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Carlo A. Pedrioli
Barry University

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A KEY INFLUENCE ON THE DOCTRINE OF ACTUAL MALICE: JUSTICE WILLIAM BRENNAN'S JUDICIAL PHILOSOPHY AT WORK IN CHANGING THE LAW OF SEDITIOUS LIBEL

CARLO A. PEDRIOLI*

Much of the scholarship on Justice William Brennan's landmark opinion in New York Times Co. v. Sullivan has focused on the actual malice doctrine and its implications. In light of the historic change in the law of seditious libel in the United States as a result of the case and the need for further exploration of the human factors behind the case, this article explains how Justice Brennan's instrumentalist judicial philosophy had an important influence on changing the course of legal protection for speech critical of the government. The article concludes that the outcome of the case likely would have differed notably if a justice with a formalist, Holmesian or natural law philosophy had authored the opinion for the Court.

Judicial self-restraint, which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases, will not serve to enhance Madison's priceless gift of "the great rights of mankind secured under this Constitution."¹

We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.²

*Member, State Bar of California; Ph.D. student, Department of Communication, University of Utah.

¹William J. Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 778 (1961).

²BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921).

The profound impact of the actual malice doctrine that Justice William Brennan laid out in *New York Times Co. v. Sullivan*,³ which constitutionalized libel law, an area of the law traditionally left to the states, and “held that the ‘central meaning’ of the First Amendment is to protect criticism of the government,”⁴ has become apparent in the years since 1964.⁵ The opinion by Justice Brennan⁶ for the Supreme Court of the United States aided the news media in informing the U.S. public, without fear of legal retaliation, about the South’s resistance to civil rights advocates like Martin Luther King, Jr.⁷ This national awareness of resistance in the South helped King gain support for his cause and influenced passage of the 1964 Civil Rights Act fewer than four months after the Court ruled in *Times v. Sullivan*.⁸ Additionally, the actual malice doctrine has had a major impact on the news, political and otherwise, that people in the United States receive every day since, without the case, news organizations would

³376 U.S. 254 (1964). The doctrine of actual malice specifically states that a public official can prevail in a libel suit related to the official’s public status only if the official shows that the defendant acted “with knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not.” *Id.* at 280–81. Because this doctrine raises the level of proof for public officials in lawsuits, one impact is to open the door to greater criticism of government officials.

⁴W. Wat Hopkins, *Justice Brennan, Justice Harlan, and New York Times Co. v. Sullivan: A Case Study in Supreme Court Decision Making*, 1 COMM. L. & POL’Y 469, 471 (1996).

⁵For an idea of the general scholarly agreement of the historic status that *Times v. Sullivan* has among Supreme Court decisions on free speech jurisprudence, see, e.g., MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 146 (2001); W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 83 (1991); KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 185 (1993); Clay Calvert, *When First Amendment Principles Collide: Negative Political Advertising & the Demobilization of Democratic Self-Governance*, 30 LOY. L.A. L. REV. 1539, 1546 (1997). Hopkins has called the decision “the most important libel opinion ever written and the most important free-expression opinion in U.S. jurisprudence” because the case changed both the law and the language of libel. *Supra* note 4, at 471. Calvert has labeled the decision “seminal,” at 1546.

⁶Chief Justice Earl Warren asked Justice Brennan to write the majority opinion, perhaps because Brennan already had demonstrated his ability to craft opinions that could command a Court in difficult cases. For instance, Brennan had done so in *Baker v. Carr*, 369 U.S. 186 (1962), in which the Court held that federal courts can hear suits by voters who claim that legislative apportionment has denied the voters equal protection of the law. See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 166 (1991). Also, while Brennan, like other justices, often asked his law clerks to write initial drafts of opinions, Brennan himself drafted the opinion in *Times v. Sullivan*. *Id.* at 166.

⁷See HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 232 (1995).

⁸See *id.*

have to be much more careful about avoiding potential libel suits.⁹ In the wake of the September 11, 2001, terrorist attacks on the United States and President George W. Bush's war on terror,¹⁰ the case once again stands as a firm reminder that citizens have a fundamental right to criticize the government when they do not approve of its conduct.¹¹ This right to criticize the government, formerly not a right but the crime of seditious libel,¹² is a key part of representative democracy, regardless of whether the members of government fully appreciate it.¹³

⁹See STEPHEN L. SEPINUCK & MARY PAT TREUTHART, *THE CONSCIENCE OF THE COURT: SELECTED OPINIONS OF JUSTICE WILLIAM J. BRENNAN JR. ON FREEDOM AND EQUALITY* 4 (1999).

¹⁰See, e.g., *President Bush Addresses Congress*, ONLINE NEWSHOUR (Sept. 20, 2001), http://www.pbs.org/newshour/bb/military/terroristattack/bush_speech_9_20.html (last visited Feb. 6, 2004) ("Our war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.").

¹¹Many citizens opted to exercise their rights under *Times v. Sullivan* and protest the Bush Administration's 2003 war against Iraq. Some individuals even protested the war months before it began. See, e.g., *Protesting War with Iraq*, ONLINE NEWSHOUR (Nov. 25, 2002), http://www.pbs.org/newshour/bb/military/july_dec02/antiwar_11_25.html (last visited Feb. 6, 2004); *Background: Protesting War*, ONLINE NEWSHOUR (Jan. 20, 2003), http://www.pbs.org/newshour/bb/politics/jan_june03/background_protesting_1_20.html (last visited Feb. 6, 2004); *Anti-War Protests Continue with Large Crowds in N.Y.*, ONLINE NEWSHOUR (Mar. 22, 2003), http://www.pbs.org/newshour/updates/protests_03_22_03.html (last visited Feb. 6, 2004).

¹²See DWIGHT L. TEETER ET AL., *LAW OF MASS COMMUNICATIONS: FREEDOM AND CONTROL OF PRINT AND BROADCAST MEDIA* 25 (1998) (defining *seditious libel* "as expression attacking government's form, laws, institutions, or officers"). The traditional justification for criminalizing speech critical of the government was that such speech would tarnish necessary respect for the government. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 91 (1984). More recently, the justification has been that speech critical of the government might bring about illegal acts. *Id.* For the early seventeenth century origin of the crime of seditious libel in England, see Irving Brant, *Seditious Libel: Myth And Reality*, 39 N.Y.U. L. REV. 1 (1964) (arguing that Sir Edward Coke had essentially no precedent upon which to base a claim that seditious libel had become well established in the English common law by Coke's own time). For more on the genesis of seditious libel, see Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 691-97 (1985).

¹³In his opinion for the Court, Brennan wrote, "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)). The notion of free speech as an important component of democracy goes back at least as far as ancient Greece. See Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 879-80 (1984). See also David J. Vergobbi, *Freedom of Expression, Western Historical Foundations of*, in 2 ENCYCLOPEDIA OF INT'L MEDIA & COMMUNICATIONS 41, 41-43 (Donald H. Johnston ed., 2003). Unfortunately for 60% of the population in ancient Athens, free speech rights only attached to citizenship, and this fact left "males un-

Nonetheless, despite the memory of a cultural legacy of free expression that many individuals in the United States may have today, for much of its history the United States experienced a cultural legacy of suppression. As this article will demonstrate, from soon after the ratification of First Amendment until the middle of the twentieth century, the legal basis for protecting criticism of the government was generally quite feeble. The protection for this type of speech changed with *Times v. Sullivan*, in which the Court offered a reassuring defense for speech critical of the government.

Perhaps not surprisingly, much of the scholarship on Brennan's opinion for the Court has focused on the actual malice doctrine and its implications. Some of this scholarship has defended the actual malice rule in a democratic society,¹⁴ evaluated the rule in the context of contemporary political campaigning,¹⁵ considered whether the economic impacts of the rule would justify modifying the rule,¹⁶ proposed a standard lower than actual malice in cases without damages at stake,¹⁷ looked at the rule in the context of the corporation as a defamation plaintiff,¹⁸ and even questioned whether the Supreme Court made a prudent decision in *Times v. Sullivan*.¹⁹ Also, this scholarship has compared the rule in *Times v. Sullivan* with a similar rule in Australian law.²⁰

The doctrinal components of the case are worthy of study, but so are other aspects. In light of this point, some research has given at-

der eighteen, women, resident aliens, [and] slaves" without such rights. James G. McLaren, *The "Primacy" of the First Amendment: Does It Have a Justification in Natural Law, History, and Democracy?*, 5 USAFA J. LEG. STUD. 45, 47 (1994/1995). Justice Louis Brandeis, echoing the work of Pericles, picked up on the better aspects of this Greek understanding of the relationship between free speech and democracy with the concurring opinion in *Whitney v. California*, 274 U.S. 357, 375 (1927). See Koffler & Bennet, *supra* at 880 n.297.

