan acknowledge his substantial influence on the Supreme Court. Justice Antonin Scalia, who often opposed Brennan, remarked that Justice Brennan "is probably the most influential justice of the century." Patricia Brennan, *Seven Justices, On Camera*, WASH. POST, Oct. 6, 1996, at Y06; see also Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77

and liberty, which derive from his belief that the principle of human dignity is firmly entrenched in the United States Constitution,³ secured individual rights for all Americans and advanced a nation.⁴ In his own retrospective of his years on the Supreme Court, Justice Brennan stated, “[a]s I have said many times and in many ways, our Constitution is a charter of human rights and human dignity. It is a bold commitment by a people to the ideal of dignity protected through law.”⁵ Although he authored many seminal opinions, Justice Brennan’s jurisprudence is often overlooked and not considered to be relevant today. This article will show that Brennan’s vision of the Constitution is timeless and that it is firmly grounded in constitutional principles held by one of the most significant Framers, James Wilson of Pennsylvania, who signed both the Declaration of Independence and the United States Constitution.⁶

Justice Brennan’s constitutional jurisprudence focused on achieving the full realization of individual rights, based in equality and liberty that were recognized in the Declaration of Independence, protected in the United States Constitution with its

WASH. U. L.Q. 183, 183-84 (1999) (Although critical of Justice Brennan’s jurisprudence, the author recognizes that “[t]he changes brought about by the Supreme Court during Justice Brennan’s tenure were truly revolutionary, remaking not only our form of government, but also the nature of our society and the quality of civilization.”).

³ Authors who have reviewed the many references to “human dignity” found in Supreme Court jurisprudence identify Justice Brennan as a leading proponent of the concept. See DAVID E. MARION, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN, JR.: THE LAW AND POLITICS OF “LIBERTARIAN DIGNITY”* 166-67 (1997) (describing Justice Brennan’s effort to advance the dignity of all persons as “one of the remarkable events in American constitutional history,” although questioning whether his objective was achieved); FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 40-42 (1999) (stating that human dignity is at the core of Justice Brennan’s jurisprudence); *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 9 (Michael J. Meyer & William A. Parent eds., 1992) (dedicating the volume to Justice Brennan “in recognition of his long and distinguished career and in acknowledgement of his tireless commitment to the defense of human dignity”); Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998) (tracing the history of human dignity in Supreme Court jurisprudence and exploring Justice Brennan’s vision of the role that human dignity should play in a constitutional system); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 783 (2006) (finding Justice Brennan’s vision of human dignity expressed in numerous cases).

⁴ Justice Brennan viewed the protection of individual rights as the principal contribution that the Supreme Court made to jurisprudence during his tenure. David O. Stewart, *A Life on the Court*, 77 A.B.A. J. 62, 62 (1991); see also STERN & WERMIEL, *supra* note 1, at 418 (quoting Justice Brennan during an interview at the end of his Supreme Court tenure that human dignity is “the basic premise on which I build everything under the Constitution”).

⁵ William J. Brennan, Jr., *My Life on the Court*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 17, 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) [hereinafter Brennan, *My Life*].

⁶ For a view of Justice Brennan’s deep respect for the Constitution, see *Bill Moyers: In Search of the Constitution, Ep. 4 “Mr. Justice Brennan”* (PBS television broadcast Apr. 16, 1987). In a one-hour interview, Bill Moyers questioned Justice Brennan on his views of the Constitution. Fortunately, Justice Brennan’s passion for the Constitution and the country it established is preserved in this video. *Id.*

Bill of Rights, and further advanced in 1868 by the ratification of the Fourteenth Amendment to the Constitution. It is an American vision of individual rights that is grounded in a belief in the inherent dignity of each individual.⁷ In *Paul v. Davis*, Justice Brennan wrote, “I have always thought that one of this Court’s most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth.”⁸ Constitutional scholar Laurence Tribe recognized Justice Brennan as “the chief architect of the federal judiciary’s protection of individual rights.”⁹

While Justice Brennan attained a status of prominence among Supreme Court Justices, his jurisprudence has drawn substantial criticism and is not widely embraced as relevant today. At the conclusion of a recent Brennan biography, the authors quote President Barack Obama as stating that while he viewed Justice Brennan as a personal hero, he did not necessarily think that his judicial philosophy is appropriate today.¹⁰ The biography further notes that all recent nominees for the Supreme Court have distanced themselves from Justice Brennan’s judicial philosophy.¹¹

The criticism of Justice Brennan is that, instead of interpreting the Constitution, he merely enacted his personal social philosophy.¹² This criticism is entirely unfounded and reflects a misunderstanding of Justice Brennan’s jurisprudence which this article seeks to correct. In fact, Justice Brennan engaged in a principled interpretation of the Constitution which led to decisions that were at times in direct

⁷ See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (stating that respect for human dignity underlies the Constitution’s elusive but central protections of equality and liberty). Professor Tribe finds that a review of rulings by judges enacting fundamental freedoms under the Constitution shows “a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly locked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity.” *Id.* at 1897-98. Tribe wrote that the double helix of liberty and equality underlies the theme of dignity that ran through his own constitutional advocacy. Laurence H. Tribe, *Introductory Remarks at the Legal Scholarship Symposium: The Scholarship of Laurence Tribe*, 42 TULSA L. REV. 797, 799 (Summer 2007).

⁸ *Paul v. Davis*, 424 U.S. 693, 734-35 (1976).

⁹ Laurence H. Tribe, *Architect of the Bill of Rights*, 77 A.B.A. J. 47, 47 (1991).

¹⁰ STERN & WERMIEL, *supra* note 1, at 546 (citing Barack Obama, interview with *Detroit Free Press* editorial board, Oct. 3, 2008, available at <http://www.freep.com/article/20081003/OPINION01/810030434/Obama-Aim-for-fundamental-change>).

¹¹ *Id.*

¹² Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL’Y, 875, 882 (2008) (stating that Justice Brennan engaged in legislating from the bench to produce what he deemed to be good consequences); Raoul Berger, *Justice Brennan, “Human Dignity,” and Constitutional Interpretation*, in Meyer & Parent, *supra* note 3, at 129, 134 (stating that respect for “human dignity” clearly is spun out of thin air, and constitutes Justice Brennan disquietingly interpreting the Constitution based on his own personal predilections).

opposition to the beliefs that he personally held.¹³ His decisions prohibiting prayer in the classroom and supporting a woman's right to choose to have an abortion in some circumstances were difficult for him precisely because they were in conflict with his personal views.¹⁴

When Justice Brennan was asked to identify the most difficult decision that he had to make as a Justice, he identified the school prayer cases because as a lifelong Roman Catholic, it was quite hard for him to say that prayer is not appropriate in public schools.¹⁵ In regard to abortion, Brennan stated, "I wouldn't under any circumstances condone an abortion in my private life. But that has nothing to do with whether or not those who have different views are entitled to have them and are entitled to be protected in their exercise of them. That's my job in applying and interpreting the Constitution."¹⁶ And while he upheld the right of a political demonstrator to burn a flag in *Texas v. Johnson*,¹⁷ it is unlikely that Justice Brennan, a veteran of World War II who cherished the United States,¹⁸ would himself burn its flag.

This article will show that Justice Brennan's constitutional interpretation is grounded firmly in the views of one of the Framers of the United States Constitution, James Wilson, whose influence in the drafting of the Constitution is considered second only to that of James Madison.¹⁹ Justice Brennan once referred to James Wilson as one of "the most respected and influential" of the Framers.²⁰ Although it is unknown to what extent Brennan was directly influenced by his knowledge of Wilson, the similarity of the views of both men on broad constitutional principles, and even on specific legal issues discussed in this article, is truly remarkable. Justice Brennan and James Wilson shared a commitment to the values of equality and liberty, based on their respect for the individual. Their shared constitutional vision should be returned to a contemporary relevance.

¹³ Jeffrey T. Leeds, *A Life on the Court*, N.Y. TIMES (Oct. 5, 1986), <http://www.nytimes.com/books/97/07/06/reviews/brennan-interview.html>.

¹⁴ *Id.*

¹⁵ *Id.* Justice Brennan began his Conference Memo for *Marsh v. Chambers*, which considered the constitutionality of legislative prayer, by stating that "[t]his is a hard and sensitive case, which I would have preferred not to have to confront. But it is here, and we should approach it in a principled manner consistent with our long-held view that the Establishment Clause requires the government to be absolutely neutral in matters of religion." Conference Memorandum from Justice William J. Brennan, Jr. (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 617, Folder 9, *Marsh v. Chambers*).

¹⁶ STERN & WERMIEL, *supra* note 1, at 372.

¹⁷ *Texas v. Johnson*, 491 U.S. 397 (1989); see discussion, *infra* Part V.B.1. Justice Brennan held that the burning of the American flag during a protest of the government is expressive conduct protected by the First Amendment.

¹⁸ STERN & WERMIEL, *supra* note 1, at 37.

¹⁹ Mark David Hall, *The Political and Legal Philosophy of James Wilson 1742-1798* 1 (1997).

²⁰ William J. Brennan, Jr., *Landmarks of Legal Liberty*, in 1 THE FOURTEENTH AMENDMENT CENTENNIAL 7-8 (Bernard Schwartz ed., 1970) [hereinafter, Brennan, *Landmarks*].

Part II lays a foundation by introducing James Wilson, whose important role in drafting the U.S. Constitution remains unnoticed by many constitutional scholars. It then relates James Wilson's principle of the sovereignty of the people to Justice Brennan's principle of human dignity, noting that both principles mean that the government should respect the individual. Part III shows that respect for the individual underlies Brennan's and Wilson's commitment to the values of equality and liberty. Part IV presents Justice Brennan's view that James Wilson and the other Framers established a Constitution of broad principles that was intended to be interpreted by future generations. Part V discusses leading cases in which Justice Brennan advanced equality for racial minorities and women and liberty for all individuals to freely express their political views and make personal decisions without interference from the State. Part VI considers how a constitution based on the values of equality and liberty informs contemporary issues including Gay Rights, Affirmative Action, and Campaign Finance Regulation. Finally, Part VII concludes by discussing the hope, expressed by both Justice Brennan and James Wilson, that succeeding generations will preserve the Constitution's promise of dignity, equality, and liberty for all Americans.

II. THE FOUNDATION OF THE CONSTITUTION IS THE PEOPLE

Part II introduces many readers to James Wilson, who remains largely unknown to most Americans.²¹ After providing background on James Wilson and his significant contributions as one of the framers of the United States Constitution, Part II.A relates James Wilson's foundational principle of the sovereignty of the people to Justice Brennan's principle of Human Dignity, finding that both emphasize the preeminence of the individual in the Constitution. Part II.B explores the formative life experiences of both men that may have contributed to their passionate commitment to the individual. Part II.C demonstrates Justice Brennan's high respect for the individual by examining his adamant opposition to the death penalty, noting that James Wilson also thought that respect for the individual might invalidate the death penalty.

A. Justice Brennan's principle of Human Dignity Relates to James Wilson's Principle of the Sovereignty of the People

James Wilson was one of only six men to sign both the Declaration of Independence and the United States Constitution.²² He was a member of Congress under the Articles of Confederation, an active participant in the Philadelphia Constitutional Convention of 1787 (the "Constitutional Convention"), and a delegate to the Pennsylvania Ratifying Convention.²³ Wilson served on the first United States Supreme Court as an associate justice.²⁴ While teaching law at the College of

²¹ See Nicholas Pederson, *The Lost Founder: James Wilson in American Memory*, 22 YALE J.L. & HUMAN. 257 (Summer 2010). The author seeks to explain how Wilson, described as "a constitutional colossus from the Revolutionary Era," remains unknown to most Americans. Although one likely reason is that due to a propensity for land speculation in the new country, Wilson's last years were spent attempting to avoid his creditors and debtor's prison. *Id.* at 279-88.

²² HALL, *supra* note 19, at 20-21.

²³ *Id.* at 20-22.

²⁴ *Id.* at 25.

Philadelphia from 1790 to 1792, Wilson delivered a series of lectures on constitutional law that are remarkable because they were given by a Framers of the Constitution.²⁵

Wilson was born in Scotland in 1742, the son of a farmer, and immigrated to the United States in 1765 where he settled in Pennsylvania.²⁶ He began the study of law in 1766 with Philadelphia lawyer John Dickinson.²⁷ In 1767, he began to practice law in Lancaster County, Pennsylvania.²⁸ His law practice grew rapidly and he was recognized as an able young lawyer.²⁹ While Wilson was applying himself to his law practice, the American colonies were showing unrest with their relationship to Great Britain, the Boston Tea Party occurred, and young lawyers such as Wilson were drawn to political discussions.³⁰ Entering the public fray, James Wilson published a pamphlet titled “Considerations on the Nature and Extent of the Legislative Authority of the British Parliament” in 1774.³¹ Having gained recognition, Wilson was elected to the second Continental Congress in May 1775, representing Pennsylvania.³² When a Declaration of Independence was introduced to the Continental Congress, James Wilson voted for it.³³ He was one of the eight framers of the Declaration of Independence to also be elected to the Constitutional Convention and one of only six to sign both documents.³⁴ He attended the Constitutional Convention from start to finish and spoke more times (168) than any other member with the exception of Gouverneur Morris, also of Pennsylvania.³⁵ Wilson was appointed to the five-member Committee of Detail, which prepared the first draft of the United States Constitution.³⁶ In 1789, President George Washington appointed James Wilson as an associate justice of the United States Supreme Court, where he contributed to the early formation of American law.³⁷

²⁵ *Id.* at 27-28. Wilson’s law lectures were first published by his son Bird Wilson in 1804. References to the law lectures and other writings by James Wilson will cite to COLLECTED WORKS OF JAMES WILSON, VOLUME I AND II (Kermit L. Hall & David Mark Hall eds., 2007). The high regard in which James Wilson was held by his contemporaries is illustrated by the fact that his first law lecture was attended by President George Washington, the Vice-President, and members of both houses of the Congress. HALL, *supra* note 19, at 27-28.

²⁶ HALL, *supra* note 19, at 7, 10.

²⁷ Charles Page Smith, James Wilson: Founding Father 1742-1798 24-25 (1956).

²⁸ *Id.* at 30.

²⁹ *Id.* at 37.

³⁰ *Id.* at 50.

³¹ *Id.* at 54.

³² HALL, *supra* note 19, at 13.

³³ *Id.* at 14.

³⁴ *Id.* at 20-21.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 25. On Sept. 30, 1789, President George Washington wrote to James Wilson, “I experience peculiar pleasure in giving you notice of your appointment to the office of an Associate Judge in the Supreme Court of the United States. Considering the Judicial System

The cornerstone of James Wilson's political thought is the principle of the sovereignty of the people of the United States.³⁸ He believed that a government established by the Constitution is based directly on the people.³⁹ For this reason, man does not exist for the government; the government exists to protect and promote the rights of man.⁴⁰ At the time of the drafting of the Constitution, the states were considered to have supremacy over the citizenry.⁴¹ James Wilson worked to shift the basis of the new government from the concept of state sovereignty to the sovereignty of the people themselves.⁴² During the Constitutional Convention, Wilson stated, "The General Government is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them . . ."⁴³

When James Wilson served on the Committee of Detail, which wrote the first draft of the Constitution, he altered the first lines of the Preamble from "The people and the states of New Hampshire, Massachusetts, Rhode Island" to "We, the people of the states."⁴⁴ The Committee of Style later put the phrase into its final form, "We the people of the United States."⁴⁵ James Wilson shifted the emphasis in the first words of the Constitution to recognize that the new government was founded on the people, not the states. During the Pennsylvania Convention to ratify the U.S. Constitution, Wilson explained to the delegates that the leading principle that pervades the American Constitution is that the supreme power resides in the people. The Constitution, therefore, opens with a solemn recognition of that principle: "We,

as the chief Pillar upon which our national Government must rest, I have thought it my duty to nominate for the high office, in that department, such men as I conceived would give dignity and lustre to our national character—and I flatter myself that the love which you have to our country, and a desire to promote the general happiness, will lead you to a ready acceptance of the enclosed commission." LUCIEN HUGH ALEXANDER, *JAMES WILSON: NATION BUILDER (1742-1798)* 272 (1907).