¹⁴See Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

¹⁵See Thomas Kane, *Malice, Lies, and Videotape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 RUTGERS L.J. 755 (1999).

¹⁶See Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of New York Times v. Sullivan*, 32 CUMB. L. REV. 519 (2001).

¹⁷See Pierre N. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place*, 101 HARV. L. REV. 1287 (1988).

¹⁸See D. Mark Jackson, *The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491 (2001).

¹⁹See Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

²⁰See Russell L. Weaver & Kathe Boehringer, *Implied Rights and the Australian Constitution: A Modified New York Times, Inc. v. Sullivan Goes Down Under*, 8 SETON HALL CONST. L.J. 459 (1998).

tention to various human factors behind the actual malice rule. For instance, research has focused on the interpersonal and group dynamics of the members of the Court who decided the case²¹ and considered *Times v. Sullivan* in the context of Brennan's views on free speech.²² However, such research has not given sufficient attention to the broad judicial philosophy that guided Brennan's understanding of free speech. Given that humans make the rules of constitutional law by which citizens in the United States live and that different justices might establish differing rules of law in the same case, additional research on the human factors behind *Times v. Sullivan* is necessary to foster a better understanding of this vitally important case and its impact on changing the course of the law.

In light of the historical change in the law of seditious libel that *Times v. Sullivan* prompted and the need for further exploration of the human factors behind the case, this article gives attention to Brennan's judicial philosophy at work in the case. It defines judicial philosophy as a system of guiding principles upon which a judge calls in the process of legal decision-making.²³ Specifically, the article explains how, through *Times v. Sullivan*, Brennan's instrumentalist judicial philosophy had an important influence on changing the course of legal protection for criticism of the government in the United States.²⁴ To advance this central point, the article will present a short history of criticism of the government in the United States before *Times v. Sullivan*, an overview of Brennan and his judicial philosophy, a summary of *Times v. Sullivan*, and an application of Brennan's judicial philosophy to the case.

²¹See Hopkins, *supra* note 4.

²²See HOPKINS, *supra* note 5, at 83–90. Much of chapter five of this study focuses on *Times v. Sullivan*, but, as the title suggests, the book as a whole considers Brennan's views on free speech beyond this case.

²³In the words of Benjamin Cardozo, a judicial philosophy is "a stream of tendency ... which gives coherence and direction to thought and action." CARDOZO, *supra* note 2, at 12. Factors like "inherited instincts, traditional beliefs, [and] acquired convictions" influence one's judicial philosophy. *Id.*

²⁴Other factors likely influenced Brennan's decision in *Times v. Sullivan*, too. For instance, the other justices had their say in the decision. Also, the civil rights era of the 1950s and 1960s in which the Court issued *Times v. Sullivan* can help to account for the political context of the decision. See Clay Calvert, *Protecting the Cellular Citizen-Critic: The State of Political Speech from Sullivan to Popa*, 9 WM. & MARY BILL RTS. J. 353, 353 (2001). Additionally, law professor Herbert Wechsler coauthored the brief and argued the case for the New York Times Co.; Brennan adopted in the Court's opinion portions of Wechsler's argument. See Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 603–07 (1983). Regardless of these other influences, since Brennan himself ultimately authored the opinion for the Court, his judicial philosophy deserves careful attention.

CRITICISM OF THE GOVERNMENT BEFORE *TIMES V. SULLIVAN*

Prior to *Times v. Sullivan*, the United States had experienced a history of hostility towards criticism of the government. For example, several years after the ratification of the First Amendment, the Congress passed the Sedition Act of 1798, which criminalized:

any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute.²⁵

Under the Sedition Act, one could face a fine of up to \$2,000 and up to two years in prison.²⁶ The government successfully prosecuted fourteen journalists and publicists for criticizing the administration of John Adams.²⁷

This approach to free speech continued into the nineteenth century. Before the Civil War, almost all southern states passed laws that limited speech critical of slavery, a government-sanctioned institution.²⁸ In addition, many postmasters in the South censored abolitionist literature that passed through the mails,²⁹ and southern academics who spoke out against slavery faced “a better than excellent chance of losing [their] job[s].”³⁰ Suppression of speech was not limited to the South. Some citizens, no matter where they lived, decided to take matters into their own hands regarding abolition.³¹ In 1835, for example, a Boston mob dragged outspoken abolitionist Wil-

²⁵1 Stat. 596 (1798).

²⁶*Id.* at 597.

²⁷See TEETER ET AL., *supra* note 12, at 31. Some of the Jeffersonian Republicans pointed out that the Sedition Act was a clear impediment to self-government. *Id.*

²⁸See NAT HENTOFF, *THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA* 89 (1980). See also Amy Reynolds, *The Impact of Walker's Appeal on Northern and Southern Conceptions of Free Speech in the Nineteenth Century*, 9 COMM. L. & POL'Y 73 (2004).

²⁹See *id.* at 90.

³⁰*Id.*

³¹*Id.* Unlike most of the examples of suppression of speech discussed herein, the pre-Civil War mob activity was not officially government action. Hence, it did not implicate the First Amendment since the Constitution generally limits government rather than private action. See WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1107 (1998). Regardless, this mob activity did impact the right of citizens to speak out against the government policy that legitimized slavery.

liam Lloyd Garrison through the streets.³² In other cases, mobs destroyed abolitionists' printing presses.³³

During the Civil War, suppression of speech persisted. Congress passed a law that banned seditious conspiracy, and the government practiced censorship.³⁴ President Abraham Lincoln shut down New York City newspapers for printing material which reflected poorly on the government,³⁵ and some northern military commanders shut down newspapers.³⁶ President Lincoln also ordered that "[t]housands of suspected or known dissenters and suspected 'dangerous' men [be] thrown into military prisons without charges and without trial."³⁷ Additionally, the postmaster general banned certain types of papers from the mails.³⁸

Despite earlier suppression of speech, the World War I era may have been the most oppressive toward speech critical of the government. Congress passed the Sedition Act of 1918, which criminalized criticism of the government, especially criticism which attempted to interfere with the draft or the armed forces.³⁹ Under the Sedition Act of 1918, one could face a fine of up to \$10,000, up to twenty years in prison, or both.⁴⁰ The government used this legislation to prosecute about 1,900 individuals.⁴¹ In the same spirit, the Supreme Court refused to allow opponents of the government to send anti-war leaflets through the post,⁴² to criticize *via* newspapers the government's involvement in the war,⁴³ to deliver speeches against the government's involvement in the war,⁴⁴ or to distribute pro-anarchy circulars.⁴⁵ Essentially, the Court upheld the Sedition Act of 1918 and allowed a number of critics of the government to go to jail.

³²*Id.*

³³*Id.* at 91.

³⁴See Margaret A. Blanchard, "Why Can't We Ever Learn?" *Cycles of Stability, Stress and Freedom of Expression in United States History*, 7 COMM. L. & POL'Y 347, 354 (2002).

³⁵See *id.*

³⁶See HENTOFF, *supra* note 28, at 94.

³⁷Koffler & Gershman, *supra* note 13, at 829-30.

³⁸See HENTOFF, *supra* note 28, at 94.

³⁹40 Stat. 553-54 (1918). The Sedition Act of 1918 amended the Espionage Act of 1917. 40 Stat. 217 (1917).

⁴⁰*Id.*

⁴¹See TEETER ET AL., *supra* note 12, at 33.

⁴²See *Schenck v. United States*, 249 U.S. 47 (1919).

⁴³See *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁴⁴See *Debs v. United States*, 249 U.S. 211 (1919).