³⁸ HALL, *supra* note 19, at 25.

³⁹ *Id.*

⁴⁰ William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 978 (2007-2008).

⁴¹ SMITH, *supra* note 27, at 273.

⁴² *Id.* In *Chisholm v. Georgia*, 2 U.S. 419 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, Justice James Wilson wrote that a state could be sued by a person because the state has only limited sovereignty, while the people enjoy a sovereignty that was never surrendered to a state. *Id.* at 453-466. In *Chisholm*, Justice Wilson established that the people of the United States formed a nation. *Id.* at 462-63. The principle of the sovereignty of the people holds even though *Chisholm* was abrogated by the 11th Amendment, which held only that a state could not be sued by a citizen of another state.

⁴³ James Madison, *Remarks of James Wilson in the Federal Convention, 1787*, in 1 COLLECTED WORKS OF JAMES WILSON VOLUME I 104 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter Madison, *Remarks*].

⁴⁴ SMITH, *supra* note 27, at 246.

⁴⁵ Ewald, *supra* note 40, at 988 n.241.

the *people of the United States*, in order to form a more perfect union...⁴⁶ In a lecture honoring Justice Benjamin N. Cardozo delivered in 1987, Justice Brennan cited James Wilson for the proposition that the United States government was formed by and for the people and that those who administer the laws are thus the servants of the people.⁴⁷

Wilson shows his emphasis on the sovereignty of the people by his advocacy for placing political power directly in the people of the United States. Wilson favored the direct election of both houses of the national legislature, as well as the direct election of the President, by the people.⁴⁸ Although the Constitutional Convention determined that the House of Representatives would be elected by the people, it chose to have the Senate elected by the state legislatures.⁴⁹ James Wilson's proposal that the Senate should be chosen by the people was ultimately adopted in 1913 with passage of the Seventeenth Amendment.⁵⁰ Wilson's advocacy for the direct election of the President by the people was highly democratic for its time.⁵¹ A compromise, however, was adopted that involved creation of an Electoral College indirectly chosen by the people, which for Wilson was a better result than the election of the President by the Congress.⁵²

Like James Wilson, Justice Brennan believed that the U.S. Constitution is based on the preeminence of the people of the United States. Brennan noted that the choice of democratic self-governance showed the Framers' faith in the people,⁵³ observing that "the supreme value of a democracy is the presumed worth of each individual."⁵⁴

⁴⁶ James Wilson, Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, 1787, in 1 COLLECTED WORKS OF JAMES WILSON 193 (Kermit L. Hall & Mark David Hall eds., 2007) [hereinafter Wilson, Ratifying Remarks].

⁴⁷ William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3, 15 (1988-89) [hereinafter Brennan, *Reason, Passion*].

⁴⁸ According to James Madison's notes of the Constitutional Convention, Wilson "wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures but the Executive also." Madison, *Remarks*, *supra* note 43, at 85.

⁴⁹ SMITH, *supra* note 27, at 256.

⁵⁰ U.S. CONST. amend XVII.

⁵¹ SMITH, *supra* note 27, at 256.

⁵² *Id.*

⁵³ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 439 (1985-1986) (also find at 19 U.C. DAVIS L. REV. 2 (1985) [hereinafter Brennan, *Contemporary Ratification*]). This article was originally given as a speech at Georgetown University in Washington, D.C. on October 12, 1985. In the speech, Justice Brennan presented his approach to constitutional interpretation, and it remains the best source for Justice Brennan's views on the Constitution, specifically that its text is "a sparkling vision of the supremacy of the human dignity of every individual." *Id.* It is considered to be a response to criticism of the Court by United States Attorney General Edwin Meese in an address that Meese gave to the American Bar Association on July 9, 1985. The dueling speeches set up the debate on whether the Constitution should be interpreted based on the original intent of the founders or by applying its overarching principles to current circumstances.

⁵⁴ *Id.* Justice Brennan cited a statement found in an article by H. Lasswell and M. McDougal as one of the best statements of the democratic ideal: "The supreme value of

Further, provisions in the Constitution illustrate that the Framers intended to form a government to protect the dignity of each person because they placed restraints on the power that the government could exert on individuals.⁵⁵ These restraints are found in the body of the Constitution, including the prohibition on bills of attainder and ex post facto laws, and in the Bill of Rights.⁵⁶ The adoption of federalism and a tripartite form of national government protected the individual by diffusing government power. By adopting these provisions, the Framers intended to limit the power of the government in order to protect the individual.⁵⁷

Brennan adopted the term “dignity” to express the principle that each person possesses inherent worth or value under the Constitution.⁵⁸ In 1793, while serving on the U.S. Supreme Court, Justice James Wilson expressed the principle that the State derives its value from the inherent dignity of individuals, writing in an opinion that “[a] State, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his *native* dignity derives all its *acquired* importance.”⁵⁹ Justice Brennan believed that from its founding, the United States had been guided by a basic commitment to recognize the dignity of all persons within its borders.⁶⁰ In his

democracy is the dignity and worth of the individual; hence, a democratic society is a commonwealth of mutual deference—a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion, culture or class. It is a society in which such specific values as power, respect and knowledge are widely shared and are not concentrated in the hands of a single group, class or institution—the state—among the many institutions of society.” William J. Brennan, Jr., *What’s Ahead for the New Lawyer*, 47 U. PITT. L. REV. 705, 707 (1986) [hereinafter Brennan, *New Lawyer*] (citing H. Lasswell & M. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 212 (1943)).

⁵⁵ Brennan, *Contemporary Ratification*, *supra* note 53, at 440.

⁵⁶ William J. Brennan, Jr., *Constitutional Adjudication*, 40 NOTRE DAME L. REV. 559, 569 (1964-65) [hereinafter, Brennan, *Constitutional Adjudication*].

⁵⁷ *Id.* at 568.

⁵⁸ Brennan’s definition of human dignity is consistent with the generally held view of the meaning of human dignity:

In general, as presently conceived, human dignity requires that in any society every person count, that he (she) be considered worthy as an individual, not merely as part of the collectivity. Specifically, human dignity requires respect for every person’s physical and psychic integrity, for his (her) “personhood” before the law, for her (his) autonomy and freedom; these are not to be lightly sacrificed, even for the welfare of the majority or for the common good.

Louis Henkin, *Human Dignity and Constitutional Rights*, in Meyer & Parent, *supra* note 3, at 210-11; *see also* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 196-201 (2011) (discussing dignity as intrinsic human worth which attaches to each individual by virtue of being human).

⁵⁹ *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793) (Justice Wilson stated that man is the “wonderfully made” work of his Creator and is sovereign over the State and Government which were made for him); *see also* THE FEDERALIST NO. 1 (Alexander Hamilton) (advocating adoption of the Constitution as “the safest course for your liberty, *your dignity*, and your happiness” (emphasis added)).

⁶⁰ *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

speeches, he frequently cited a 1964 American Bar Association (“ABA”) report that advocates for a jurisprudence that is based on the “recognition of human beings, as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence.”⁶¹ Justice David Souter, who assumed Justice Brennan’s seat on the Supreme Court following Brennan’s retirement in 1990, observed that Justice Brennan’s constitutional vision of human dignity was “a vision of worth to be recognized in every last person in the republic.”⁶²

The sovereignty or dignity of the individual is protected and preserved only when a government respects the innate rights of individuals. Justice Brennan observed that the Founding Fathers “set up in America a system of government based upon the dignity and inviolability of the individual soul, declaring that all men have God-given inalienable rights to life, liberty, and the pursuit of happiness.”⁶³ James Wilson also understood rights to exist from the natural state of man, and therefore, government, to claim validity, must recognize those rights.⁶⁴ In fact, Wilson believed that the primary object of government is the protection of individual rights.⁶⁵

James Wilson worked to frame the Constitution to recognize that the fundamental unit of government is the individual human being.⁶⁶ In his years on the

⁶¹ Miriam Theresa Rooney, Report of ABA Section of International and Comparative Law, Committee on Comparative Jurisprudence and Legal Philosophy 195, 198 (1964). This report is cited by Justice Brennan with approval in numerous speeches. *See, e.g.*, Brennan, *Landmarks*, *supra* note 20, at 10; William J. Brennan, Jr., *The Role of the Court—The Challenge of the Future*, in *An Affair with Freedom* 315, 321 (Stephen J. Friedman ed., 1967) [hereinafter Brennan, *Challenge of the Future*]; William J. Brennan, Jr., *How Goes the Supreme Court*, 36 *Mercer L. Rev.* 781, 787 (1984-85) [hereinafter Brennan, *Supreme Court*]; Brennan, *Constitutional Adjudication*, *supra* note 56, at 563.

⁶² David H. Souter, *Justice Brennan’s Place in Legal History*, in Rosenkranz & Schwartz, *supra* note 5, at 308. Justice Souter noted that Justice Brennan dedicated his tenure on the Supreme Court to attacking the human diminishment implied by the Court’s ruling in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which sanctioned the separateness that perpetuated inequality. *Id.* *Plessy* held that a Louisiana statute requiring railway companies to maintain equal but separate accommodations for black and white passengers did not violate the Fourteenth Amendment.

⁶³ William J. Brennan, Jr., Speech to the Charitable Irish Society in Boston, Mass. (Mar. 17, 1954), in *Nomination of William J. Brennan, Hearings Before the S. Comm. on the Judiciary*, 85th Cong., 1st Sess. 28, reprinted in 103 CONG. REC. 3945 (1957). This early speech, which preceded Justice Brennan’s appointment to the Supreme Court, foreshadowed the focus on human dignity and individual rights that would drive his jurisprudence. Justice Brennan’s emphasis on the law’s respect for the inherent value of the individual is also evident in one of his New Jersey Supreme Court decisions. In *Davis v. Hellwig*, 21 N.J. 412, 417 (1956), where a policeman fired his gun at a suspected thief running down a narrow street, Justice Brennan observed that “[t]he law values human life too highly to allow an officer to proceed to the extremity of shooting an escaping offender who in fact has committed only a misdemeanor or lesser offense.”

⁶⁴ Daniel N. Robinson, Do the People of the United States form a Nation? James Wilson’s Theory of Rights, 8 *INT’L J. CONST. L.* 287-89, 291 (2010).

⁶⁵ James Wilson, *Of the Natural Rights of Individuals*, in 2 *COLLECTED WORKS OF JAMES WILSON* 1053-54 (Kermit L. Hall & Mark David Hall eds., 2007).

⁶⁶ Ewald, *supra* note 40, at 978.

Court, Justice Brennan preserved Wilson's focus on the individual by giving his attention to the "pulse of life beneath the official version of events,"⁶⁷ observing that the Court's rulings "emerged out of everyday human dramas . . . at the heart of each drama was a person who cried out for nothing more than common human dignity."⁶⁸ Thus, Brennan's opinions often carefully recount the real life stories of the persons at the center of the controversy,⁶⁹ showing a deep concern with understanding the person affected by the Court's rulings.⁷⁰

B. The Source of Justice Brennan's and James Wilson's Passion for the Individual

The similarity of the constitutional vision shared by Justice Brennan and James Wilson, separated by almost two centuries, is remarkable. This Section explores the formative life experiences of both men that may have contributed to their adoption of a constitutional vision focused on the individual. James Wilson worked aggressively to frame a Constitution based on the supremacy of the people that recognized individual rights. Almost two centuries later, Justice Brennan interpreted the Constitution to be founded on the dignity of the individual, a principle that he persistently expressed in his decisions. The significance of the individual person was fundamental to the constitutional vision of both men. Although the two men lived in radically different times, there are experiences in their backgrounds that are similar.

⁶⁷ Brennan, *Reason, Passion*, *supra* note 47, at 22.

⁶⁸ Brennan, *My Life*, *supra* note 5, at 19.

⁶⁹ Justice Brennan's dissent in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), illustrates his attention to the concrete realities of the lives of the individuals standing before the Court. A putative natural father who was not living with the child's mother at the time of the child's birth sought to establish paternity and a right to visitation. *Id.* at 115-14. Justice Scalia's opinion for the Court rejected any right of the putative father to seek visitation because history and tradition showed that there is no liberty interest that would protect his relationship to the child. *Id.* at 123-24. In contrast, Justice Brennan considered the evidence of a blood test indicating a 98.07% probability that the putative father was the natural father, as well as the interest that this purported father and child might have in a relationship to each other. *Id.* at 141-47. He opined that the putative father was entitled to a hearing to prove his paternity and to determine whether visitation would be in the best interests of the child. *Id.* Justice Brennan's evident impatience with the majority's inability to recognize a parent-child interest outside its "pinched" view of a traditional family led him to write that "[t]he document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past." *Id.* at 141.

⁷⁰ Justice Brennan's attention to the individual is well-illustrated in a letter that he wrote to Justice Sandra Day O'Connor during their consideration of *Strickland v. Washington*, 466 U.S. 688 (1984), which addressed the proper standard for effective assistance of counsel in the context of a death penalty case. Justice Brennan expressed his concern that defense counsel had not provided information to the sentencing judge concerning defendant "Washington the man" or testimony "from persons who knew the defendant before his crime spree and who could explain what kind of person he was." Letter from Justice William J. Brennan, Jr. to Justice Sandra Day O'Connor (Mar. 13, 1984) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 647, *Strickland v. Washington*).

James Wilson was a Scottish immigrant to the United States,⁷¹ while Justice Brennan was the son of Irish immigrants.⁷² Both were sons of working class fathers.⁷³ James Wilson was the son of a farmer⁷⁴ while Justice Brennan's father worked as a laborer in a brewery, progressed to become a labor leader, and was elected as Director of Public Safety for the City of Newark, New Jersey.⁷⁵ Although little is known about James Wilson's father, it is recorded that Justice Brennan's father was noted for his concern that government officials treat the individual with fairness.⁷⁶ In 1925, he prohibited forced interrogation in the Newark police department.⁷⁷ He later stated in a speech, "[t]he use of unnecessary force in making arrests, and violence in any form towards citizens, has been done away with. Nightsticks should last a long time. The police have been made the servants of the people and not their masters."⁷⁸ Brennan's father echoes the belief held by both Justice Brennan and James Wilson that the government exists of, by, and for the people.⁷⁹

Justice Wilson lived in the time of a great revolution in which he was one of the chief participants. Justice Brennan's childhood was spent in an Irish neighborhood in Newark, New Jersey⁸⁰ where he gained knowledge of the fight for freedom to establish an Irish Republic whose constitution respected religious freedom and liberty of personal expression.⁸¹ In a 1954 St. Patrick's Day speech, Justice Brennan

⁷¹ SMITH, *supra* note 27, at 3. During the Constitutional Convention, James Wilson rose to state that he was not a native to the country and that disabilities for immigrants adopted in the Constitution might incapacitate him from holding a position in the government that he had shared in the trust of making. Madison, *Remarks, supra* note 43, at 142-43. The proposal under discussion was the requirement of 14 years rather than 4 years of citizenship for non-native Americans to qualify for the Senate. *Id.* Wilson spoke of the degrading discrimination and mortification that adoption of the proposal would cause to him as an immigrant. *Id.*

⁷² STERN & WERMIEL, *supra* note 1, at 3.

⁷³ *Id.* at 5; SMITH, *supra* note 27, at 3.

⁷⁴ SMITH, *supra* note 27, at 3.

⁷⁵ STERN & WERMEIL, *supra*, note 1, at 5-10.

⁷⁶ KIM ISAAC EISLER, A JUSTICE FOR ALL 24-25 (1993). Following his retirement from the Supreme Court, Justice Brennan was quoted as stating: "All I am, I am because of my father." *Id.* at 281.

⁷⁷ *Id.* at 25.

⁷⁸ *Id.*

⁷⁹ The principle was also stated by Abraham Lincoln in his Gettysburg Address, resolving that "[this] nation shall have a new birth of freedom; and that this government of the people, by the people, for the people, shall not perish from this earth." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

⁸⁰ In a 1991 interview, Justice Brennan is quoted as stating, "[w]hat got me interested in people's rights and liberties was the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we were never without. We always had something to eat, we always had something to wear. But others in the neighborhood had a harder time." Nat Hentoff, *The Constitutionalist*, NEW YORKER, Mar. 12, 1990, at 46.

⁸¹ Brennan, Charitable Irish Society Speech, *supra* note 63, at 3938-39.

observed, “[t]he Irish love of individual liberty has naturally flowered in this America where the promise of that liberty has been realized as nowhere else on earth.”⁸²

Both Justice Brennan and James Wilson were religious men. Prior to immigrating to the United States, James Wilson had been preparing to enter the ministry.⁸³ He attended the Divinity School at the University of St. Andrews.⁸⁴ He appears to have retained his faith throughout his life, and religious references are frequently found in his writings.⁸⁵ James Wilson’s law lectures are considered by some scholars to be significantly influenced by Christian natural law theory.⁸⁶ Justice Brennan was raised in the Roman Catholic faith, attended Catholic services throughout his life, and was appointed to what was considered at the time to be the Catholic seat on the Supreme Court.⁸⁷ In his jurisprudence, however, he consistently upheld the principle of separation of Church and State.⁸⁸ Nevertheless, Brennan

⁸² *Id.* at 3938.

⁸³ HALL, *supra* note 19, at 7.

⁸⁴ *Id.*

⁸⁵ *Id.* at 72-75.

⁸⁶ *Id.* at 36-39. Some scholars relate Justice Wilson’s philosophy to St. Thomas Aquinas. *Id.* at 37-38. Interestingly, a biographer wrote that Justice Brennan, during evenings at his Georgetown home, “curled up with the complete works of the liberal thirteenth-century Catholic theologian Saint Thomas Aquinas.” EISLER, *supra* note 76, at 183. Aquinas expounded a theory of natural law based on God’s eternal law, which may have influenced Justice Brennan. In the 1964 ABA report on new trends in jurisprudence, which is frequently cited by Justice Brennan, he stated that one might find “a return to the philosophy of St. Thomas Aquinas” and a resurgence of concepts of natural law. Brennan, *Constitutional Adjudication*, *supra* note 56, at 563.

⁸⁷ Justice Brennan took the “Catholic seat” on the Supreme Court that had been vacant since the death of Justice Frank Murphy in 1949, the Catholic justice preceding Brennan. Leeds, *supra* note 15, at 15. Justice Murphy had also recognized a principle of human dignity in the Constitution. In his dissent in *Screws v. United States*, 325 U.S. 91, 135 (1945), Justice Murphy stated that an African-American citizen who had been beaten to death by police officers had been denied the “respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution.” Justice Murphy also cited “dignity” in a dissent from a decision affirming the conviction of an American citizen of Japanese descent who had refused to obey an order to leave his home during World War II. *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, Justice Murphy noted that the race-based order to abandon his home adopted “one of the cruelest rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.” *Id.* at 240; *see also Yamashita v. Styler*, 327 U.S. 1, 41 (1946) (observing that the peoples of the United States share a belief in the dignity of the individual).

⁸⁸ Justice Brennan believed that the Constitution mandated a separation of church and state. *See Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997) (school district’s provision of educational program to students in religious schools violates the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 808 (1983) (Brennan, J., dissenting) (stating that legislative prayer clearly violates the Establishment Clause principle of separation of church and state); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (Brennan, J., concurring) (stating that the constitution mandates that religious matters be left to the conscience of the citizen); *Sherbert v. Verner*,

believed Catholic social teaching had adopted the concept of human dignity, which derived from the belief that man was created in the image of God.⁸⁹ Justice Brennan echoed this thought in a speech to the Jewish Theological Seminary in 1964, stating, “the Old and New Testament teach that all men have rights - that every individual has Rights because as a child of God he is endowed with human dignity.”⁹⁰

It is likely that their religious sentiments influenced both Justice Brennan and James Wilson’s commitment to the individual in their constitutional jurisprudence. As Justice Brennan’s close friend, Judge David L. Bazelon observed, however, one can only speculate in what fire Justice Brennan’s convictions were forged.⁹¹ But it is certain that Justice Brennan saw in the Constitution the same core principle of the supremacy of the people that James Wilson labored exhaustively to place there.

C. *The Dignity of Man Destroyed by the Death Penalty*

Justice Brennan’s commitment to the dignity of each individual is best shown by his adamant opposition to the death penalty, which he viewed as an act by the State “so severe as to be utterly and irreversibly degrading to the very essence of human dignity.”⁹² James Wilson appears to have accepted the concept of a death penalty for serious crimes such as murder; although, he also considered whether respect for the individual might call into question the legitimacy of capital punishment.⁹³ Justice Brennan, however, took an absolutist position that it was unconstitutional in all circumstances because by destroying the individual, respect for human dignity is totally denied.⁹⁴

Justice Brennan wrote, “capital punishment is under all circumstances cruel and unusual punishment prohibited by the eighth and fourteenth amendments.”⁹⁵ He expressed this opinion for the first time in his concurrence in *Furman v. Georgia*,⁹⁶

374 U.S. 398, 402 (1963) (stating that the door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious belief).

⁸⁹ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 662 (2008). The Catholic Church adopted “human dignity” as the rallying cry for the social teaching developed at the end of the 19th century and it was further developed in papal encyclicals. *Id.*

⁹⁰ William J. Brennan, Jr., Address at the Louis Marshall Award Dinner of the Jewish Theological Seminary of America in New York City (Nov. 15, 1964).

⁹¹ David L. Bazelon, *A Tribute to Justice William J. Brennan, Jr.*, 15 HARV. C.R.-C.L. L. REV. 282, 285 (1980). Judge Bazelon sat on the D.C. Circuit. He met Brennan on October 16, 1956, the day on which Brennan became an Associate Justice of the U.S. Supreme Court, and over the years counted him as a “cherished friend.” *Id.* at 282.

⁹² Brennan, *Contemporary Ratification*, *supra* note 53, at 444.

⁹³ HALL, *supra* note 19, at 57-58.

⁹⁴ EISLER, *supra* note 76, at 244-46.

⁹⁵ Brennan, *Contemporary Ratification*, *supra* note 53, at 443.

⁹⁶ *Furman v. Georgia*, 408 U.S. 238 (1972). In his concurrence, Justice Brennan stated that the judiciary has the fundamental responsibility to enforce the cruel and unusual punishment clause found in the Eighth Amendment of the Bill of Rights by applying constitutional principles to its interpretation. *Id.* at 269, 271. He applied the principle that the Constitution respects human dignity in interpreting the Eighth Amendment. *Id.*

the 1972 Supreme Court case that invalidated the death penalty in every state.⁹⁷ He wrote, “[t]he state, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.”⁹⁸ Although Justice Brennan would likely have rested on it being self-evident that the destruction of human life cannot comport with human dignity, he provided additional guidance for courts to apply in determining whether a punishment is cruel and unusual:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.⁹⁹

Brennan found the death penalty to be cruel and unusual punishment under this test.¹⁰⁰ He concluded: “[d]eath is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment.”¹⁰¹

Four years after invalidating the death penalty, the Court reversed course and reinstated it in *Gregg v. Georgia*.¹⁰² Justice Brennan wrote a short dissent in *Gregg*, which confirmed the reasoning of his concurring opinion in *Furman* that the death penalty is cruel and unusual punishment under all circumstances in violation of the Eighth Amendment.¹⁰³ After the Court’s ruling in *Gregg*, Brennan dissented in every case upholding the death penalty and in every instance in which the Court declined to hear an appeal from a death row inmate.¹⁰⁴ In regard to the death penalty, Brennan

⁹⁷ *Id.* at 240.

⁹⁸ *Id.* at 270 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)) (stating that the basic concept underlying the cruel and unusual punishment clause of the Eighth Amendment is “nothing less than the dignity of man”).

⁹⁹ *Id.* at 282.

¹⁰⁰ *Id.* at 305.

¹⁰¹ *Id.* Justice Brennan’s view that the death penalty was virtually totally rejected by contemporary society was likely an overstatement of public opinion at the time.

¹⁰² *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁰³ *Id.* at 227 (Brennan J., dissenting).

¹⁰⁴ *See, e.g., Alvord v. Florida*, 428 U.S. 923, 923-24 (1976) (Brennan, J., dissenting) (stating “[p]etitioner contends that he was unconstitutionally-convicted because a statement he made during in-custody interrogation was admitted in evidence during the prosecution’s case-in-chief, despite the absence of any warning to petitioner that if he could not afford an attorney one would be appointed to represent him before questioning. On the record in this case, we would grant certiorari and set the case for oral argument. In any event, the imposition and carrying out of the death penalty in this case constitutes cruel and unusual punishment in

found that it was unconstitutional in all circumstances because when the State destroys the individual it denies that individual all of his dignity.¹⁰⁵ Thus, Justice Brennan's death penalty jurisprudence demonstrates the firmness of his belief in the constitutional principle of human dignity.¹⁰⁶

III. THE VALUES OF EQUALITY AND LIBERTY

Part III shows how the values of equality and liberty, based on respect for the individual, were expressed by Justice Brennan and James Wilson. Part III.A establishes that Brennan and Wilson both held that the dignity and sovereignty of the individual under the Constitution means that all persons have a right to equality and liberty. Part III.B shows that James Wilson's commitment to equality was progressive for its time, while Justice Brennan authored transformational decisions furthering the principle of equality. Part III.C remarks that Justice Brennan and James Wilson supported proportional representation because it secured equality of citizenship. Part III.D highlights Brennan's and Wilson's commitment to individual liberty. Finally, Part III.E illustrates the significance of individual liberty to both Wilson and Brennan, who advocated for criminal procedures that protect even the liberty of those charged with committing heinous crimes.

A. *All Men Are, by Nature, Equal and Free*

Justice Brennan and James Wilson shared the belief that the United States Constitution is based on the principle that the United States is comprised of free and equal people.¹⁰⁷ Among the advantages of a constitutional democracy, James Wilson noted, are the rights to liberty and equal laws for its citizens.¹⁰⁸ Wilson saw that principle expressly stated in the Declaration of Independence,¹⁰⁹ while Justice Brennan observed that the Declaration was grounded in the belief that all men are created equal and endowed by their creator with certain unalienable rights.¹¹⁰ James Wilson may have contributed to Thomas Jefferson's seminal phrase in the

violation of the Eighth and Fourteenth Amendments. We would therefore grant certiorari and vacate judgment in this case insofar as it leaves undisturbed the death sentence imposed." (citations omitted)).

¹⁰⁵ *Furman*, 408 U.S. at 305.

¹⁰⁶ The Court continues to find that the Eighth Amendment implicates human dignity. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."); *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("By protecting even those accused of heinous crimes, the Eighth Amendment reaffirms the duty of government to respect the dignity of all persons.") The Court, however, has not yet agreed with Justice Brennan that the death penalty is unconstitutional because it constitutes a total denial of human dignity.

¹⁰⁷ HALL, *supra* note 19, at 96-98.

¹⁰⁸ Wilson, *Ratifying Remarks*, *supra* note 46, at 192.

¹⁰⁹ John Marshall Harlan, *James Wilson and the Formation of the Constitution*, 34 AM. L. REV. 481, 483 (1900).

¹¹⁰ William J. Brennan, Jr., Speech to the Monmouth Rotary Club (Feb. 23, 1955), in *Nomination of William J. Brennan, Hearings before the Senate Committee on the Judiciary*, 85th Cong. 28 (1957), reprinted in 103 CONG. REC. 3939, 3940 (1957).

Declaration that “all men are created equal” and that they are “endowed by their creator with certain inalienable rights” among which is liberty. In 1774, two years before Jefferson penned the Declaration, James Wilson wrote in his first published pamphlet that “All men are, by nature, equal and free.”¹¹¹ Jefferson later wrote that he based the Declaration on the sentiments of the day including those expressed in printed essays.¹¹²

From an early time in the formation of the United States, equality and liberty have been recognized as basic rights of the individual. For Justice Brennan and James Wilson, these rights derive from a fundamental recognition of the dignity and supremacy of the individual. This Part will show that their views on specific constitutional issues reflect the principles of equality and liberty.

B. Equality

Paradoxically, the Founding Fathers expounded the ideal of equality in their Declaration of Independence while maintaining a society that included slaves and few rights for women.¹¹³ In his reflection on the 1987 Bicentennial of the United States Constitution, Justice Thurgood Marshall, the first African American appointed to the Supreme Court in 1967, noted that when the Founding Fathers used the phrase “We the People” in 1787, they did not have in mind the majority of America’s inhabitants, specifically women and slaves.¹¹⁴

While Justice Marshall expressed his impatience with the defense that the Founders’ approach to equality was a product of the times in which they lived,¹¹⁵ it is true that for his time, James Wilson was among the strongest supporters of the concept that the people who formed the union were equal in rights. He wrote:

¹¹¹ James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774) in 1 COLLECTED WORKS OF JAMES WILSON 4 (Kermit L. Hall & Mark David Hall eds., 2007); see also John Marshall Harlan, *supra* note 109, at 483 (“[I]n 1774, when only thirty-two years of age, in a pamphlet relating to the legislative authority of the British Parliament and which attracted great attention, Wilson disclosed the broad ground upon which his political faith rested, by declaring that all men—not some men, not men of any particular race or color, but ‘all men are by nature equal and free’—the same great principle subsequently embodied in the Declaration of Independence.”).

¹¹² Thomas Jefferson wrote that the Declaration of Independence was not his original contribution, but rather “it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All of its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right.” Letter from Thomas Jefferson to Henry Lee (May 8, 1825), available at <http://teachingamericanhistory.org/library/document/letter-to-henry-lee/>.

¹¹³ The Declaration of Independence para. 2 (U.S. 1776).

¹¹⁴ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). Justice Marshall noted that on the basic right to vote, the Framers excluded African-Americans, although they were considered to be three-fifths of a person for representational purposes, and women did not gain the right to vote for another 130 years. *Id.*

¹¹⁵ *Id.* at 3.