⁴⁵See *Abrams v. United States*, 250 U.S. 616 (1919). *But see* the dissent of Justice Oliver Wendell Holmes, 250 U.S. at 630 (noting "that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Shortly after World War I, the government pursued a wave of prosecutions of members of the Communist Party. The Supreme Court upheld these convictions for both printing and distributing a manifesto that called for the overthrow of the government⁴⁶ and for simply attending a Communist Party meeting.⁴⁷ At this time in history, individuals often went to jail for what they had communicated rather than for what they had done.⁴⁸

During World War II and the ensuing decade, the government adopted a similar attitude towards criticism of the government. Congress established the House Committee on Un-American Activities, which ultimately investigated a number of individuals believed to be Communists.⁴⁹ In 1940, Congress passed the Alien Registration Act, more commonly known as the Smith Act, which criminalized advocating the forcible overthrow of the government and carried a penalty of no more than \$10,000, a prison sentence of no longer than ten years, or both.⁵⁰ Under the Smith Act, the government fined or imprisoned approximately 100 people.⁵¹ In one highly publicized case,⁵² the Supreme Court upheld under the Smith Act the prosecutions of eleven Communists.⁵³

As this brief review of history shows, the United States before 1964 had a long-standing legacy of hostility towards criticism of the government.⁵⁴ Since shortly after the ratification of the Bill of

⁴⁶See *Gitlow v. New York*, 268 U.S. 652 (1925). *But see* the dissent of Justice Holmes, 268 U.S. at 672.

⁴⁷See *Whitney v. California*, 274 U.S. 357 (1927). *But see* the concurrence of Justice Louis Brandeis, 274 U.S. at 375 (noting that “public discussion is a political duty”).

⁴⁸See HENTOFF, *supra* note 28, at 119.

⁴⁹See Blanchard, *supra* note 34, at 364.

⁵⁰54 Stat. 670–71 (1940).

⁵¹See TEETER ET AL., *supra* note 12, at 34.

⁵²See *Dennis v. United States*, 341 U.S. 494 (1951).

⁵³See TEETER ET AL., *supra* note 12, at 35.

⁵⁴This article does not advance the position that before 1964 the law in the United States had in all cases been hostile to criticism of the government. *See, e.g.*, *Yates v. United States*, 354 U.S. 298 (1957) (overturning fourteen Smith Act convictions of Communist Party members who conspired to advocate and teach the overthrow of the government and who organized the Communist Party as a means of so advocating and teaching); *Bridges v. California*, 314 U.S. 252 (1941) (upholding the right to criticize the judiciary regarding pending cases); *Near v. Minnesota*, 283 U.S. 697 (1931) (condemning prior restraint of the press by the government). While these cases extended protection for speech critical of the government, they did not go as far rhetorically as did *Times v. Sullivan*. *Near* merely protected against governmental prior restraint; that case, unlike *Times v. Sullivan*, did not protect against libel suits that could follow the printing of material critical of government officials. Also, despite Justice Hugo Black’s language in *Bridges* that “it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public

Rights, the government, sometimes assisted by private individuals, had taken a number of steps to limit this speech. Accordingly, in 1964 the stage was set for Brennan's opinion in *Times v. Sullivan*.

JUDICIAL PHILOSOPHY AND JUSTICE BRENNAN

Justice William Brennan played a significant role on the Supreme Court between 1956, when he joined the Court, and 1990, when he retired. During that time, he wrote some 1,360 opinions—461 majority opinions, 425 dissents and a variety of other separate hybrid opinions.⁵⁵ Some of Brennan's major opinions ranged from legislative apportionment and voting rights,⁵⁶ to governmental interference with religion,⁵⁷ to school desegregation,⁵⁸ to public assistance funding,⁵⁹ to the death penalty,⁶⁰ to gender-based discrimination.⁶¹

Many of Brennan's most significant contributions, however, came in the area of free speech. During his tenure, the Court considered almost 300 cases on free speech.⁶² Brennan wrote forty-two majority or plurality opinions in those cases, more than any other member of the Court, and seventy-five concurring or dissenting opinions.⁶³ *Times v. Sullivan* may be Brennan's most significant because, in resolving the case, the Court unanimously voted to expand the range of speech protected under the ambit of the First Amendment's Free Speech and Press clauses and made lawfully criticizing public officials much

institutions," 314 U.S. at 270, that language initially did not stand up when tested because, a decade later, the Court upheld convictions under the Smith Act for eleven Communists who had advocated the overthrow of the government. See *Dennis*, 341 U.S. at 494. Finally, while *Yates* granted protection for criticism of the government, unlike *Times v. Sullivan* it did not do so in "ringing or memorable words" that would set the standard for decades to come. Blanchard, *supra* note 34, at 372.

⁵⁵See David H. Souter, *Justice Brennan's Place in Legal History*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 301 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

⁵⁶See *Baker v. Carr*, 369 U.S. 186, 186 (1962). Chief Justice Earl Warren called *Baker* "the most important case of my tenure on the Court." Lani Guinier & Pamela S. Karlan, *The Majoritarian Difficulty: One Person, One Vote*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 207 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997).

⁵⁷See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963). For limitations on *Sherbert*, see *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁵⁸See, e.g., *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

⁵⁹See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁶⁰See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring).

⁶¹See *Craig v. Boren*, 429 U.S. 190 (1976).

⁶²See HOPKINS, *supra* note 5, at 13.

⁶³*Id.* at 13, 14.

easier.⁶⁴ Perhaps in part because of Brennan's prolific nature and the prominent nature of cases like *Times v. Sullivan*, Justice Antonin Scalia, appointed by President Ronald Reagan, later called Brennan the most influential justice of the twentieth century.⁶⁵

As do all justices, Brennan called upon his own understanding of the legal system to arrive at his conclusions. Both before and after *Times v. Sullivan*, he explained his judicial philosophy in speeches later published in law reviews, sources that can prove helpful in understanding a justice's philosophy on the law.⁶⁶

Brennan's Philosophy and the Second Annual James Madison Lecture

In 1961, three years before the Supreme Court handed down *Times v. Sullivan*, Justice Brennan gave the Second Annual James Madison Lecture at the New York University School of Law.⁶⁷ In this speech, Brennan explained his belief in the doctrine of incorporation. Under the doctrine, the Bill of Rights would apply to the states so as to limit state restrictions on individual constitutional rights in situations where limitations already existed on federal restrictions on such rights.⁶⁸ The justice, who in 1961 had been on the Court a mere five years, explained how the result of the historical rejection of his position had been a failure to protect the rights of individuals. To make his case, Brennan traced the issue of incorporation to the founding of the nation, where the debate over federalism had begun,⁶⁹ through the seminal 1830s case of *Barron v.*

⁶⁴Hopkins, *supra* note 4, at 471.

⁶⁵*Justice Brennan Remembered*, available at ONLINE NEWSHOUR (July 24, 1997), http://www.pbs.org/newshour/bb/law/July_dec97/brennan_7_24.html (last visited Jan. 25, 2004).

⁶⁶See John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643 (1995) (using a number of Traynor's speeches later published as articles to gain an understanding of Traynor's judicial philosophy). Unlike many majority opinions, speeches allow for clear expression of judges' philosophies because in speeches judges do not have to consider the philosophies of their colleagues and therefore can be more direct about personal preferences. The speeches cited in this article are representative of Brennan's speeches published mostly in law reviews from the early 1960s to roughly the end of his career.

⁶⁷See Brennan, *supra* note 1. Justice Hugo Black gave the First Annual James Madison Lecture, in which he presented an absolutist understanding of the Bill of Rights and briefly expressed his support for the notion of total incorporation, by which the entire Bill of Rights applied to the states through the Fourteenth Amendment. See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960).

⁶⁸Brennan, *supra* note 1, at 761.

⁶⁹*Id.* at 762. Federalism is the political arrangement by which the national and state governments share power. See LINDA R. MONK, *THE WORDS WE LIVE BY: YOUR*

Baltimore,⁷⁰ which had taken a conservative position on federalism,⁷¹ and the post-Civil War years, during which demand for federal protection against abuse of state power had become stronger,⁷² to the twentieth century debate over incorporation, noting that as of 1961 the Court had incorporated only several aspects of the Bill of Rights, including the Free Speech and Press clauses of the First Amendment.⁷³ In light of this history, Brennan called for much fuller incorporation of the Bill of Rights.

While the once-controversial debate over incorporation may be a fascinating matter for study, Justice Brennan's speech is of particular use to a historical study of *Times v. Sullivan* for at least three key philosophical insights that the justice offered. First, Brennan expressed his view of a living Constitution. Such a Constitution evolves with the times and is not stuck forever in the past, especially in the late eighteenth century.⁷⁴ Brennan's general view of incorporation was that even if the Bill of Rights did not apply to the states in 1833, it could apply to them in 1897, as in the case of the Takings Clause.⁷⁵ Some of Brennan's other examples, including the application of the Free Speech Clause to the states in 1925, served this point, too.⁷⁶ By giving examples in which the legal understanding of the Constitution had changed with time, and also by advocating for fuller incorporation of the Bill of Rights to the states, Brennan showed his preference for a living Constitution.

ANNOTATED GUIDE TO THE CONSTITUTION 118 (2003). Under the Tenth Amendment, powers not given to the federal government nor denied to the states belong to the states or the people. U.S. CONST. amend X.

⁷⁰32 U.S. 243 (1833).

⁷¹Brennan, *supra* note 1, at 764. In *Barron v. Baltimore*, Chief Justice John Marshall held that the Bill of Rights applied only to the federal government and not to the states. 32 U.S. at 243. Hence, John Barron could not rely upon the Takings Clause of the Fifth Amendment to sue the city of Baltimore for damage to his wharf because at that time the Takings Clause did not apply to state and local governments. Under the Takings Clause, the government must provide fair compensation to a property owner whose property the government damages or acquires through ouster of the owner. BLACK'S LAW DICTIONARY 1467 (7th ed. 1999). In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), the Court overturned *Barron* and absorbed for the first time a provision of the Bill of Rights, here the Takings Clause of the Fifth Amendment, into the Fourteenth Amendment.

⁷²*Id.* at 765.

⁷³*Id.* at 768–70. The Court addressed the incorporation of the Free Speech and Press clauses in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁷⁴See Arlin M. Adams, *Justice Brennan and the Religion Clauses: The Concept of a "Living Constitution,"* 139 U. PA. L. REV. 1319, 1319 (1991).

⁷⁵Brennan, *supra* note 1, at 764, 771.

⁷⁶*Id.* at 770.

Second, Justice Brennan stated his belief in the critical importance of individual rights. As a matter of note, one point in the debate over incorporation was that without incorporation state and local governments might have the power to harm individual rights, even if the federal government frequently did not have such power. In his speech, Brennan stated that “case after case comes to the Court which finds the individual battling to vindicate a claim under the Bill of Rights,” and the justice noted that checks are needed on the government’s attempts at “whittling away the rights of the individual.”⁷⁷ Brennan described the individual rights in the Bill of Rights as the embodiment of “constitutional liberty”⁷⁸ and reminded his audience of the importance of “Madison’s priceless gift of ‘the great rights of mankind secured under this Constitution.’”⁷⁹ Hence, individual rights were of critical importance to Brennan.

Third, Justice Brennan sketched out his view of the judiciary, both at the federal and state levels, as the protector of individual rights.⁸⁰ The justice said that “[j]udicial self-restraint which defers too much to the sovereign powers of the states and reserves judicial intervention for only the most revolting cases will not serve to enhance Madison’s priceless gift of ‘the great rights of mankind secured under this Constitution.’”⁸¹ Brennan also observed that “[t]he Court has ... compelling reasons for the application to the states of more of the specifics of the Bill of Rights.”⁸² He then added, “Excessive emphasis upon states’ rights must not make the process of absorption ‘a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before’ the Court.”⁸³ These comments suggest that the courts, including the Supreme Court, have a key role to play in the

⁷⁷*Id.* at 776.

⁷⁸*Id.*

⁷⁹*Id.* at 778.

⁸⁰Critics of this perspective might describe it with the term *judicial activism*. This term refers to an approach to judicial decision-making under which judges supposedly allow their views on public policy to guide their decisions. See BLACK’S LAW DICTIONARY, *supra* note 71, at 850. In contrast, the term *judicial restraint* refers to an approach to judicial decision-making under which judges supposedly refrain from allowing their views on public policy to guide their decisions and instead look to precedent. *Id.* at 852.

⁸¹Brennan, *supra* note 1, at 778.

⁸²*Id.* at 776.

⁸³*Id.* at 777. The term *absorption* refers to application of the Bill of Rights to the states. See BLACK’S LAW DICTIONARY, *supra* note 71, at 8. From a perspective that adopts this language, the Due Process Clause of the Fourteenth Amendment would *absorb* the provisions of the Bill of Rights for application to the states.

protection of individual rights. This was Brennan's view of the judiciary as protector of individual rights.

Brennan's Philosophy Expanded

In his James Madison Lecture, Justice Brennan expressed his belief in a living Constitution, the critical importance of individual rights, and the role of the judiciary as protector of such rights, but he focused most of his speech on incorporation. Hence, he was not necessarily as explicit in his argumentation about his macro-level judicial philosophy as he could have been had he selected a broader topic. In the years after the Court's decision in *Times v. Sullivan*, Brennan took a number of opportunities to explain his judicial philosophy more specifically. The philosophy Brennan expressed in the years following the opinion can be helpful in shedding light on the philosophy from which the opinion grew. Because the detail with which Brennan addressed his philosophy in his later speeches can provide for a richer understanding of the same philosophy that he merely sketched out in the 1961 Madison Lecture, looking at some of the key points in those subsequent speeches that mirror the key points in the Madison Lecture is now appropriate.

To begin with, throughout his judicial career Justice Brennan expressed his belief in a living Constitution.⁸⁴ "The genius of the Constitution resides not in any static meaning that it had in a world that is dead and gone," he said, "but in its adaptability to interpretations of its great principles that cope with today's problems and today's needs."⁸⁵ Law, "to be effective, must conform to the world in which it finds itself," Brennan stated.⁸⁶ For example, the justice maintained, "Equal protection of the laws means equal protection today, whatever else the phrase may have meant in other times."⁸⁷ To bolster his argument for a living Constitution, Brennan even went so far as to

⁸⁴Justice Brennan adopted the metaphor which Justice Louis Brandeis had used to describe the Constitution. According to Brandeis, the Constitution "is not a strait-jacket. It is a living organism." William J. Brennan, *Why [H]ave a Bill of Rights?*, 9 OXFORD J. LEG. STUDS. 425, 426 (1989).

⁸⁵William J. Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945, 956 (1964). See also William J. Brennan, *Constitutional Adjudication*, 40 NOTRE DAME LAWYER 559, 568 (1965); William J. Brennan, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2, 7 (1985); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977); William J. Brennan, *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 8 (1991).

⁸⁶William J. Brennan, "How Goes the Supreme Court?," 36 MERCER L. REV. 781, 788 (1985).

⁸⁷Brennan, *Constitutional Adjudication*, *supra* note 85, at 567.

claim that "the Founding Fathers knew better than to pin down their descendants too closely."⁸⁸

Justice Brennan maintained that the Constitution did not exist "to preserve a preexisting society but to make a new one."⁸⁹ He put his view of a living Constitution in this manner:

We current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time?⁹⁰

Along these lines, the justice once noted with approval that "[l]aw is again coming alive as a living process responsive to changing human needs. The shift is to justice and away from fine-spun technicalities and abstract rules."⁹¹ Again, this perspective accepted the need for the law, including the Constitution, to be relevant and adaptive to the concerns of the day.

Because he was not fond of the view that the Constitution is forever fixed in the past, Justice Brennan took a jab at individuals who held such a view.⁹² "Those who would restrict claims of right to the values of 1791 specifically articulated in the Constitution," he declared, "turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance."⁹³ From Brennan's vantage point, a Constitution fixed in the past would not be able to account for the evolution of the times.

Brennan also expressed a belief that individual rights were of critical importance. The jurist wrote that equality involved bringing "justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to alienated youth, to the urban masses, to the unrepresented consumers."⁹⁴ He added, "[T]he judicial pursuit of equality is in my view properly regarded to be the

⁸⁸Brennan, *supra* note 86, at 789.

⁸⁹Brennan, *Construing the Constitution*, *supra* note 85, at 7.

⁹⁰*Id.* See also Brennan, *The Worldwide Influence*, *supra* note 85, at 8.

⁹¹Brennan, *Constitutional Adjudication*, *supra* note 85, at 563.

⁹²For an example of a perspective different from the perspective which views the Constitution as a living document, see Edwin Meese, *Construing the Constitution*, 19 U.C. DAVIS L. REV. 22 (1985). Meese called the perspective that he and others held "a jurisprudence of original intention." *Id.* at 26.

⁹³Brennan, *The Worldwide Influence*, *supra* note 85, at 8.