However great the variety and inequality of men may be with regard to virtue, talents, taste, and acquirements; there is still one aspect, in which all men in society, previous to civil government are equal. With regard to all, there is an equality in rights and obligations . . . The natural rights and duties of man belong equally to all. Each forms a part of that great system, whose greatest interest and happiness are intended by all the laws of God and nature. These laws prohibit the wisest and the most powerful from inflicting misery on the meanest and most ignorant; and from depriving them of their just acquisitions.¹¹⁶

Some members of the Constitutional Convention argued that suffrage for national elections should be restricted to those who held property.¹¹⁷ James Wilson, however, advocated that suffrage should be granted to all free adult males.¹¹⁸ For his time, universal suffrage for all free adult males was a progressive position that evidenced a substantial commitment to human equality.¹¹⁹ In regard to slavery, Wilson stated that the Constitution gave Congress the power to prohibit the importation of slaves beginning in 1808, a power that he believed laid “the foundation for the banishing of slavery out of this country” although at a time more distant than he would wish.¹²⁰ Additionally, he observed that “this reproachful trade” will never be introduced in the new states which would be formed.¹²¹ He concluded that this restriction on slavery was “all that could be obtained. I am sorry it was no more; but from this I think there is reason to hope that yet a few years, and it will be prohibited altogether.”¹²²

Equality means that differences in race, gender, religion, or wealth are not relevant to questions of fundamental rights. Two centuries later, and following the passage of the Fourteenth Amendment, Justice Brennan was able to greatly expand on James Wilson’s principle that all men are, by their nature, equal. Justice Brennan’s opinions that furthered the achievement of equality for racial minorities and women will be discussed in Part V.A of this article.

C. Equality of Citizenship: Baker v. Carr

The most fundamental right in a democracy is the right to vote. Justice Brennan and James Wilson both believed that each elector’s vote should have equal weight and, for this reason, they both supported proportional representation.¹²³ During the Constitutional Convention, James Wilson supported the concept of “one person-one vote”. James Madison’s journal from the convention notes:

¹¹⁶ HALL, *supra* note 19, at 96.

¹¹⁷ *Id.* at 108-9.

¹¹⁸ *Id.* at 108.

¹¹⁹ Ewald, *supra* note 40, at 1008.

¹²⁰ Wilson, *Ratifying Remarks*, *supra* note 46, at 210. Wilson owned one domestic slave, whom he later freed. Pederson, *supra* note 21, at 273, 275.

¹²¹ Wilson, *Ratifying Remarks*, *supra* note 46, at 210.

¹²² *Id.*

¹²³ Ewald, *supra* note 40, at 945.

[Mr. Wilson] entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal n[umber] of representatives, and different numbers of people different numbers of representatives.¹²⁴

Further, when delegates at the Constitutional Convention sought to give the maritime states greater political power than the newer western states that one day might have greater populations, Wilson interjected in opposition that “all men wherever placed have equal rights.”¹²⁵ James Wilson never deviated from his insistence that each person’s vote should have equal weight in the new government.¹²⁶

One of Justice Brennan’s most transformational decisions is his opinion for the Court in *Baker v. Carr*,¹²⁷ which held that the method by which state legislatures apportion legislative districts affects a basic right that is justiciable by courts.¹²⁸ Chief Justice Earl Warren observed that *Baker v. Carr* was the foundation for all subsequent decisions guaranteeing equal weight to the vote of every American citizen¹²⁹ and Justice Brennan related the decision to the principle of human dignity reflecting that “[r]ecognition of the principle of ‘one person, one vote’ as a constitutional principle redeems the promise of self-governance by affirming the essential dignity of every citizen in the right to equal participation in the democratic process.”¹³⁰

Although *Baker v. Carr* did not reach the merits of the legislative apportionment at issue, Justice Brennan foreshadowed the application of equal protection to voting rights cases, stating that “[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”¹³¹ He concluded that “the complaint’s allegations of a denial of equal protection present a

¹²⁴ Madison, *Remarks*, *supra* note 43, at 93; Ewald, *supra* note 40, at 901.

¹²⁵ Madison, *Remarks*, *supra* note 43, at 115; Ewald, *supra* note 40, at 980.

¹²⁶ Ewald, *supra* note 40, at 970.

¹²⁷ *Baker v. Carr*, 369 U.S. 186 (1962).

¹²⁸ *Id.*

¹²⁹ Earl Warren, *Mr. Justice Brennan*, 80 HARV. L. REV. 1, 1 (1966). When Justice Brennan read the opinion from the bench, Warren slipped him a hand-written note stating: “Bill: It is a great day for the (Irish) country. EW” Handwritten Note from Chief Justice Earl Warren to Justice William J. Brennan, Jr. (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 64, Folder 4, *Baker v. Carr*).

¹³⁰ Brennan, *Contemporary Ratification*, *supra* note 53, at 442.

¹³¹ *Baker*, 369 U.S. at 226. Justice Brennan routinely planted a seed in his opinions that would germinate into new constitutional doctrine in a subsequent case. Richard A. Posner, *Tribute to Justice Brennan*, 111 HARV. L. REV. 9, 11 (1997). Laurence Tribe also noted that one of the crucial elements in Brennan’s work as a constitutional architect was his ability to craft an opinion in a way that would lay the foundation for future decisions. Laurence H. Tribe, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 41, 44 (1997).

justiciable constitutional cause of action upon which appellants are entitled to a trial and decision.”¹³²

Prior to Justice Brennan’s *Baker* ruling in 1962, many states had not reapportioned their congressional and state legislative districts for decades, despite the fact that the Country’s population had substantially shifted from rural to urban areas.¹³³ Incumbent state legislators did not want to enact re-districting because it would result in a loss of their own power.¹³⁴ At issue in *Baker* was Tennessee’s standard for allocating legislative representation among its counties.¹³⁵ To show how Tennessee’s policies affected real people, a Brennan law clerk prepared a chart, based on the exhibits that were part of the record, that showed disproportionate representation among Tennessee counties of the same size, disproportionate populations among counties with the same representation, and situations in which counties with populations one-sixth the size of other counties had up to three times as many representatives.¹³⁶ These facts showed that Tennessee’s citizens did not have equal representation in their government.

Earlier decisions, such as *Colgrove v. Green*,¹³⁷ held that cases raising issues pertaining to legislative representation presented non-justiciable political questions.¹³⁸ Justice Brennan’s decision in *Baker*, however, opened the courthouse doors to subsequent voting rights cases.¹³⁹ Two years after *Baker*, in *Reynolds v. Sims*,¹⁴⁰ Justice Brennan joined Chief Justice Earl Warren’s opinion that established the substantive principle of “one-man, one-vote”.¹⁴¹ As a result of the holding in *Baker*, courts could now provide a forum to all persons seeking to enforce their equal right to participate in the democracy.

Thus, Justice Brennan’s opinion in *Baker* substantially furthered the principle of proportional representation that James Wilson had articulated during the Constitutional Convention. Proportional Representation recognizes that each citizen in a democracy has an equal right to participate in the election of his representatives, and conversely, that a democracy is composed of individuals with equal rights.

¹³² *Baker*, 369 U.S. at 237.

¹³³ Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 95 U. ILL. L. REV. 683, 685 (1995).

¹³⁴ *Id.*

¹³⁵ *Baker*, 369 U.S. at 187-188.

¹³⁶ Conference Memorandum from Justice William J. Brennan, Jr. (Oct. 12, 1961) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 63, Folder 5, *Baker v. Carr*).

¹³⁷ *Colgrove v. Green*, 328 U.S. 549 (1946).

¹³⁸ *Id.* at 552.

¹³⁹ Mikva, *supra* note 133, at 686.

¹⁴⁰ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁴¹ *Id.* at 558.

D. Liberty

Justice Brennan and James Wilson advocated an expansive view of individual liberty. James Wilson observed that, “The Citizens of the United States, however different in some other respects, are well known to agree in one strongly marked feature of their character—a warm and keen sense of freedom and independence.”¹⁴² And for this reason he continued, “The principles and dispositions of [the citizens of the United States] indicate, that in this government liberty shall reign triumphant.”¹⁴³ Wilson supported restrictions on the state to insure that individuals were not improperly deprived of their liberty.¹⁴⁴ Additionally, he believed in the freedom of conscience and the right of the individual to make his own choices, stating:

The right of private judgment is one of the greatest advantages of mankind; and is always considered as such. To be deprived of it is insufferable. To enjoy it lays a foundation for that peace of mind, which the laws cannot give, and for the loss of which the laws can offer no compensation.¹⁴⁵

Consistent with his view that individuals are entitled to liberty of thought, Wilson strongly supported the right of each individual to form and hold his own religious beliefs.¹⁴⁶

For Justice Brennan, “the ability independently to define one’s identity” is central to any concept of liberty.¹⁴⁷ He explained:

The constitutional vision of human dignity rejects the possibility of political orthodoxy imposed from above; it respects the right of each individual to form and to express political judgments, however far they may deviate from the mainstream and however unsettling they might be to the powerful or the elite. Recognition of these rights of expression and conscience frees up the private space for both intellectual and spiritual development, free of government dominance, either blatant or subtle.¹⁴⁸

Justice Brennan advocated strenuously for the fullest protection of those freedoms that preserve the integrity of the individual spirit, giving it a wide berth to express itself even in ways that might be unsettling to the majority. He was not concerned with the manner in which the individual develops; he did not endorse a set of thoughts or behaviors.¹⁴⁹ His concern was simply that the individual be given the liberty to develop, preserving a domain of personal autonomy into which the government may not intrude. For this reason, Justice Brennan authored opinions that

¹⁴² Wilson, *Ratifying Remarks*, *supra* note 46, at 179.

¹⁴³ *Id.* at 187.

¹⁴⁴ HALL, *supra* note 19, at 54.

¹⁴⁵ *Id.* at 55.

¹⁴⁶ *Id.*

¹⁴⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

¹⁴⁸ Brennan, *Contemporary Ratification*, *supra* note 53, at 442-43.

¹⁴⁹ *Id.* at 443.

promoted liberty of speech, thought, and action that will be discussed in Part V.B of this article.

E. The Preservation of Liberty in Criminal Procedure

The strongest evidence of Justice Brennan and James Wilson's commitment to liberty is their advocacy for strong restraints on the government's ability to deprive an individual of his liberty when he has been accused of a crime. By supporting liberty in the hard cases, the liberty of all citizens is preserved. Among the protections of individual liberty that James Wilson supported are: (1) the right to a fair trial prior to imprisonment; (2) grand jury indictment only under the higher standard of "certainty," rather than the lower standard of probable cause; and (3) that the dissent of a single juror in a criminal trial should result in acquittal.¹⁵⁰

Justice Brennan similarly supported criminal procedures that protect individual liberty. Brennan's view that the State must act with restraint when it confronts the individual is illustrated in the following exchange that he had with Chief Justice Earl Warren during their consideration of *Miranda v. Arizona*:¹⁵¹

Earl Warren: "The root problem is the role society must assume, consistent with the federal constitution, in prosecuting individuals for crime."

Justice Brennan: "I would suggest that the root issue is *the restraints society must observe* consistent with the federal constitution, in prosecuting individuals for crime."¹⁵²

Although a strong advocate for the rights of the accused, Justice Brennan recognized the competing interests involved, stating that "[w]here the police have ample evidence of a man's guilt, but to be sure of their case put into evidence a confession obtained through coercion, the conflict arises between his right to a fair

¹⁵⁰ HALL, *supra* note 19, at 54.

¹⁵¹ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the prosecution may not use a defendant's statements obtained during custodial interrogation unless there were procedural safeguards that ensured the defendant's right against self-incrimination was preserved). Chief Justice Warren's opinion for the Court stated, "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens." *Id.* at 460.

¹⁵² Letter from Justice William J. Brennan, Jr. to Chief Justice Earl Warren (May 11, 1966) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 142, Folder 10, *Miranda v. Arizona*) (emphasis added). Chief Justice Warren's opinion in *Miranda* opens with Justice Brennan's words: "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime." *Miranda*, 384 U.S. at 439. Justice Brennan served with Justice Warren on the Supreme Court for thirteen of the sixteen years that Warren presided as Chief Justice and described him as a "cherished friend." William J. Brennan, Jr., *In Memoriam: Earl Warren*, 88 HARV. L. REV. 1 (1974). Justice Brennan wrote that Justice Warren "strongly believed that individual human dignity was a primary value fostered and protected by the Constitution." *Id.* at 3. Brennan observed that Warren "wrote *Miranda v. Arizona*, as a step toward enforcing a constitutional framework of criminal justice consistent with human dignity and democratic equality by mandating enlightened and civilized treatment by law enforcement officers of criminal suspects." *Id.*

prosecution and society's right to protection against his depravity."¹⁵³ He advised that these are conflicts that require the Court to make difficult choices in order to protect constitutional rights for everyone.¹⁵⁴

In 1961, Justice Brennan titled a speech he gave on issues of criminal law, "The Essential Dignity of Man."¹⁵⁵ He addressed the speech to a volunteer association of New Jersey citizens that had been formed to make improvements to the state's corrections system.¹⁵⁶ He commended their efforts, noting that "[t]he law breaker has not been an appealing object of sympathy or concern."¹⁵⁷ And he addressed the question of why the average citizen should be concerned about the criminal:

Foremost is our boast that the supreme value of our American democracy is the value we give the dignity and worth of the individual. We recognize this value when we accuse the offender of the crime before we convict him. We insist that, however guilty, he shall not go to prison except upon indictment and conviction by a jury of his peers, and then only if the State can persuade the jury of his guilt beyond a reasonable doubt. We will not allow his guilt to be based upon a confession coerced from him, and we give him the shield of the privilege against self-incrimination so that he shall not be convicted out of his own mouth. We insist that his trial be fair and the decision be reached by an impartial jury. All of these safeguards stem from the firm conviction of a free society that these safeguards are essential to preserve simple human dignity.¹⁵⁸

In his many years on the Court following this speech, Justice Brennan strove to assure that the Court safeguarded the essential dignity and right to liberty of criminal defendants: recognizing that an indigent defendant in a criminal prosecution has a right to have appointed counsel;¹⁵⁹ allowing state criminal defendants to obtain a full and fair hearing on important constitutional claims;¹⁶⁰ finding that a post-indictment line-up is a critical stage of the prosecution at which defendant is entitled to aid of counsel;¹⁶¹ recognizing that the due process clause requires proof beyond a reasonable doubt in a criminal trial;¹⁶² and arguing for a strict application of the

¹⁵³ Brennan, *Constitutional Adjudication*, *supra* note 56, at 565.

¹⁵⁴ *Id.*

¹⁵⁵ William J. Brennan, Jr., *Remarks to the Morrow Citizens Association of Correction in Newark, New Jersey* (Nov. 21, 1961), *available at* <http://www.chattanoogaendeavors.com/brennan/speech>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Justice Brennan joined Justice Black's opinion for the Court).

¹⁶⁰ *Fay v. Noia*, 372 U.S. 391(1963), *abrogated by* *Coleman v. Thompson*, 501 U.S. 722 (1991).

¹⁶¹ *U.S. v. Wade*, 388 U.S. 218 (1967).

¹⁶² *In re Winship*, 397 U.S. 358 (1970).

exclusionary rule as a personal right to be free from unreasonable searches and seizures.¹⁶³

By advocating for the strong protection of the individual's right to liberty, even in the hard cases involving those accused of crimes, Justice Brennan and James Wilson sought to protect the liberty of all Americans.

IV. A CONSTITUTION OF PRINCIPLES

Part III discussed the values of equality and liberty, derived from the principle of individual dignity, that James Wilson expressed in the drafting of the Constitution in the eighteenth-century, and that Justice Brennan upheld during the twentieth-century. Part IV discusses Justice Brennan's strongly-held belief that James Wilson and his contemporaries at the Constitutional Convention framed a Constitution for future generations that would require interpretation in light of changing times. He believed that the Constitution's values of equality and liberty, renewed by the Fourteenth Amendment, may be interpreted by each succeeding generation of judges in the light of the circumstances of the time.

Justice Brennan believed that the Framers deliberately chose general language because they "were formulating a Constitution for the illimitable future."¹⁶⁴ At the Constitutional Convention, James Wilson explicitly stated this principle, advising the other Framers that, "We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment."¹⁶⁵ For this reason, Brennan observed that the Framers wrote in broad outlines so that the past would not excessively govern the future.¹⁶⁶ As American society has evolved, the foundational principles of the Constitution have been more fully realized. For example, although the Nation was founded on the principle that all men are created equal, Justice Brennan observed that "the Framers of our Constitution, to forge Thirteen Colonies into one Nation, openly compromised [the] principle of equality with its antithesis: slavery."¹⁶⁷ It took a Civil War to clarify that the Constitution was inconsistent with human slavery.

Justice Brennan wrote that "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."¹⁶⁸ He expressed disapproval of constitutional interpretation that rests on an attempt to discern how the Framers would decide today's issues, based on the positions they

¹⁶³ U.S. v. Leon, 468 U.S. 897 (1984) (Brennan, J., dissenting).

¹⁶⁴ William J. Brennan, Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 7 (1991) [hereinafter Brennan, *Charter of Human Rights*].

¹⁶⁵ Madison, *Remarks*, *supra* note 43, at 125.

¹⁶⁶ Brennan, *Charter of Human Rights*, *supra* note 164, at 7.

¹⁶⁷ Justice William J. Brennan, Jr. (n.d.) (draft bench statement) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 441, Folder 5, *Board of Regents v. Bakke*).

¹⁶⁸ Brennan, *Contemporary Ratification*, *supra* note 53, at 438. "Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance." *Id.* at 436.

took in the eighteenth century.¹⁶⁹ He found this method of interpretation inherently unreliable because the sources for their views provide ambiguous evidence further distorted by the distance of two centuries.¹⁷⁰ It is the judge's role to apply the Constitution's broadly worded principles to circumstances that were not contemplated when those principles were first articulated.¹⁷¹

In fact, it trivializes the work that James Wilson did to frame a Constitution for the ages, to attempt to uncover whether or not Wilson's children read Bible passages in their eighteenth-century schoolhouse, rather than considering whether in the diverse public schools of today, it violates the freedom of religion of all school children to be required to read religious texts. Further, it is unlikely that when James Wilson affirmed a Constitution that considered African-Americans to count as three-fifths of a person, that he would have contemplated that a person of African-American heritage would be President or that a woman would be a serious contender for the office.

The role of the judge in interpreting the Constitution's broad principles is challenging. It would be easier for judges to apply specific and simple legal rules. Justice Brennan noted that the Framers recognized the demands of constitutional interpretation, and more importantly, the need for judges to be independent of political pressures while engaged in this interpretation.¹⁷² Therefore, the Constitution grants life tenure and a secure salary to federal judges.¹⁷³ Justice Brennan cited with approval James Wilson's advocacy for a strong and independent judiciary:

¹⁶⁹ *Id.* at 435

¹⁷⁰ *Id.* Brennan was derisive of attempts to constrain the Constitution to life in 1791. "Indeed, if it were possible to find answers to all constitutional questions by reference to historical practices, we would not need judges. Courts could be staffed by professional historians who could be instructed to compile a master list of life in 1791. Cases could be decided based on whether a challenged practice or rule or procedure could be located on that great list." William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 326 (1986) [hereinafter Brennan, *Death Penalty View*]. In *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 237 (1963), Brennan noted that searching for the advice of the Founding Fathers on the issue of whether bible readings should be allowed in schools would be futile because the historical record is at best ambiguous and statements can readily be found to support either side of the proposition.

¹⁷¹ Brennan, *Death Penalty View*, *supra* note 170, at 326. In considering whether legislative prayer is constitutional, Justice Brennan expressed his view of the role that historical practice should have in constitutional interpretation:

I recognize that the 1st Congress approved the practice of legislative prayer. But that historical fact cannot be dispositive: it is entirely possible that the same men who wrote a broad and lasting mandate for religious neutrality into the Constitution would, under pressures or passions of the moment, violate the very principle they had enacted. History can give us guidance in a broad sense; it cannot validate forever every piece of legislation passed by the First Congress or prevent us from reading the Constitution in light of the realities of the day and the requirements of evolving legal principle.

Conference Memorandum from Justice William J. Brennan, Jr., *supra* note 15.

¹⁷² Brennan, *Death Penalty View*, *supra* note 170, at 326.

¹⁷³ *Id.* (stating that the Framers intended that judges would have the responsibility, burden, and challenge of working with the majestic generalities of the Constitution).

James Wilson of Pennsylvania pointed out that “the Judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two [political] branches of government.” The result of life tenure for judges, he said, will be “that private property, so far as it comes before the courts, and personal liberty, so far as it is not forfeited by crimes, will be guarded with firmness and watchfulness.” “I believe,” he went on, “that public happiness, personal liberty and private property depend essentially upon the able and upright determinations of independent judges.”¹⁷⁴

Constitutional interpretation, however, is not reduced to the mere imposition of the judge’s personal views of morality or policy. For Justice Brennan, a judge’s application of his personal philosophy to constitutional interpretation is held in check because “judges have to proceed and to persuade by reasoned argument in a public context.”¹⁷⁵ The judge is always aware that the public must find legitimacy in his decisions.

Guided by the principles of equality and liberty, constitutional interpretation can be counter-majoritarian. Justice Brennan stated that “[i]t is the very purpose of our Constitution - and particularly of the Bill of Rights - to declare certain values transcendent, beyond the reach of temporary political majorities.”¹⁷⁶ Thus courts have a special responsibility to protect individual rights even though those rights may not be affirmed by the democratic will of the majority.¹⁷⁷ As a result, “there are circumstances in which the majority must yield to the greater national interest in the protection of rights.”¹⁷⁸ James Wilson observed, “On one side, indeed, there stands a single individual; on the other side, perhaps, there stand millions; but right is weighed by principle; it is not estimated by numbers.”¹⁷⁹

¹⁷⁴ Brennan, *Landmarks*, *supra* note 20, at 8; *see also* Wilson, *Ratifying Remarks*, *supra* note 46, at 237.

¹⁷⁵ Brennan, *Death Penalty View*, *supra* note 170, at 329. Justice Brennan described the public context of his work interpreting the Constitution:

My encounters with the constitutional text are not purely or even primarily introspective: the Constitution cannot be for me simply a contemplative haven for private moral reflection. My relation to this great text is inescapably public. That is not to say that my reading of the text is not a personal reading, only that the personal reading perforce occurs in a public context and is open to critical scrutiny from all quarters. The Constitution is fundamentally a public text—the monumental charter of a government and a people—and a Justice of the Supreme Court must apply it to resolve public controversies.

Brennan, *Contemporary Ratification*, *supra* note 53, at 433.

¹⁷⁶ Brennan, *Contemporary Ratification*, *supra* note 53, at 436.

¹⁷⁷ This special role of the courts was anticipated by James Madison, who stated, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of [constitutional] rights.” Brennan, *Challenge of the Future*, *supra* note 61, at 332 (citing 1 ANNALS OF CONG. 439 (Gales & Seaton eds., 1834)).

¹⁷⁸ Brennan, *Charter of Human Rights*, *supra* note 164, at 6.

¹⁷⁹ James Wilson, *Of Citizens and Aliens, Law Lectures*, in 2 COLLECTED WORKS OF JAMES WILSON 1043 (Kermit L. Hall & Mark David Hall eds., 2007).

In 1868, the Fourteenth Amendment to the Constitution affirmed the values of equality and liberty that James Wilson believed the government must preserve for its citizens.¹⁸⁰ Within the Fourteenth Amendment's Due Process and Equal Protection Clauses,¹⁸¹ Justice Brennan found "the prime tool by which we as citizens are striving to shape a society which fully champions the dignity and worth of the individual as its supreme value."¹⁸² The Due Process Clause demands that the government treat individuals with respect.¹⁸³ Due process asks "whether government has treated someone fairly, whether individual dignity has been honored, whether the worth of an individual has been acknowledged."¹⁸⁴ It assures that personal liberties are not unduly forfeited.¹⁸⁵ In regard to the Equal Protection Clause, Justice Brennan viewed it as fundamental to a constitutional democracy because it provided equality of rights and opportunities for all people of the nation to share in the abundance of American life.¹⁸⁶ Differences in age, sex, race, and religion are not relevant to the manner in which the government treats its citizens.¹⁸⁷ Relying on the Fourteenth Amendment's reaffirmation of the principles of equality and liberty and holding a view that constitutional interpretation should reflect current realities, Justice Brennan substantially furthered James Wilson's assertion that "All men, by their nature, are Equal and Free."

V. JUSTICE BRENNAN ADVANCES EQUALITY AND LIBERTY

James Wilson served as a justice on the first United States Supreme Court, however, he wrote fewer than two dozen opinions.¹⁸⁸ In contrast, Justice Brennan

¹⁸⁰ U.S. CONST. amend. XIV; *see supra* Part III.A (discussing the importance of equality and liberty to Wilson).

¹⁸¹ "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁸² Brennan, *Landmarks*, *supra* note 20, at 1.

¹⁸³ Brennan, *Reason, Passion*, *supra* note 47, at 22.

¹⁸⁴ *Id.* at 16.

¹⁸⁵ *Id.* at 15-16.

¹⁸⁶ William J. Brennan, Jr., *The Equality Principle in American Constitutional Jurisprudence*, 48 OHIO ST. L.J. 921, 921-22 (1987).

¹⁸⁷ In the Equal Protection Clause, Justice Brennan also found a means to recognize certain fundamental rights. Many of the issues related to fundamental rights arise in the context of the unequal acknowledgment of those rights. In *Shapiro v. Thompson*, 394 U.S. 618, 636-38 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974), Brennan found that a state's one-year residency requirement for the receipt of public assistance created two classes of needy resident families, indistinguishable except that one class resided in the state for a longer period of time. The classification implicated interstate travel, which Brennan found to be a fundamental right. He, therefore, applied strict scrutiny review and held that the residency requirement was unconstitutional. *Id.* The *Shapiro* opinion is noted for establishing the application of strict scrutiny to fundamental rights. *Id.* at 638.

¹⁸⁸ HALL, *supra* note 19, at 25.

served on the Court for thirty-four years and authored well over one thousand opinions.¹⁸⁹ The breadth of issues that came before Justice Brennan far out-numbered the issues that Justice Wilson considered. Part V reviews leading cases that Justice Brennan authored upholding the values of equality and liberty based on his constitutional vision of human dignity.

Part V.A.1 highlights Justice Brennan's opinions that furthered racial equality. The strength of Justice Brennan's commitment to equality is demonstrated in *Green v. County School Board of New Kent County*, which held that equality cannot be delayed, it must be achieved *now*.¹⁹⁰ Part V.A.2 discusses Justice Brennan's effort to have the strictest standard of review applied to gender claims in *Frontiero v. Richardson*.¹⁹¹ Part V.A.3 highlights Justice Brennan's decision in *Goldberg v. Kelly*,¹⁹² which secured an equal right to due process for welfare recipients and suggested that individuals may have a positive right to government benefits ensuring minimal subsistence.¹⁹³

In Part V.B.1, Justice Brennan's commitment to liberty of expression is shown by *Texas v. Johnson*,¹⁹⁴ which upheld the right of an individual to protest government policies by burning an American flag, even if that act would not be approved by the majority of citizens.¹⁹⁵ Part V.B.2 concludes with a review of Justice Brennan's substantial contribution to the recognition of a fundamental right to privacy, which allows each individual liberty in decisions that affect his person.

A. Equality

1. Racial Equality: Discrimination Eliminated Root and Branch

Justice Brennan joined the Supreme Court two years after the historic opinion in *Brown v. Board. of Education* was issued in May 1954.¹⁹⁶ Thurgood Marshall, the N.A.A.C.P. Legal Defense Fund lawyer who argued the case in the Supreme Court, later joined the Court in 1967.¹⁹⁷ He became one of Justice Brennan's closest colleagues on the Court.¹⁹⁸ Upon Justice Brennan's retirement from the Court, Justice Marshall wrote that his friend and colleague, Bill Brennan, was irreplaceable as a justice, distinguished by his unwavering commitment to basic principles of civil rights.¹⁹⁹

¹⁸⁹ See BRENNAN CENTER FOR JUSTICE, *supra* note 1.

¹⁹⁰ *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438-39 (1968) (emphasis added).

¹⁹¹ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

¹⁹² *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁹³ *Id.* at 263-64, 268.

¹⁹⁴ *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

¹⁹⁵ *Id.* at 419, 435.

¹⁹⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁹⁷ *Id.* at 484.

¹⁹⁸ Thurgood Marshall, *A Tribute to Justice William J. Brennan, Jr.*, 104 Harv. L. Rev. 1 (1990).

¹⁹⁹ *Id.* at 1-2.

Although Justice Brennan did not hear Thurgood Marshall argue *Brown*, Brennan was on the Supreme Court bench in 1958 when Marshall argued the case of *Cooper v. Aaron*.²⁰⁰ At issue in *Cooper* was whether the Little Rock, Arkansas School Board could suspend its school desegregation plan in response to strong resistance from the state's governor and others opposed to the desegregation of the schools, specifically Little Rock's Central High School.²⁰¹ Justice Brennan recalled that Marshall's "forceful presentation helped influence the Court's unprecedented and decisive" order to reinstate "the desegregation order on the day after oral argument."²⁰² In response to the school board's recitation of the difficulties it would encounter in implementing the desegregation plan, Marshall reminded the Court that the issues at hand were the constitutional rights of the African-American children which should not be watered down simply because democracy is tough.²⁰³ Although *Cooper v. Aaron* was a plurality decision, Justice Brennan is credited with being its principal author.²⁰⁴ The decision reaffirmed the Court's holding in *Brown*, stating that the principles announced in *Brown* "are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth."²⁰⁵

Ten years later, in *Green v. County School Board of New Kent County*, Justice Brennan would again address the issue of achieving equality of education for all

²⁰⁰ *Cooper v. Aaron*, 358 U.S. 1 (1958). The first face-to-face meeting between Justice Brennan and Thurgood Marshall is described by a Brennan law clerk, Frank I. Michelman, who recalled that it took place in 1961. Justice Brennan held an oral argument in his chambers to address an application filed by the Board of Education in New Rochelle, New York to stay a lower court order requiring the school board to facilitate the transfer of African-American school children out of segregated schools. At the time, Marshall was the lead lawyer for the N.A.A.C.P. Legal Defense & Education Fund. After listening attentively to the lawyer representing the school board, Justice Brennan asked Marshall whether there was any problem with the children waiting for relief. Marshall responded: "Justice Brennan, my clients have been waiting a long time . . . [t]hese other folks, won't hurt them if they have to hustle a bit." Justice Brennan denied the stay. For Michelman, Justice Brennan's respect shown to both lawyers and his decision to consider the needs of the African-American school children was one of many examples where Justice Brennan "fought so ably to make the law look out for the dignity and 'intrinsic worth' of every person." Frank I. Michelman, *Tribute to Justice Brennan*, 111 HARV. L. REV. 37, 39-41 (1997-1998).

²⁰¹ *Cooper*, 358 U.S. at 12.