⁹⁴William J. Brennan, *Address*, 6 U. HAW. L. REV. 1, 2 (1984). See also William J. Brennan, *The Equality Principle: A Foundation of American Law*, 20 U.C. DAVIS L. REV. 673, 674 (1987).

noblest mission of judges; it has been the primary task of judges since the repudiation of laissez faire capitalism as our central constitutional concern.⁹⁵ Beyond the principle of equality, Brennan stressed due process individual rights such as the rights of life and liberty.⁹⁶ For example, he expressed great concern for the right of criminal defendants in capital cases to life.⁹⁷ “As government acts ever more deeply upon those areas of our lives once marked ‘private,’” he warned, “there is an even greater need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the ‘public good.’”⁹⁸ Brennan viewed the Constitution as the “charter of [those] human rights” for which he had stated his concern.⁹⁹

The jurist suggested that protection of individual rights promoted the human dignity of citizens. Specifically, he expressed his belief that the Constitution “is a sparkling vision of the supremacy of the human dignity of every individual,”¹⁰⁰ later adding, “The supreme value of democracy is the dignity and worth of the individual”¹⁰¹ Additionally, Brennan saw the protection of individual rights as a process that would help the United States set a worldwide example “as a shining city upon a hill.”¹⁰²

Although Justice Brennan maintained that he was a “believer in our concept of federalism,” he would not allow federal deference to the rights of states to harm individual rights.¹⁰³ Hence, while states had a role in enforcing individual rights, so did the federal govern-

⁹⁵*Id.* at 2.

⁹⁶Brennan, *State Constitutions*, *supra* note 85, at 491–92.

⁹⁷See, e.g., William J. Brennan, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313 (1986); William J. Brennan, *Foreword: Neither Victims Nor Executioners*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (1994).

⁹⁸Brennan, *Construing the Constitution*, *supra* note 85, at 9.

⁹⁹Brennan, *The Worldwide Influence*, *supra* note 85, at 2.

¹⁰⁰Brennan, *Construing the Constitution*, *supra* note 85, at 8.

¹⁰¹William J. Brennan, *What’s Ahead for the New Lawyer?*, 47 U. PITT. L. REV. 705, 707 (1986).

¹⁰²Brennan, *The Equality Principle*, *supra* note 94, at 678. Of note, the “city upon a hill” metaphor has been a somewhat popular metaphor in U.S. rhetoric. John Winthrop, Ronald Reagan and other speakers have used the metaphor. See Amos Kiewe & Davis W. Houck, *The Rhetoric of Reaganomics: A Redemptive Vision*, 40 COMM. STUD. 97, 97, 107 (1989); Harold Mixon, “A City Upon a Hill”: *John Cotton’s Apocalyptic Rhetoric and the Fifth Monarchy Movement in Puritan New England*, 12 J. COMM. & RELIG. 1, 1 (1989). The metaphor dates back at least as far as Matthew’s gospel. *Matthew* 5:14.

¹⁰³Brennan, *State Constitutions*, *supra* note 85, at 502.

ment. "Federalism is not served when the federal half of that protection is crippled," he explained on more than one occasion.¹⁰⁴

Furthermore, Justice Brennan expressed a strong belief that the judiciary should enforce the individual rights he believed to be of such critical importance. Noting "the American habit, extraordinary to other democracies, of casting social, economic, philosophical, and political questions in the form of actions at law and suits in equity,"¹⁰⁵ he pointed out that "important aspects of the most fundamental issues confronting our democracy end up ultimately in the Supreme Court for judicial determination."¹⁰⁶ Given this understanding of the legal system, the justice claimed, "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."¹⁰⁷ Later, Brennan noted, "It will remain the business of judges to protect fundamental constitutional rights that will be threatened in ways not possibly envisaged by the Framers."¹⁰⁸ On this point, the justice quoted James Madison, who had declared, "[T]he independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights."¹⁰⁹

Brennan believed that both federal and state courts had a duty to protect the rights of individuals. "The fact that state courts have a duty to safeguard individual rights, and are honoring that duty," he pointed out, "cannot justify the Supreme Court in going on to limit the protective role of the federal judiciary."¹¹⁰ According to Brennan, individual rights required protection from both levels of government.

As one can see, Brennan in his later speeches addressed some of the same key philosophical points that he addressed in his 1961 Madison Lecture. However, in later speeches Brennan was more specific about the same ideas, so consideration of the later speeches is helpful in attempting to develop a deeper understanding of some of the main ideas that influenced Brennan's decision in *Times v. Sullivan*.

¹⁰⁴*Id.* at 503. See also William J. Brennan, *Color-Blind, Creed-Blind, Status-Blind, Sex-Blind*, 14 HUM. RTS. Q. 30, 37 (1987).

¹⁰⁵Brennan, *Constitutional Adjudication*, *supra* note 85, at 560.

¹⁰⁶*Id.*

¹⁰⁷Brennan, *State Constitutions*, *supra* note 85, at 494 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

¹⁰⁸Brennan, *supra* note 86, at 793.

¹⁰⁹William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986).

¹¹⁰Brennan, *supra* note 86, at 784.

Brennan's Judicial Philosophy As Instrumentalist

Broadly defined, Brennan's judicial philosophy is instrumentalist in nature.¹¹¹ Such a philosophy views the "law in functional terms as a means serving an end."¹¹² From an instrumentalist perspective, judges "see the judicial role primarily as an instrument to achieve justice in society."¹¹³ Instrumentalist thinking adopts the belief "that people in ... society seek to use law to achieve practical social goals"¹¹⁴ and that judges have an important role to play "in making and carrying out public policy."¹¹⁵ Sometimes this perspective is seen as "social engineering."¹¹⁶ In placing more emphasis on outcomes, instrumentalist judges place less emphasis on deference to the legislature and to precedent.¹¹⁷ Frequently, an instrumentalist philosophy focuses on the protection and preservation of individual rights, especially those of minorities,¹¹⁸ rather than on the technical legal process of determining those rights in the first place. Besides Brennan, Earl Warren, William Douglas, Thurgood Marshall and Harry Blackmun adopted instrumentalist philosophies.¹¹⁹

A succinct understanding of three other major philosophical approaches to judging—formalist, Holmesian and natural law approaches—can help to clarify Brennan's instrumentalist approach via contrast. To begin with, a formalist approach to judging emphasizes "the literal meaning of terms" in law¹²⁰ and looks for "clear, bright-line rules" of law that are capable of formal, logical, and predictable application.¹²¹ Sometimes legal formalists consider evidence that sheds light on the specific intent of the framers of a constitu-

¹¹¹Instrumentalist philosophy is frequently associated with the 1960s and the Warren Court. See Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 390–94 (1994).

¹¹²R. Randall Kelso & Charles D. Kelso, *How the Supreme Court is Dealing with Precedents in Constitutional Cases*, 62 BROOKLYN L. REV. 973, 980 (1996).

¹¹³*Id.*

¹¹⁴Willard Hurst, *The Unfinished Work of the Instrumentalists: Instrumentalism and American Legal Theory by Robert Samuel Summers*, 82 MICH. L. REV. 852, 853 (1984) (book review).

¹¹⁵*Id.* at 854.

¹¹⁶*Id.* at 853.

¹¹⁷See R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History*, 29 VAL. U. L. REV. 121, 215, 217 (1994).

¹¹⁸See MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 49 (1994).

¹¹⁹Kelso & Kelso, *supra* note 112, at 981.

¹²⁰*Id.* at 977.

¹²¹*Id.* at 978.

tional provision,¹²² but often law by itself is a sufficient basis for deciding cases.¹²³ Rather than tending to focus on outcomes and an understanding of social justice as would instrumentalists, adherents of legal formalism attempt to employ syllogistic-like logic, which they maintain helps them to arrive at “value-free” conclusions.¹²⁴ A legal formalist philosophy understands law as a science¹²⁵ that denies judges choices in the outcomes of cases.¹²⁶ Justices Antonin Scalia and Clarence Thomas are examples of justices who view the law in a formalist manner.¹²⁷

Additionally, some judges adhere to a Holmesian approach to judging. While recognizing the importance of legal clarity and certainty so vital to formalist judges, Holmesian judges look beyond formalist considerations to extra-legal human experience that sheds light on the law and believe that citizens of a democracy should act upon this human experience through the passing of legislation.¹²⁸ Hence, Holmesian judges emphasize judicial restraint and frequently defer to the legislature and the executive for law-making purposes.¹²⁹ Instead of viewing the judiciary as an instrument of social justice, as do instrumentalist judges, Holmesian judges look to the other two branches of government for social progress. Justices Oliver Wendell Holmes, Felix Frankfurter and William Rehnquist have exemplified this perspective.¹³⁰

Other judges subscribe to a natural law perspective. Under this approach, judges support “reasoned elaboration of the law over time.”¹³¹ This means that judges will look to moral principles in the Constitution or in other pre-existing laws and then attempt to interpret those principles in light of history.¹³² Original intent and plain meaning of laws receive consideration, too.¹³³ In a way, this Enlight-

¹²²See *id.* at 977.

¹²³See David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981).

¹²⁴ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION-MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 39 (2002).

¹²⁵See C.C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS viii (1879).

¹²⁶See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 538 (1988).

¹²⁷See Kelso & Kelso, *supra* note 112, at 978.

¹²⁸See *id.* at 979.

¹²⁹See *id.*

¹³⁰See *id.* at 979, 980; Kelso, *supra* note 117, at 199.

¹³¹Kelso & Kelso, *supra* note 112, at 982.

¹³²See *id.*

¹³³See R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, But the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S L.J. 1051, 1058 (1995).

enment-oriented approach is about reviewing the terms of a social contract to make sure that they are current.¹³⁴ If necessary, judges will add glosses to pre-existing understandings of the Constitution, but such glosses frequently are based on precedent.¹³⁵ To more of an extent than instrumentalist judges, natural law judges tend to give great weight to precedent.¹³⁶ Justices John Marshall, Joseph Story, Sandra Day O'Connor and Anthony Kennedy are examples of justices on the Supreme Court who have adopted a natural law approach to judging.¹³⁷

While these four major approaches to judging are helpful in organizing judicial thinking, it is important to note that the categories are not mutually exclusive.¹³⁸ For example, an instrumentalist judge likely will give some weight to precedent, and a formalist judge might avoid a close reading of a statute or other law if that would produce an absurd result.¹³⁹ Regardless of the limitations of these categories, they help to draw boundaries around judicial philosophies, and such boundaries are useful in studying judges and their approaches to the law.

TIMES V. SULLIVAN

Nearly four years before Brennan's judicial philosophy would help to resolve *Times v. Sullivan*, the events that ultimately led to the case began to unfold. On March 29, 1960, the *New York Times* published for the Committee to Defend Martin Luther King and the Struggle for Freedom in the South a full-page advertisement entitled "Heed Their Rising Voices."¹⁴⁰ The advertisement stated: "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights."¹⁴¹ The advertisement alleged that individuals opposed to the students' activities were spreading a "wave of terror" against the students.¹⁴²

Two of the ten paragraphs of text were of particular note to the case. The third paragraph alleged that after students sang "My

¹³⁴See Kelso & Kelso, *supra* note 112, at 982.

¹³⁵See Kelso, *supra* note 133, at 1063.

¹³⁶See Kelso & Kelso, *supra* note 112, at 984.

¹³⁷See *id.* at 982, 983.

¹³⁸See I CHARLES D. KELSO, MATERIALS ON CONSTITUTIONAL LAW 14 (2000).

¹³⁹See *id.*

¹⁴⁰*Times v. Sullivan*, 376 U.S. 254, 256, 257 (1964).

¹⁴¹*Id.* at 256.

¹⁴²*Id.* at 256-57.

Country 'Tis of Thee" on the steps of the Alabama capitol building, student leaders were expelled and armed police surrounded the Alabama State College campus.¹⁴³ When students protested the police presence, the police allegedly padlocked the dining hall in order to starve them into submission.¹⁴⁴ The sixth paragraph alleged that the "Southern violators" had bombed the home of Martin Luther King, Jr., assaulted King and arrested him initially for trivial offenses and then for the felony of perjury.¹⁴⁵

The name of Commissioner L. B. Sullivan, who supervised the city police department in Montgomery, Alabama, appeared nowhere in the advertisement.¹⁴⁶ However, Sullivan believed that since he was commissioner of police in Montgomery, readers would associate the references to police action and the "wave of terror" with him.¹⁴⁷ The *New York Times* distributed about 394 copies of this edition of the newspaper in Alabama, and approximately 35 copies went to subscribers in Montgomery County.¹⁴⁸

No one involved in the case disputed that some of the statements were inaccurate. For instance, the students sang "The Star Spangled Banner" rather than "My Country 'Tis of Thee," and the students who were later expelled from school were expelled for requesting service at the county courthouse lunch counter rather than for leading the demonstration at the capitol building.¹⁴⁹ Also, the police did not come to Alabama State College in response to the protest on the steps of the capitol, nor did the police ever padlock the dining facilities at the university.¹⁵⁰ Additionally, the police had not been involved in the bombing of King's house, and the bombing had taken place before Sullivan assumed his job as commissioner.¹⁵¹ Moreover, Sullivan was not responsible for charging King with perjury; several of King's arrests had occurred before Sullivan began his commissionership.¹⁵²

In response to the advertisement in the *Times*, Sullivan sued four black Alabama clergymen, whose names appeared in the advertisement as names of endorsers, and the New York Times Company, publisher of the *Times*, for libel.¹⁵³ Under Alabama law, the state-

¹⁴³*Id.* at 257.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 257-58.

¹⁴⁶*Id.* at 256, 258.

¹⁴⁷*Id.* at 257, 258.

¹⁴⁸*Id.* at 260 n.3.

¹⁴⁹*Id.* at 258-59.

¹⁵⁰*Id.* at 259.

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³*Id.* at 256, 286.

ments in the advertisement were libelous *per se* because they attacked a person's "reputation, profession, trade or business, or charge[d] him with an indictable offense, or tend[ed] to bring the individual into public contempt," so the jury only had to find that the defendants had published the advertisement and that the statements were "of and concerning" Sullivan.¹⁵⁴ Sullivan received \$500,000 in damages from the jury in Montgomery County, and Alabama's Supreme Court affirmed the award of damages.¹⁵⁵

The Supreme Court granted certiorari in the case.¹⁵⁶ On January 6, 1964, the Supreme Court heard oral arguments; some two months later, on March 9, 1964, the Court issued its historic decision.¹⁵⁷ According to Brennan's opinion for the Court, one major issue emerged. Brennan asked whether the First and Fourteenth Amendment protections of free speech and press limit the power of a state to award damages in a libel action that a public official brings against critics of the official's conduct in office.¹⁵⁸

BRENNAN'S JUDICIAL PHILOSOPHY AND *TIMES V. SULLIVAN*

To *New York Times Co. v. Sullivan*, Brennan brought his own judicial philosophy. As previously indicated, this philosophy was dedicated to a living Constitution, the critical importance of individual rights, and the judiciary as enforcer of individual rights.

A Living Constitution

In 1964 some states already had laws that offered individuals varying degrees of protection against defamation suits,¹⁵⁹ but the Constitution did not protect free speech and press interests from such defamation suits.¹⁶⁰ Indeed, while the First Amendment states that "Congress shall make no law ... abridging the freedom of speech, or of the press,"¹⁶¹ the document is devoid of specifics and says nothing about defamation. The nature of free speech and press protection at the time of the creation of the Constitution remains somewhat nebu-

¹⁵⁴*Id.* at 263 (quoting *New York Times Co. v. Sullivan*, 273 Ala. 656, 673 (1962)).

¹⁵⁵*Id.* at 256.

¹⁵⁶*Id.* at 264.

¹⁵⁷*Id.* at 254.

¹⁵⁸*Id.* at 256, 268.

¹⁵⁹See W. WAT HOPKINS, *ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN* 47-48 (1989).

¹⁶⁰See TEETER, LE DUC & LOVING, *supra* note 12, at 206.