²⁰² William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 Harv. L. Rev. 23, 25 (1991).

²⁰³ Transcript of Oral Argument at 90-91, *Cooper v. Aaron*, 358 U.S. 1 (1958) (No. 1).

²⁰⁴ The opinion in *Cooper v. Aaron* was first assigned to Justice Brennan, who circulated several draft opinions. It was eventually decided that it should be a joint opinion with Brennan's draft opinion as the point of departure. Peter M. Fishbein & Dennis G. Lyons, *Note on the Undelivered Opinions and Memoranda Included in this Volume*, in *Opinions of William J. Brennan, Jr.*, Aug. Special Term 1958 & Oct. Term 1958 at V (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part II, Box 6, Folder 1) (The case histories contained in the Brennan Papers were prepared by Justice Brennan and his law clerks at the end of each term to describe the evolution of certain decisions of the Court.).

²⁰⁵ *Cooper*, 358 U.S. at 19-20.

children irrespective of their race.²⁰⁶ Although Justice Brennan recognized that dismantling a well-entrenched system of dual education based on race was complex and raised multifaceted problems, he stated that, nevertheless, school boards were charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which “racial discrimination would be eliminated root and branch.”²⁰⁷ He breathed new life into *Brown* by instructing school boards that they had an affirmative duty to eliminate racial inequality *now*. Chief Justice Earl Warren recognized the significance of the *Green* opinion by writing in a note to Justice Brennan that “[w]hen this opinion is handed down, the traffic light will have changed from *Brown* to *Green*.”²⁰⁸ Justice Brennan required the school board to formulate a plan that promised realistically, but promptly, to convert “to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”²⁰⁹

2. Gender Equality: Not on a Pedestal, but in a Cage

Justice Brennan’s belief in the dignity and the equality of all persons extended to seeking equal rights for women. Justice Brennan believed that the “recognition of full equality for women—equal protection of the laws—ensures that gender has no bearing on claims to human dignity.”²¹⁰ He sought to achieve full equality for women by advocating that a strict scrutiny standard be applied to the Court’s review of classifications based on gender.²¹¹ The authors of the Constitution, a group that omitted women, likely did not envision full equality of citizenship for women, who were not granted the right to vote until 1920.²¹² The Country’s history of slowly moving towards recognition of equal rights for women is vivid support for Justice Brennan’s belief that overarching principles in the Constitution can be more perfectly realized over time as social conditions change and the understanding of what constitutes human dignity evolves.

In *Frontiero v. Richardson*,²¹³ Justice Brennan sought to extend the strict scrutiny standard applied to racial discrimination to claims of gender discrimination, but he

²⁰⁶ *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 431-32 (1968).

²⁰⁷ *Id.* at 437-38. Justice Marshall also recognized the difficulty of breaking apart segregated schools, and in a note to Justice Brennan stating that he would join Brennan’s opinion in *Green*, Justice Marshall observed that Brennan’s opinion constituted “[a] marvelous and careful job on a tough question.” Letter from Justice Thurgood Marshall to Justice William J. Brennan, Jr. (May 17, 1968) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 174, Folder 6, *Green v. Cnty. Sch. Bd.*).

²⁰⁸ Letter from Chief Justice Earl Warren to Justice William J. Brennan, Jr. (May 22, 1968) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 174, Folder 6, *Green v. Cnty. Sch. Bd.*)

²⁰⁹ *Green*, 391 U.S. at 442.

²¹⁰ Brennan, *Contemporary Ratification*, *supra* note 53, at 442.

²¹¹ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

²¹² *Id.* at 685.

²¹³ *Id.* at 678-79. The case was brought pursuant to the Due Process Clause of the Fifth Amendment because the plaintiff was a United States military service woman. *Id.* at 678.

was unable to obtain a majority for the heightened standard.²¹⁴ *Frontiero* was the first Supreme Court case argued by Justice Ruth Bader Ginsburg during her many years of advocacy for the law's recognition of gender equality prior to her own appointment to the Supreme Court.²¹⁵ Justice Ginsburg stated that Justice Brennan's opinion in *Frontiero* was "the first in a line of Brennan opinions holding that our living Constitution obligates government to respect women and men as persons of equal stature and dignity."²¹⁶ Justice Ginsburg also observed that "[n]o one on the Court was more suited by judicial philosophy and personal generosity to respond to emerging claims of dignity and equal stature than Bill Brennan."²¹⁷

Sharon Frontiero was a lieutenant in the U.S. Air Force who sought housing and medical benefits for her husband.²¹⁸ Although these benefits would have been granted for a male officer seeking them for his wife, her application was denied because she failed to demonstrate that her husband was dependent on her for more than one-half of his support.²¹⁹ Sharon Frontiero and her husband filed suit to obtain the same housing and medical benefits that a similarly-situated male service member would receive.²²⁰ Justice Brennan's opinion notes that "our nation has a long history of sex discrimination...which, in practical effect, put women, not on a pedestal, but in a cage."²²¹ As a result, the law had provided that women could not hold office, serve on juries, or bring suit.²²² These disabilities, however, had no relation to women's abilities and capabilities to perform the prohibited activities.²²³ Because classifications based on gender, like those based on race, are inherently suspect,

²¹⁴ When Justice Brennan circulated his first draft of *Frontiero*, he attached a cover letter stating that if there was a Court majority for recognizing sex as a suspect classification calling for strict scrutiny, he would have no difficulty writing such an opinion. In fact, he felt that the case would provide an appropriate vehicle for the court to recognize sex as a suspect classification. Opinions of William J. Brennan, Jr. at LXXXII (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part II, Box 6, Folder 16). Brennan believed that he might obtain sufficient votes to support this position; therefore, he revised the draft to state that sex was sufficiently similar to race and national origin to justify its being considered a "suspect criterion." *Id.* at LXXXIII.

²¹⁵ *Frontiero*, 411 U.S. at 678.

²¹⁶ Ruth Bader Ginsburg, Closing Remarks for Symposium on "Justice Brennan and the Living Constitution," 95 CALIF. L. REV. 2217, 2219 (2007).

²¹⁷ Ruth Bader Ginsburg & Wendy Webster Williams, *Court Architect of Gender Equality: Setting a Firm Foundation for the Equal Stature of Men and Women*, in Rosenkranz & Schwartz, *supra* note 5, at 186. The authors noted that Justice Brennan emerged as the architect of a new tradition of respect for women's claims to equality under the Constitution. *Id.*

²¹⁸ *Frontiero*, 411 U.S. at 680.

²¹⁹ Ginsburg & Williams, *supra* note 217, at 187.

²²⁰ *Frontiero*, 411 U.S. at 680.

²²¹ *Id.* at 684-85.

²²² *Id.* at 686.

²²³ *Id.* at 686-87.

Brennan advocated for an application of strict scrutiny to those laws that made a distinction solely upon gender.²²⁴

Justice Brennan was unable to gain five votes for the application of strict scrutiny in *Frontiero*.²²⁵ Therefore, it was issued as a plurality opinion, striking down the law discriminating against *Frontiero*'s rights to equal benefits, but divided as to whether strict scrutiny should be applied to classifications based on gender.²²⁶ Justice Brennan was never able to achieve a Court majority for the application of strict scrutiny to claims of gender inequality²²⁷ and he subsequently settled in *Craig v. Boren* for an intermediate standard of review.²²⁸ Due to his pursuit of full equality for women, however, the standard of review applied to gender claims was heightened from mere rationality.²²⁹ Although Justice Brennan was disappointed that strict scrutiny was not applied to gender discrimination, he stated that this "disappointment has been far outweighed by the satisfaction that the Court has at least subjected gender distinctions to substantial scrutiny."²³⁰ Justice Brennan would then see the Court strike down numerous discriminatory practices based on gender inequality under the intermediate level of review.²³¹

3. Economic Equality: Positive Rights?

In *Goldberg v. Kelly*,²³² Justice Brennan wrote for the Court that persons receiving public assistance have a right to due process in reviewing their eligibility to receive that assistance prior to it being terminated.²³³ The right to due process is even more vital where the entitlement is the individual's basic subsistence – his right to basic food and shelter in order to survive.²³⁴ The *Goldberg* opinion expounds Justice Brennan's jurisprudence affirming equality of rights for *all* persons. Brennan, however, also considered the possibility that there are individual positive rights in addition to "negative rights". Rights are most often concerned with what government

²²⁴ *Id.* at 688.

²²⁵ Ginsburg & Williams, *supra* note 217, at 187.

²²⁶ *Id.* at 187-88.

²²⁷ *Id.* at 188.

²²⁸ *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding that a gender-based distinction in an Oklahoma statute that prohibited the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 constituted a denial of equal protection of the laws for males aged 18-20). In articulating the intermediate standard of review, Justice Brennan wrote, "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." *Id.* at 197.

²²⁹ *Id.* at 201.

²³⁰ William J. Brennan, Jr., *A Tribute to Justice Sandra Day O'Connor*, ANN. SURV. AM. L. xvi, xviii (1996).

²³¹ *Id.*

²³² *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²³³ *Id.* at 264.

²³⁴ *Id.*

cannot do – it cannot limit an individual’s speech or his right to practice his religion or subject him to cruel and unusual punishment. In contrast, positive rights state what the government must do for the individual. Justice Brennan inserted in *Goldberg* the possibility that all individuals have a right to receive basic subsistence from the government.²³⁵

Although in *Goldberg*, the State of New York provided some elements of due process to individuals pending denial of their welfare benefits, including provisions for a seven day termination notice, opportunity to submit a written explanation, and review by a higher ranked official, Brennan believed that the severity of the loss required more.²³⁶ His opinion emphasized the importance of the government benefit at stake. It was a benefit that “provides the means to obtain essential food, clothing, housing, and medical care.”²³⁷ In a later speech, Justice Brennan cited to a brief filed in *Goldberg* that told the story of the effect of denial of benefits on the individuals involved:

After termination, Angela Velez and four children were evicted for non-payment of rent and all forced to live in one small room of a relative’s already crowded apartment. The children had little to eat during the four months it took for the Department to correct its error. Esther Lett and her four children at once began to live on the handouts of impoverished neighbors, within two weeks all five required hospital treatment because of the inadequacy of their diet.²³⁸

Brennan determined that because the benefit lost was that of basic subsistence, due process mandated the right to an oral hearing before its termination.²³⁹ The oral hearing would provide the individual with the opportunity to tell his story and not be disadvantaged by an inability to express himself in a written statement.²⁴⁰ The hearing would also provide the opportunity to confront and cross-examine adverse witnesses.²⁴¹ The opinion, however, did not provide a right for counsel to be present, only the choice to retain counsel if desired.²⁴²

In *Goldberg*, Justice Brennan only went as far as holding that once the government has made the decision to provide public assistance benefits, the benefits cannot be taken away without due process being afforded the recipients.²⁴³ There is evidence, however, that Justice Brennan would have preferred to go further to ask whether dignity requires the government to provide basic subsistence and to

²³⁵ *Goldberg*, 397 U.S. at 265.

²³⁶ These procedures were instituted after the lawsuits were filed. Prior to the filing of the lawsuits, there were no requirements for prior notice or a hearing of any kind. *Id.* at 255.

²³⁷ *Id.* at 263.

²³⁸ Brief for Appellees, *Goldberg v. Kelly*, 397 U.S. 253 (1970) (No. 62), 1969 WL 136924, at *27-28.

²³⁹ *Goldberg*, 397 U.S. at 266.

²⁴⁰ *Id.* at 269.

²⁴¹ *Id.* at 270.

²⁴² *Id.*

²⁴³ *Id.* at 261.

recognize it as a constitutional property right. Justice Brennan stated that “[p]ublic assistance, then, is not mere charity, but a means to ‘promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.’”²⁴⁴ In using these words taken from the Constitution’s preamble, Justice Brennan made a bold statement that providing for the basic needs of its citizens is within the constitutionally considered functions of government.²⁴⁵ In a footnote, Brennan interjected the idea of welfare as a property right, stating that “[i]t may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”²⁴⁶ He cited the work of Charles Reich, a Yale law professor and former clerk to Justice Black, who advocated for a new property right for individuals to have sufficient resources to live under conditions of health and decency.²⁴⁷ Brennan is quoted as stating: “I was looking for a ‘new property’ case. I knew of Charles Reich’s work—I remembered him from his clerkship with Justice Black—but I was interested in the issue before that, back in New Jersey....*Goldberg v. Kelly* seemed to be a good vehicle to present the issue.”²⁴⁸

Although Justice Brennan opened the door to a consideration of whether the government had an interest in preserving the dignity of the poor by recognizing a right to basic subsistence, that position did not become the basis for his opinion. In order to hold Justices Harlan and White in the majority, the opinion was written narrowly to focus on fundamental fairness, rather than to find a property right in basic subsistence.²⁴⁹ Further, at Justice Harlan’s request, Justice Brennan deleted a footnote that stated, “The question concerns only procedural and not substantive due process. Thus, we do not consider whether a recipient has a substantive due process right to receive welfare[,]” or not to be compensated should it be terminated.²⁵⁰ While Justice Brennan sought to introduce the concept of a substantive due process right to basic subsistence, Harlan wanted it deleted “lest even the mention of such a possibility lead to pressure for its realization.”²⁵¹

In *Goldberg v. Kelly*, Justice Brennan upheld for recipients of public assistance, the Constitution’s promise of dignity for each and every person.²⁵² And he suggested

²⁴⁴ *Id.* at 266. Justice Brennan saw in the provision of welfare benefits that met the basic needs of all individuals the opportunity to “help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.” *Id.* at 265.

²⁴⁵ *Id.* at 265.

²⁴⁶ *Id.* at 262 n.8.

²⁴⁷ *Id.*

²⁴⁸ Tony Mauro, *Fair Hearing: Legacy to the Poor*, in Rosenkranz & Schwartz, *supra* note 5, at 237.

²⁴⁹ Opinions of William J. Brennan, Jr. at IV (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part II, Box 6, Folder 12).

²⁵⁰ William J. Brennan, Jr., Draft Opinion, at 6, n.7 (Nov. 1969) (unpublished) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 209, Folder 3, *Goldberg v. Kelly*).

²⁵¹ Opinions of William J. Brennan, Jr., *supra* note 249, at VII.

²⁵² *Goldberg*, 397 U.S. at 262.

that the principle of equality might require a positive constitutional right – a right to basic subsistence.²⁵³ The *Goldberg* decision marked the zenith in the consideration of equal rights for the poor. Justice Brennan’s vision that all individuals have an equal right to basic subsistence is one that is unlikely to be realized as the country has moved to providing less, not more, support for the poor within its borders.