¹⁶¹U.S. CONST. amend I.

lous. Various authorities believe that at that time the Free Speech and Press clauses protected against governmental prior restraint and nothing else.¹⁶² Other authorities believe the Free Speech and Press clauses stood for more than a prohibition on prior restraint and did away with the crime of seditious libel, thus opening the door to criticism of the government legally unknown before the colonies broke away from England.¹⁶³ In trying to resolve the matter, one might want to know what the framers of the First Amendment thought, but determining the exact framers and their collective intent proves difficult.¹⁶⁴ Thus, although through the years the Free Speech and Press clauses came to stand for much more than mere protection against prior restraint, if that is indeed what the clauses stood for in 1791, their origin is somewhat murky and hence disputed. Nonetheless, until 1964 the two clauses did not cover traditional defamation suits.¹⁶⁵

Despite this historical background, Justice Brennan decided in *Times v. Sullivan* that a new rule of constitutional law to protect criticism of government officials was necessary.¹⁶⁶ The justice called upon *Coleman v. MacLennan*,¹⁶⁷ a case the Supreme Court of Kansas decided in 1908, for the legal principle that a public official can prevail in a libel suit related to the official's public status only if the public official shows "actual malice," which Brennan defined as acting "with knowledge that [the statement] was false or with reckless disregard of whether [the statement] was false or not."¹⁶⁸ In a long footnote, Brennan added that the "consensus of scholarly opinion

¹⁶²See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xiii–xiv (1995). See also HOPKINS, *supra* note 5, at 59; DON R. PEMBER, *MASS MEDIA LAW* 40 (2003).

¹⁶³See, e.g., ZECHARIAH CHAFEE, *FREEDOM OF SPEECH IN THE UNITED STATES* 21 (1941); Mayton, *supra* note 12, at 119–21. Also, at least one commentator has wondered how the founders could have ignored seditious libel, "the primary form of restraint on the press during the colonial period." David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 534–35 (1983) (also noting several other problems with the argument that the First Amendment did not do away with seditious libel).

¹⁶⁴See Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 *HASTINGS L.J.* 901, 910 (1993).

¹⁶⁵See LEWIS, *supra* note 6, at 153.

¹⁶⁶As of 1964, some states already had adopted various versions of the actual malice rule, which offered differing levels of protection for defamation defendants. See HOPKINS, *supra* note 159, at 47–48. At that time, several states offered *Sullivan*-like protection for defamation defendants. See cases cited at *Times v. Sullivan*, 376 U.S. 254, 280 n.20 (1964).

¹⁶⁷78 Kan. 711 (1908).

¹⁶⁸*Times v. Sullivan*, 376 U.S. at 280–81.

apparently favors the rule that is here adopted.”¹⁶⁹ While Brennan adopted the rule for public officials, he declined to state how far down the chain of command in government the rule would pertain.¹⁷⁰

This judicial argumentation provided a clear case in which Justice Brennan saw the Constitution as a “living organism,” as Justice Louis Brandeis once called it.¹⁷¹ When the case began, defamation suits were beyond the scope of the First Amendment, but when the case came to a close, Brennan had written an opinion that brought defamation suits within the ambit of the First Amendment. In short, he brought centuries of the common law of defamation onto the federal constitutional scene and expanded the scope of constitutional protection of individual rights. With Brennan’s opinion in *Times v. Sullivan*, the Constitution had continued to evolve and grow.

Justices with other judicial philosophies probably would not have been inclined to embrace the concept of a living Constitution the way Brennan did. For example, a formalist justice likely would not have accepted the newly articulated idea of “the central meaning of the First Amendment,”¹⁷² no matter how much Justice Brennan’s argument created the appearance that this “central meaning” had enjoyed widespread support in the United States for the better part of two centuries. Also, despite the passing claim Justice Holmes made in *Abrams v. United States* that the First Amendment abolished the crime of seditious libel,¹⁷³ developing a clear argument for that position given the somewhat murky origin of the First Amendment would be a difficult task.¹⁷⁴ Hence, in light of both little Supreme Court precedent to support the idea of “the central meaning of the First Amendment” and the relatively obscure original intent of the Amendment,¹⁷⁵ a formalist justice likely would have rejected Brennan’s approach as activist and thus creating new law.

Other non-instrumentalists would have leaned toward the same result. For instance, if a Holmesian justice had favored a

¹⁶⁹*Id.* at 280 n.20.

¹⁷⁰*Id.* at 284.

¹⁷¹See Brennan, *supra* note 84, at 426.

¹⁷²*Times v. Sullivan*, 376 U.S. at 273.

¹⁷³250 U.S. 616, 630 (Homes, J., dissenting) (1919).

¹⁷⁴On this point, the Sedition Act of 1918, which the Court upheld in a number of cases, was relatively similar to the Sedition Act of 1798. Hence, if the Sedition Act of 1798 had not expired of its own accord and prior to *Times v. Sullivan* the Court had heard a case on the Sedition Act of 1798, the Court could have found the original Sedition Act constitutional. Thus, the argument that the First Amendment did away with the crime of seditious libel becomes problematic. See Kalven, *supra* note 14, at 206-07.

¹⁷⁵See Kelso & Kelso, *supra* note 112, at 977.

reinterpretation of the First Amendment, the justice would have been inclined to allow the legislative branch of government to take the step of introducing a constitutional amendment. This approach would have come from the respect that Holmesian justices have for the other branches of government and Holmesian justices' reluctance to engage in judicial activism such as reinterpreting an Amendment to develop its meaning.¹⁷⁶ Finally, given a great respect for precedent,¹⁷⁷ a natural law justice might have shied away from Brennan's discarding much of the legal thinking in cases like *Schenck v. United States*,¹⁷⁸ *Abrams v. United States*¹⁷⁹ and others. Thus, if a formalist, Holmesian, or natural law justice had authored the opinion for the Court, a result that embraced a living Constitution and allowed for the creation of the rule of actual malice would have been unlikely.

The Critical Importance of Individual Rights

Brennan's strong belief in the importance of individual rights manifested itself in his explanation in *Times v. Sullivan* of why free speech is of vital importance to citizens of the United States. Brennan wrote that the main purpose of the First Amendment is to allow for political and social changes which citizens of the country want¹⁸⁰ and that free speech and assembly are necessary because of the "occasional tyrannies of governing majorities."¹⁸¹ He also observed, "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."¹⁸² Given this understanding of the individual right to free speech, the justice framed the Court's consideration of the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."¹⁸³

Justice Brennan wrote that the individual right of free speech is so important that it does not necessarily lose its First Amendment protection either because statements made are false or because they are

¹⁷⁶*See id.* at 979.

¹⁷⁷*See id.* at 984.

¹⁷⁸249 U.S. 47 (1919).

¹⁷⁹250 U.S. 616 (1919).

¹⁸⁰*Times v. Sullivan*, 376 U.S. 254, 269 (1964).

¹⁸¹*Id.* at 270 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

¹⁸²*Id.* at 269 (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)).

¹⁸³*Id.* at 270.

defamatory.¹⁸⁴ First, Brennan cited a number of authorities to support the point that the First Amendment protects many false statements of fact: James Madison for the proposition that some degree of abuse is inherent in the operation of the press, prior Supreme Court case law for the recognition that “erroneous statement is inevitable in free debate,” the U.S. Court of Appeals for the District of Columbia for the notion that in discussion of politics errors are inevitable, and John Stuart Mill for the idea that since faulty arguments are so often made in “perfect good faith,” it is infrequently possible “to stamp the misrepresentation as morally culpable.”¹⁸⁵ Second, Brennan came to the conclusion that statements do not necessarily lose their First Amendment protection because they are defamatory. The justice stated that public officials ought to be able to thrive in harsh political climates.¹⁸⁶ These points support a rigorous understanding of the individual right of free speech.

One matter of interpretation is important here. Sullivan ultimately lost his case against the *New York Times*. At first blush, this might seem like a case where the rights of an individual lost to the rights of a major media power.¹⁸⁷ However, re-framing the case can help in understanding how individual rights won out. One can view the *New York Times* as a conduit of the message that various individual social outsiders used to disseminate a message of social change that the powerful establishment, symbolized by Sullivan, did not want to hear. The Court protected the speech rights of individuals in the civil rights movement from the oppressive power of Alabama and state agents like Sullivan.¹⁸⁸ Framed in this way, the case was one about the individual right to free speech in a representative democracy.

Justices with other philosophies likely would have come to different results. A formalist justice who consulted the Court's precedent for

¹⁸⁴*Id.* at 271.

¹⁸⁵*Id.* at 271–72.