B. Liberty

1. Liberty of Expression: No More Appropriate Response to a Burning Flag than Waving One’s Own

Justice Brennan’s decisions expanded the scope of the First Amendment, so that individuals have the liberty to exercise their right to free expression.²⁵⁴ The Brennan decision that safeguarded the individual’s right to free expression, while at the same time was likely the most unsettling to the majority, was his ruling in *Texas v. Johnson*.²⁵⁵ In *Johnson*, Brennan held that Gregory Lee Johnson’s act of burning a flag during a political protest was expressive conduct protected by the First Amendment.²⁵⁶

Johnson burned a U.S. flag during a political demonstration in 1984 that protested policies of the Reagan administration and certain Dallas-based corporations.²⁵⁷ Johnson unfurled the American flag in front of Dallas City Hall, doused it with kerosene, and set it on fire.²⁵⁸ Justice Brennan found this conduct to be overtly political and sufficiently imbued with elements of communication to implicate the First Amendment.²⁵⁹ The State of Texas argued that it had an interest in preventing Johnson from breaching the peace by burning the flag.²⁶⁰ Justice Brennan

²⁵³ *Id.*

²⁵⁴ See *Herbert v. Lando*, 441 U.S. 153, 178 n.1 (1979) (Brennan, J., dissenting in part) (“Freedom of speech is itself an end because the human community is in large measure defined through speech; freedom of speech is therefore intrinsic to individual dignity.”); *Lamont v. Postmaster Gen.*, 381 U.S. at 310 (1965) (Brennan, J., concurring) (“In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[D]ebate 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.”); *N.A.A.C.P. v. Button*, 371 U.S. 415, 444-45 (1963) (holding that the First Amendment protects expression without regard to race, creed, religion, or political affiliation of the speaker or the popularity of the ideas and beliefs expressed). Additionally, Justice Brennan was a strong supporter of freedom of religious thought, and he guarded “the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.” *School Dist. v. Ball*, 473 U.S. 373, 382 (1985).

²⁵⁵ *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (showcasing an unusual alliance, in which Justice Antonin Scalia joined Justice Brennan’s majority opinion).

²⁵⁶ *Id.* at 406.

²⁵⁷ *Id.* at 399.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 406.

²⁶⁰ *Id.* at 407.

concluded that the evidence did not show a breach of the peace, or threat of it, only that several persons had been seriously offended by the flag burning.²⁶¹ He wrote, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”²⁶² In response to public criticism of the decision, the U.S. Senate voted on a Constitutional Amendment that would prohibit burning the U.S. flag; however, it fell short of passage by a 51 to 48 vote.²⁶³ Congress then passed a federal flag desecration statute.²⁶⁴ Immediately after its passage, Johnson challenged the statute by burning several flags in front of the U.S. Capitol.²⁶⁵ His action prompted the Supreme Court to again uphold the right to freely express a political opinion by burning the flag.²⁶⁶ The opinion, *United States v. Eichman*, was authored by Justice Brennan.²⁶⁷ Although the federal statute, unlike the Texas statute at issue in *Johnson*, did not contain an explicit content-based limitation, Justice Brennan found that the government’s interest in prohibiting the burning of a flag is related to the suppression of free speech.²⁶⁸ He did not accept the government’s suggestion that the flag burning decision should be reconsidered based on a Congressional finding that there is a national consensus to prohibit burning of the U.S. flag.²⁶⁹ Justice Brennan noted that “[e]ven assuming such a consensus exists, any suggestion that the Government’s interest in suppressing speech becomes more weighty as popular opposition to that grows is foreign to the First Amendment.”²⁷⁰

In *Johnson* and in *Eichman*, Justice Brennan protected the right of an individual to have the liberty to express himself.²⁷¹ In so doing, he also upheld the principle that the Court can, and must, be contra-majoritarian when protecting the constitutional rights of an individual citizen.²⁷²

²⁶¹ *Id.* at 408.

²⁶² *Id.* at 414.

²⁶³ Elaine S. Povich, *Senate Rejects Flag-Burning Amendment*, CHI. TRIB. (Oct. 20, 1989), http://articles.chicagotribune.com/1989-10-20/news/8901240012_1_flag-desecration-treatise-on-constitutional-law-constitutional-amendment.

²⁶⁴ *United States v. Eichman*, 496 U.S. 310, 314 (1990).

²⁶⁵ *Id.* at 312.

²⁶⁶ *Id.* at 311.

²⁶⁷ *Id.* at 310.

²⁶⁸ *Id.* at 315.

²⁶⁹ *Id.* at 318.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 319.

²⁷² *Id.*

2. Liberty of Personal Decisions: The Right to be Free from Government Intrusion into One's Privacy

Justice Brennan's view of liberty recognized the right of the individual to make decisions regarding his person without interference from the State. He exerted substantial influence in the Court's recognition of a right of privacy within the Bill of Rights and in the liberty interest protected by the Fourteenth Amendment. The right to privacy developed in the context of cases that considered government intrusion into the individual's right to make decisions regarding his personal, intimate relationships, including the decision to have a child.²⁷³ Although a Catholic, Brennan upheld a woman's right to obtain an abortion until the point of viability, voting with the majority in *Roe v. Wade*.²⁷⁴

On the road to *Roe*, Justice Douglas' decision in *Griswold v. Connecticut*²⁷⁵ was heavily influenced by Justice Brennan. *Griswold* held that Connecticut's birth control statute, which prohibited the use of contraceptives by married couples, was unconstitutional.²⁷⁶ In the first draft, Justice Douglas rested the holding on a right of association protected by the First Amendment.²⁷⁷ Justice Brennan, however, sent Douglas a letter recommending that the decision rest on a finding of a right of marital privacy.²⁷⁸ In the end, Douglas' opinion held that the Connecticut law infringed on a fundamental right to privacy, which flowed from the specific guarantees of the Bill of Rights, specifically those that protect person and home from government intrusion.²⁷⁹

Justice Brennan would build on the concept of marital privacy recognized in *Griswold* in *Eisenstadt v. Baird*.²⁸⁰ The issue in *Eisenstadt* was whether a guest speaker at a private university who displayed contraceptives during his lecture, and

²⁷³ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

²⁷⁴ *Id.* at 113 (holding that a Texas statute prohibiting abortion except when necessary to save the life of the mother violated the due process clause of the Fourteenth Amendment because it infringed on a woman's right to privacy).

²⁷⁵ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²⁷⁶ *Id.* at 485.

²⁷⁷ Opinions of William J. Brennan, Jr. (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part II, Box 6, Folder 7).

²⁷⁸ In his April 24, 1965 letter to Justice Douglas, Justice Brennan suggested that there is an interest in the privacy of married couples derived from the fundamental concern in the Bill of Rights with the sanctity of the home and the right of the individual to be left alone. The amendments implicated are the Third (soldiers shall not be quartered in a home), the Fourth (right of persons to be secure in their persons and houses), and the Fifth (self-incrimination clause). Brennan wrote that "[t]he guarantees of the Bill of Rights do not necessarily resist expansion to fill in the edges where the same fundamental interests are at state." Letter from Justice William J. Brennan, Jr. to Justice William Douglas (Apr. 24, 1965) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 126, Folder 13); see also David H. Souter, *Justice Brennan's Place in Legal History*, in Rosenkranz & Schwartz, *supra* note 5, at 307 (discussing Justice Brennan's role in the *Griswold* case).

²⁷⁹ *Griswold*, 381 U.S. at 484.

²⁸⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

distributed one to an unmarried woman, violated a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons.²⁸¹ Justice Brennan decided the case on equal protection grounds, holding that the State did not articulate a rational basis for discriminating between the rights of married and unmarried persons to obtain contraceptives.²⁸² He noted that “whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”²⁸³ Toward the end of his opinion, however, Justice Brennan introduced a fundamental liberty right: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwanted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁸⁴ Justice Brennan’s recognition of a right to reproductive privacy in *Eisentadt* would eventually lead to the Court’s decision in *Roe v. Wade*, which was based on a fundamental constitutional right of privacy.

Justice Brennan’s decisions relating to the constitutionality of abortion rest on his belief that the individual must be allowed to make important decisions affecting his person free from government interference. Responding to a question concerning his view of the abortion issue, Justice Brennan stated that “nobody can dictate for everyone else what must be done with respect to the most intimate choices, private choices, family decisions, that individuals face.”²⁸⁵ Justice Brennan considered privacy in personal decision-making to be a species of liberty which encompasses “*first*, freedom from bodily restraint or inspection, freedom to do with one’s body as one likes, and freedom to care for one’s health and person; *second*, freedom of choice in the basic decisions of life, such as marriage, divorce, procreation, contraception, and the education and upbringing of children; and, *third*, autonomous control over the development and expression of one’s intellect and personality.”²⁸⁶ Justice Brennan concluded that the decision to abort a pregnancy fit directly into each of the three categories of fundamental freedoms.²⁸⁷

Although Justice Brennan viewed the abortion question as an issue of a woman’s fundamental right to make a personal, medical decision,²⁸⁸ he did not disregard the question of whether the fetus has worth or dignity.²⁸⁹ On that question he stated, “I would leave open the question when life ‘is actually present’ – whether there is some point in the term before birth at which the interest in the life of the fetus does become subordinating.”²⁹⁰ This appears to reflect his belief that the fetus does not

²⁸¹ *Id.* at 440.

²⁸² *Id.* at 446.

²⁸³ *Id.* at 453.

²⁸⁴ *Id.* This is another example of Justice Brennan’s penchant for slipping ideas into his opinions that would lay the foundation for future decisions that expanded on a Court holding.

²⁸⁵ Leeds, *supra* note 15, at 11.

²⁸⁶ Opinions of William J. Brennan, Jr. at XLIII (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part II, Box 6, Folder 14).

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

have human life at the time of conception, but only later acquires human life to which the principle of human dignity would attach.

Justice Brennan's role in the Court's recognition of a constitutional right to privacy is perhaps the most dramatic example of his vision of human dignity transforming the law. From Brennan's initial advocacy for a right to individual privacy to serve as the basis for Justice Douglas' opinion in *Griswold* arose the right of all individuals to enjoy a realm of personal liberty into which the government cannot enter.

VI. CONTEMPORARY ISSUES

Part VI considers three contemporary issues involving individual rights from the perspective of a jurisprudence that recognizes equality and liberty as foundational principles of the Constitution. As shown in the preceding sections, Justice Brennan advanced both equality and liberty during his term on the Court. Questions involving individual rights, however, remain among the most divisive that the Court considers today. Part VI.A considers whether gay couples have an equal right to obtain respect for their relationships and the tangible benefits that are provided by government sanctioned marriage. Part VI.B discusses affirmative action programs, where the Court has eschewed an equality rationale based on well-documented inequality, in favor of a diversity rationale that in the long-run may be less defensible. Part VI.C analyzes legislative attempts to regulate campaign finance which the Court has found implicates liberty under the First Amendment, but has yet failed to recognize a government interest in the equality of persons with substantially unequal resources to fund political speech. James Wilson's view that elections should be both free and equal is also discussed.

A. *The Right to Same-Sex Marriage*

Justice Brennan would likely uphold an individual's right to enter into a same-sex marriage because equality means equality of rights for every individual, including homosexuals, and liberty means that each individual has the freedom to define his intimate relationships, including to choose a marital relationship. Therefore, equality for homosexuals requires, as Justice Brennan advocated for gender, the application of a strict standard of review to any classification based on sexual orientation, while the individual liberty to make personal decisions cannot be restricted absent a compelling justification. Cases involving gay rights often focus on both an equality and a liberty interest.

In 1986, Justice Brennan had the opportunity to consider a case that involved the individual rights of homosexuals.²⁹¹ In *Bowers v. Hardwick*, the Supreme Court held that a Georgia statute prohibiting sodomy did not violate the fundamental rights of homosexuals.²⁹² Justice Brennan joined the dissents of Justice Harry A. Blackmun, who wrote that the majority failed to consider the fundamental right of the individual to choose for himself how to conduct his intimate relationships,²⁹³ and Justice John Paul Stevens, who opined that liberty embraces the right to engage in sexual conduct

²⁹¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁹² *Id.* at 196.

²⁹³ *Id.* at 214.

that others may consider offensive or immoral.²⁹⁴ Linking equality and liberty, Justice Stevens stated that the meaning of the principle that “all men are created equal” must surely mean that every citizen has the same interest in liberty that the members of the majority share.²⁹⁵

In 2003, the views of the dissenters in *Bowers* were affirmed when the Court in *Lawrence v. Texas* overruled the holding in *Bowers* and recognized the right of two consenting adults to engage in sexual practices common to a homosexual life style because that behavior resided in a realm of personal liberty into which the government may not enter.²⁹⁶ In his majority opinion, Justice Kennedy recognized the link between equality and liberty, “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”²⁹⁷ Although finding an equal protection argument tenable, Justice Kennedy rested his decision on a fundamental liberty interest in homosexual behavior, which he believed would more strongly protect homosexuals from discrimination.²⁹⁸

Justice Brennan expressly stated his view on gay rights in 1985 when, joined by Justice Thurgood Marshall, Brennan dissented from the Court’s denial of a writ of certiorari in a case involving a teacher whose employment was terminated because she had told a colleague that she was bisexual.²⁹⁹ Justice Brennan identified both equality and liberty interests of the teacher that were impinged by the school’s termination of her employment due to her bisexuality.³⁰⁰ He wrote that discrimination against homosexuals or bisexuals, who constitute a significant and insular minority based solely on their sexual preferences, raises significant equal protection questions.³⁰¹ He also noted that courts had found discrimination based on sexual preference to infringe fundamental constitutional rights such as the right to privacy and to freedom of expression.³⁰² In effect, he asserted that homosexuals have the same rights to equality and liberty enjoyed by all other persons.

Justice Brennan’s views on the rights of homosexuals may be considered progressive for 1985. Indeed, it has taken the space of an additional twenty years for

²⁹⁴ *Id.* at 217.

²⁹⁵ *Id.* at 218.

²⁹⁶ *Lawrence*, 539 U.S. at 578. Justice Kennedy’s opinion noted: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” *Id.* at 562.

²⁹⁷ *Id.* at 575.

²⁹⁸ *Id.* at 574-75. Laws might be designed that would appear to confer equality, whereas a liberty interest in homosexual behavior more fully protects the right to engage in intimate behavior.

²⁹⁹ *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting).

³⁰⁰ Justice Brennan also raised the issue of whether the teacher’s discharge for private speech, which did not interfere with her employer’s business, might raise a substantial claim under the First Amendment. *Id.* at 1011-12.

³⁰¹ *Id.* at 1014.

³⁰² *Id.* at 1015.

the equality and liberty of homosexuals to be regarded by a younger generation as a widely accepted social norm. In contrast, Justice Brennan's view that the equality and liberty of all individuals is a foundational principle of the Constitution naturally led him to apply that principle to issues involving homosexuality as early as 1985.³⁰³ Because he consistently sought the maximum protection of equality and liberty for all individuals, he would uphold the right of homosexual couples to enjoy the same status and benefits of marriage that all similarly situated consenting adult couples enjoy.³⁰⁴

B. Affirmative Action

Advocacy for full equality for homosexuals flows naturally from the first principle that all individuals have equal rights.³⁰⁵ Affirmative action presents a harder question because by attempting to achieve equality for some individuals, the equal treatment of other individuals is compromised.³⁰⁶ Nonetheless, Justice Brennan supported affirmative action for racial minorities.³⁰⁷ After 34 years on the Supreme Court, his last opinion for the court in *Metro Broadcasting v. FCC* upheld two minority preference policies implemented by the Federal Communications Commission.³⁰⁸

In an earlier affirmative action case, *Regents of the University of California v. Bakke*, the Justices were divided on the question of affirmative action.³⁰⁹ Justice Lewis F. Powell, Jr. cast the deciding vote to invalidate the University of California Medical School program that gave special consideration to the admission of certain racial and ethnic minorities, while leaving open the possibility that some race conscious affirmative action programs could be upheld under a strict scrutiny standard.³¹⁰ Justice Powell wrote that a university could have a compelling interest in achieving the educational benefits of a diverse student body.³¹¹ Justice Brennan, however, wrote a dissent that advocated for an intermediate level of scrutiny for affirmative action programs.³¹²

³⁰³ *Id.*

³⁰⁴ *Id.* at 1018.

³⁰⁵ *Id.* at 1012.

³⁰⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995).

³⁰⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978).

³⁰⁸ *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 566 (1990), *overruled by Adarand Constructors*, 515 U.S. 200.

³⁰⁹ *Bakke*, 438 U.S. at 379.

³¹⁰ *Id.* at 271.

³¹¹ *Id.* at 311-12.

³¹² Justice Brennan's dissent noted that government actions that restrict fundamental rights or apply to suspect classifications are reviewed under a strict scrutiny standard. However, under *Bakke*, education is not a fundamental right and Caucasians do not have any of the traditional indicia that would view them as a suspect class. *Id.* at 357. Therefore, racial classifications designed to further remedial purposes need only serve an important government objective and be substantially related to achievement of that objective. *Id.* at 358.

A Memorandum to the Conference regarding *Bakke* written by Justice Brennan proves instructive on his reasoning for advocating lesser review of affirmative action programs.³¹³ He wrote that the purpose of the Fourteenth Amendment was to secure for African Americans “real, not just abstract equality.”³¹⁴ For this reason, he stated that it was “clear that states are free to pursue the goal of racial pluralism in their institutions in order to afford minorities full participation in the broader society.”³¹⁵ Justice Brennan was concerned with remedying the reality of inequality of minorities in institutions and in the larger society.³¹⁶ He noted that it was undisputed that the numbers of minorities admitted to medical schools was negligible, and the number of black physicians was only 2.2%.³¹⁷

Justice Brennan, however, also addressed the difficult question of the affirmative action program’s effect on non-minorities. He acknowledged that the Fourteenth Amendment protects non-minorities as well as minorities.³¹⁸ The distinction that he made is that the University of California’s affirmative action program did not label non-minorities as inferior with a stigma, insult, or badge of inferiority.³¹⁹ He did not believe that Alan Bakke, the non-minority applicant denied admission to medical school, stood before the Court in the same posture as the African-American child in *Brown v. Board of Education*.³²⁰ If the University had stereotyped Alan Bakke as incompetent or pinned him with a badge of inferiority because he was Caucasian, Justice Brennan would have applied strict scrutiny.³²¹ Because the University’s affirmative action program did not demean non-minorities in an invidious manner, Justice Brennan viewed it as a remedial government action that could be upheld because it addressed the reality of a substantial inequality in medical schools and in the medical profession.³²²

³¹³ Conference Memorandum from Justice William J. Brennan, Jr. (Nov. 23, 1977) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 441, Folder 4, Regents v. Bakke).

³¹⁴ *Id.* at 2.

³¹⁵ *Id.*

³¹⁶ *Id.* at 3.

³¹⁷ *Id.*

³¹⁸ *Id.* at 4.

³¹⁹ *Id.* at 5.

³²⁰ *Id.* at 9.

³²¹ *Id.* at 4-9.

³²² *Id.* at 8, 13-15. In a Memorandum to the Conference in *Bakke*, Justice Thurgood Marshall advised his colleagues that equality had not been realized for African Americans. He noted that the Court itself had only three African American law clerks. He wrote, “[t]he dream of America as the melting pot has not been realized by [African Americans]—either [African Americans] did not get into the pot, or [they] did not get melted down.” Conference Memorandum from Justice Thurgood Marshall (Apr. 13, 1978) (on file with the Library of Congress, Manuscript Division, Papers of William J. Brennan, Jr., Part I, Box 441, Folder 5, Regents v. Bakke).

In *Metro Broadcasting v. FCC*, Justice Brennan upheld a congressional plan that benefited minorities in the award of broadcasting licenses.³²³ He began his opinion by recounting the substantial inequality that existed in the ownership of broadcast licenses:

Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country and none of the more than 1,000 television stations....Moreover, these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority broadcasters serve geographically limited markets with relatively small audiences.³²⁴

He included lengthy references to the record in order to emphasize that both Congress and the FCC had made the appropriate findings recognizing the barriers encountered by minorities who sought to obtain broadcast licenses.³²⁵ Justice Brennan cited a Congressional finding that “the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.”³²⁶

Instead of focusing solely on a government interest in remedying the existing inequality in those who held broadcast licenses, Justice Brennan slid into a diversity justification, finding that the policies furthered the important governmental objective of achieving a greater diversity of broadcast viewpoints, which would in the end benefit all persons.³²⁷ He was likely constrained by the diversity holding in *Bakke* and the need to obtain four additional votes from his colleagues on this difficult issue.³²⁸ Justice Brennan’s failure to express and gain support for the fundamental nature of a government interest in achieving equality under facts showing substantial existing inequality in *Metro Broadcasting*, may have contributed to its being overruled by *Adarand Constructors, Inc. v. Peña*, where the Court held that all racial classifications – even those that might have the effect of rectifying existing inequality – must be reviewed under a strict scrutiny standard.³²⁹

In the years since the Court decided *Metro Broadcasting*, the Court has tightened its review of affirmative action programs for racial minorities. In *Fisher v. University of Texas at Austin*, the Court stated that the University of Texas’

³²³ *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 600 (1990).

³²⁴ *Id.* at 553.

³²⁵ *Id.* at 554.

³²⁶ *Id.* at 566.

³²⁷ *Id.* at 567-68. The FCC minority ownership policies were upheld under an intermediate standard of review, finding that broadcast diversity is an important government objective and that the FCC policies were substantially related to the achievement of that objective. *Id.* at 566.

³²⁸ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995).

³²⁹ *Id.* (overruling the intermediate standard of review that Brennan had applied to affirmative action programs in *Metro Broadcasting*).

affirmative action program must meet a “demanding burden of strict scrutiny.”³³⁰ At the same time, the unequal representation of racial minorities in many institutions persists. Recognizing equality as a foundational principle would sanction reasonable affirmative actions to achieve racial equality where inequality is substantial and persistent.³³¹ *Bakke* and *Metro Broadcasting* well documented that equality for racial minorities did not exist in medical schools or in the ownership of broadcast licenses.³³² To achieve equality *in fact*, Justice Brennan advocated a lesser standard of review of affirmative action programs where existing inequality was documented as substantial and persistent, and the program did not have the effect of stigmatizing any individuals.³³³ Justice Brennan might well ask the Court today whether assertions that the law should be “color-blind” reflects a “myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”³³⁴

C. Campaign Finance Regulation

Congress has enacted a myriad of campaign finance restrictions that courts have found, by equating money with speech, implicate the First Amendment rights of citizens and corporations. Justice Brennan was vigilant in upholding First Amendment rights as a liberty interest.³³⁵ And he believed that First Amendment protections extend to political speech.³³⁶ He thought, however, that corporate political expenditures could be regulated because corporate assets reflect the economically motivated decisions of investors and customers, and are not a reflection of their political ideas.³³⁷ Therefore, campaign finance restrictions could be placed on the general corporate treasury.³³⁸

In 2010, *Citizens United v. Federal Elections Commission*³³⁹ overruled *Austin v. Michigan Chamber of Commerce*, a case in which Justice Brennan had joined Justice Thurgood Marshall’s majority opinion upholding a Michigan statute prohibiting corporations from contributing corporate treasury funds to state office candidates.³⁴⁰ The *Austin* Court held that there was a compelling government interest in preventing corruption of the political process by restricting the influence of money accumulated through the corporate form.³⁴¹ The Court found that corruption arises where funds

³³⁰ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013).

³³¹ *Id.* at 2425-26.

³³² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 292 (1995); *Metro Broad.*, 497 U.S. at 553.

³³³ *Bakke*, 438 U.S. at 361-62.

³³⁴ *Id.* at 327.

³³⁵ *F.E.C. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986).

³³⁶ *Id.* at 256.

³³⁷ *Id.* at 258.

³³⁸ *Id.* at 257-258.

³³⁹ *Citizens United v. F.E.C.*, 558 U.S. 310, 365 (2010).

³⁴⁰ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 669 (1990).

³⁴¹ *Id.* at 659.

used by a corporation for political purposes are acquired from individuals who contributed their money to the corporation for economic reasons and not to support the corporation's political ideas.³⁴²

The corruption rationale is not an equality rationale because the *Austin* opinion clearly states that the Michigan statute does not attempt to equalize the relative influence of speakers on elections. It merely requires that the expenditure reflect actual support for the political ideas espoused by corporations.³⁴³ The latter requirement is satisfied by requiring corporations to make all independent political expenditures from a separate fund consisting of money contributed expressly for political purposes.³⁴⁴ Justice Brennan wrote a concurring opinion finding that there is a cognizable interest in ensuring that organizations that amass great wealth in the *economic* marketplace not gain unfair advantage in the *political* marketplace.³⁴⁵ Brennan, however, did not invoke a rationale based on a government interest in equalizing the relative ability of corporations to influence elections.³⁴⁶

In his concurring opinion in *Citizens United*, Chief Justice John Roberts wrote that the *Austin* opinion, in reality, upheld the Michigan statute's restriction of corporate speech "in the name of equality," citing scholars who opined that *Austin* adopted an equality rationale, disguised in the language of political corruption.³⁴⁷ Roberts was adamant that if *Austin* were read to endorse a government interest in equalizing the ability of individuals to influence elections, that interest was expressly rejected by *Citizens United*.³⁴⁸ He endorsed the principle expressed in *Buckley v. Valeo* that restricting "the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."³⁴⁹

Although it's debatable whether *Austin* was driven by an equality rationale, Justice Robert's emphatic rejection of any equality interest in political speech is concerning for a jurisprudence that views equality as a foundational constitutional principle.³⁵⁰ This is true even if Justice Brennan would also be challenged to compromise his strong support of the First Amendment by considerations of equality in political speech.³⁵¹ On this issue, Justice Brennan may have ultimately shared the view of James Wilson who thought that equality, as well as liberty, in the electoral process is a compelling government interest.

³⁴² *Id.* at 659-60.

³⁴³ *Id.* at 660.

³⁴⁴ *Id.* at 668-69.

³⁴⁵ *Id.* at 670 (Brennan, J., concurring) (citing *F.E.C. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986)).

³⁴⁶ *Austin*, 494 U.S. at 671.

³⁴⁷ *Citizens United v. F.E.C.*, 558 U.S. 310, 381 (2010).

³⁴⁸ *Id.* at 380.

³⁴⁹ *Id.* at 349-50 (citing *Buckley v. Valeo*, 424 U.S. 48-49 (1976) (per curiam)).

³⁵⁰ *Id.* at 380.

³⁵¹ *F.E.C. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986).

In a law lecture on the Legislative Department, Wilson stated that one of the great principles of a democratic government is that elections are free *and equal*.³⁵² He further stated that the principle of free *and equal* elections should be “the first care, of every free state.”³⁵³ James Wilson viewed a democratic government as a pyramid and in order for it to rise to a dignified altitude, it must be based on a broad and strong foundation of the people.³⁵⁴ Today, where elections are heavily influenced by paid political advertising, the ability of all persons to participate in the democracy should not be compromised by foreclosing some from participating due to a lack of money, or allowing those with wealth to dominate the political discussion. James Wilson found it challenging to express “with sufficient energy” how important participation of every citizen is to a democracy.³⁵⁵ He stated that “[i]n real majesty an independent and unbiased elector stands superior to princes.”³⁵⁶

In order to preserve the “majesty” of the voter, the Court should recognize a government interest in achieving equality in the relative ability of persons or groups to influence elections. Thus, an elector’s views would not become biased because he receives a substantially unequal amount of information as a result of the relative wealth of the speakers.³⁵⁷ Absolute equality is not required, but a legislature should be allowed to set reasonable standards in the interest of maintaining free and *equal* elections, which James Wilson believed is a primary care of government.³⁵⁸ For this reason, equality should have an equal status with liberty in preserving each person’s right to participate in a democracy.

VII. CONCLUSION

The enduring vision of James Wilson expressed in the framing of the Constitution, which was brought forward by Justice Brennan during his tenure on the Supreme Court, is that the United States is composed of individuals, possessing innate human dignity, who each have a fundamental right to equality and liberty. Both men focused on the individual, whether in constructing a Constitution, or rendering a decision on a Constitutional issue. Although neither man saw his vision fully realized, their principles of equality and liberty, supported by a recognition of the dignity and supremacy of the individual, should remain relevant to the consideration of contemporary issues involving individual rights.

In his era, Justice Brennan was highly deferential to protecting the individual right to equality and liberty. The essence of individual dignity is within the boundaries of his opinions which sought equality of all persons without regard to race, gender, or sexual orientation, equal participation in the political process, liberty of thought and personal decision-making, and a restraint on the government as

³⁵² James Wilson, *Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department*, in 2 COLLECTED WORKS OF JAMES WILSON 833 (Kermit L. Hall & Mark David Hall eds., 2007).

³⁵³ *Id.*

³⁵⁴ *Id.* at 834.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 833.

against the individual. In these decisions, Justice Brennan brought to life James Wilson's principle written in 1774 that "all men, are by nature, equal and free." Today, the Court should strive to assure that the attainment of equality and liberty for each individual is considered to be a fundamental constitutional principle. And, it might well keep in mind Justice Brennan's vision that the Court's decisions should advance, not degrade, human dignity.³⁵⁹

Justice Brennan, however, believed that the task of protecting the principle of human dignity did not "rest solely with nine Supreme Court justices, or even with the cadre of state and federal judges," but rather that "[w]e all share the burden."³⁶⁰ He advised that continuous hard work by everyone is needed to realize the Constitution's true potential:

The vision of human dignity embodied in our Constitution throughout most of its interpretive history is, at least for me, deeply moving. It is timeless. It has inspired citizens of this country and others for two centuries. If we are to continue to be an example to the nations of the world, it will be because of our ceaseless pursuit of the constitutional ideal of human dignity.³⁶¹

Two centuries earlier, James Wilson had also been deeply moved by the Constitution stating, "I feel myself lost in the contemplation of its magnitude. By adopting this system, we shall probably lay a foundation for erecting temples of liberty in every part of the earth."³⁶² Foreshadowing Justice Brennan, Wilson also advised that "[a] good constitution is the greatest blessing, which a society can enjoy [therefore] it is the duty of every citizen to use his best and most unremitting endeavors for preserving it pure, healthful, and vigorous."³⁶³ It is the hope of the Author that a new generation of lawyers and judges will be inspired by the Constitution's promise of human dignity for each American. This was the vision of the Constitution shared by Justice Brennan and James Wilson.

³⁵⁹ See Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 427 (2011) ("[I]ncorporating the requirement of human dignity into American constitutional law might encourage jurists to consider not only whether a particular law violates the text or original intent of the Constitution's language, but the impact it has on a person's dignity."); Goodman, *supra* note 3, at 759 ("[H]uman dignity should have independent standing as a value, factoring into the Court's decision-making as that which underlies our constitutional guarantees and [finding] that status even if public opinion or the executive branch supports a competing interest."); Meyer & Parent, *supra* note 3, at 9 ("[W]hen insignificant differences provide reasons to disregard the humanity of others, human and constitutional rights anchored in a vision of human dignity offer the strongest constraint against doing so.").

³⁶⁰ Brennan, *My Life*, *supra* note 5, at 20.

³⁶¹ Brennan, *Charter of Human Rights*, *supra* note 164, at 8.

³⁶² Wilson, *Ratifying Remarks*, *supra* note 46, at 284.

³⁶³ James Wilson, *Oration Delivered on the Fourth of July, 1788 at the Procession Formed at Philadelphia to Celebrate the Adoption of the Constitution of the United States*, in 1 COLLECTED WORKS OF JAMES WILSON 284 (Kermit L. Hall and David Mark Hall eds., 2007).