¹⁸⁶*Id.* at 273. Later in his opinion, Brennan drew an analogy between the protection granted to public officials' job-related speech and the protection that Brennan sought to grant to citizens' political speech. *Id.* at 282–83 (citing *Barr v. Matteo*, 360 U.S. 564 (1959)). In short, both types of speech served democratic purposes. *Id.*

¹⁸⁷Brennan even noted that “occasional injury to the reputations of individuals must yield to the public welfare.” *Id.* at 281 (quoting *Coleman v. MacLennan*, 78 Kan. 711, 724 (1908)). Given the civil rights struggle of a few social outsiders against the establishment out of which the *Times v. Sullivan* case grew, this quotation is probably not the most accurate way of explaining the outcome in the case.

¹⁸⁸See Blanchard, *supra* note 34, at 374. Blanchard considers this point in the context of other cases from the civil rights era, but the idea applies just as well to *Times v. Sullivan* since it is a civil rights-era case, too. Also, Blanchard notes the Court's awareness of the need to promote individual rights during this time. *Id.*

“clear, bright-line rules” of law¹⁸⁹ would have had a difficult time finding a sturdy right to speak out against the government because, as noted above, precedent did not afford much of a right of that nature. Along the same lines, given the somewhat murky origins of the First Amendment previously outlined, a formalist justice who endeavored to discern the original intent of the founders would have had a difficult time arguing for a robust right to criticize the government.¹⁹⁰

Also, a Holmesian justice would have been inclined to agree with a formalist justice on this matter. For example, upon not finding in First Amendment precedent and history a sturdy right to criticize the government, a Holmesian justice likely would have deferred to the legislature in the possible event of the creation of a new rule of law that provided for this right.¹⁹¹ By doing so, the justice would have allowed the people’s representatives to call upon social experience to enact new laws *via* the legislature and would have avoided the appearance of judicial activism.¹⁹²

¹⁸⁹Kelso & Kelso, *supra* note 112, at 977.

¹⁹⁰*Id.* To the contrary, a formalist justice who looked at the actual text of the First Amendment and did not extensively consider other relevant legal rules or make an attempt to ascertain the original intent of the founders could come to the same conclusion about the right to criticize the government to which Brennan came since the plain words of the First Amendment by themselves do not allow any exceptions to the abridgment of speech or press. This point helps to explain how Justice Hugo Black, no instrumentalist himself, agreed with Brennan’s conclusion in *Times v. Sullivan*. See Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 28–29 (1994).

¹⁹¹See Kelso & Kelso, *supra* note 112, at 979. Ironically, the namesake of the Holmesian approach to judging, Oliver Wendell Holmes, did find such a right, but his initial argument for that right came only in passing at the end of his dissent in *Abrams v. United States*. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁹²Despite Kelso and Kelso’s observations that Justices Tom Clark, Potter Stewart, Byron White and John Marshall Harlan held Holmesian judicial philosophies, these four justices joined Brennan’s opinion for the Court in *Times v. Sullivan*. See KELSO, *supra* note 138, at 12; Charles D. Kelso & R. Randall Kelso, *A Review of Professor Lusky’s Call for Judicial Restraint: Our Nine Tribunes: The Supreme Court in Modern America*, 5 SETON HALL CONST. L.J. 1289, 1320 (1995) (generally reviewing Lusky’s book). This result may be a testimony to the consensus-building skills of Brennan, who had a reputation for crafting consensus among members of the Court but had a challenge getting and maintaining a majority in *Times v. Sullivan*. See Hopkins, *supra* note 4, at 494. See also LEWIS, *supra* note 6, at 164. Also, Sullivan’s \$500,000 jury award and the potential for chilling political speech that affirming the decision of the Alabama Supreme Court would have had may have loomed ominously for these four justices as well as for the other members of the Court. Whether each of the four Holmesian justices on the Court would have authored an opinion like Brennan’s instead of merely going along with Brennan’s opinion may be a different question. Regardless, these justices were not as consistent with following their philosophies as one might have expected them to be. A key point here is that judicial philosophies provide predictions rather than promises of what justices will do in any given case. Helpfully, Hopkins and Lewis have studied some of the interac-

Finally, a natural law justice would have looked to the Constitution, history, original intent of the founders and precedent in an attempt to find a sturdy right to criticize the government,¹⁹³ and, unless the justice had reasoned that such a right was found somewhere within these sources, the justice probably would not have created such a right. Given the absence of relatively compelling authority, whether constitutional, historical or otherwise, this individual right probably would not have appeared in the opinion of a natural law justice. Accordingly, the individual right to criticize the government would not have been likely to come from most formalist, Holmesian, and natural law readings of the case.

The Judiciary As Enforcer of Individual Rights

Justice Brennan's judicial philosophy had an important impact on the *Times v. Sullivan* decision through the ideas of a living Constitution and the critical importance of the individual right to free speech in a representative democracy. Furthermore, Brennan's philosophy had an impact on the case through the idea of judicial protection of the defendants' legal rights.

Accordingly, instead of merely introducing the Supreme Court's version of the actual malice doctrine, Justice Brennan used the Court to enforce the rights that this doctrine sought to protect. While Brennan might have stated the new rule of constitutional law and then remanded the case for further consideration, he instead opted to apply the rule and came to the conclusion that actual malice was lacking. This judicial step of passing judgment on the facts as well as the law was a highly unusual one for the Court.¹⁹⁴ The jurist noted there was no evidence at trial that the four individual defendants were aware of any falsity in the advertisement.¹⁹⁵ Furthermore, the editors at the *Times* said they believed the content of the advertisement was "substantially correct," and the *Times* relied upon the good reputations of many of the individuals named in the advertise-

tions among the justices, including Harlan's eventual acquiescence to Brennan despite Harlan's concerns that the Court's actual malice doctrine would violate the principle of federalism, during the formulation of Brennan's opinion in *Times v. Sullivan*. See LEWIS, *supra* note 6, at 164–82; Hopkins, *supra* note 4. Future research might seek to explain further why all four Holmesian justices on the Court in March 1964 embraced what appeared to be a judicially-created individual right rather than deferring to the Congress for the possible creation of such a right.

¹⁹³See Kelso & Kelso, *supra* note 112, at 982, 984; Kelso, *supra* note 133, at 1058.

¹⁹⁴See KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 316 (1989).

¹⁹⁵*Times v. Sullivan*, 376 U.S. 254, 286 (1964).

ment.¹⁹⁶ At best, the *Times* was negligent in failing to discover the faulty statements in the advertisement.¹⁹⁷ Brennan added that the advertisement specifically did not name Sullivan and that several of the accusations in the advertisement did not even concern the police.¹⁹⁸ As to the accusations that did concern the police, Brennan found that Sullivan's witnesses at trial had not indicated that they thought Sullivan's reputation came under attack simply because Sullivan was the police commissioner.¹⁹⁹ In short, Sullivan did not muster enough evidence to demonstrate that either the individual defendants or the *New York Times* acted with actual malice. By not only proclaiming a new rule of First Amendment doctrine, the rule of actual malice, but also by applying the rule to come to the conclusion that the defendants were not liable to Sullivan, Brennan used the judiciary to enforce the free speech and press rights of the defendants.

Justices with other judicial philosophies probably would have shied away from judicial activism. For instance, many formalists are against an activist judiciary. They see the law as a scientific endeavor,²⁰⁰ and the creation of rights *via* judicial activism tends not to be a part of that endeavor. Hence, a formalist justice probably would not have gone along with the opinion in *Times v. Sullivan*.²⁰¹ Along the same lines, a Holmesian justice, based on an inclination of judicial deference to the legislature,²⁰² likely would not have engaged in judicial activism of the sort found in Brennan's opinion.²⁰³ Finally, unless a natural law justice had felt that a new gloss over previous understanding of the Free Speech and Press clauses was appropri-

¹⁹⁶*Id.* at 286–87.

¹⁹⁷*Id.* at 287.

¹⁹⁸*Id.* at 288.

¹⁹⁹*Id.* at 289.

²⁰⁰See LANGDELL, *supra* note 125, at viii. In some cases, Justice Hugo Black was an exception. He did not shy away from judicial enforcement of rights he believed to be within the Constitution because he saw the judiciary as the enforcer of the explicit rights in that text. See Gerhardt, *supra* note 190, at 56.

²⁰¹Notably, Justice Black was against an activist judiciary when he could not find a given right in the text of the Constitution. However, in cases where he believed a right to be solidly grounded in the Constitution, Black did not hesitate to enforce the right *via* judicial activism. See Gerhardt, *supra* note 190, at 65–66. This information helps to explain why Black supported Brennan's conclusion in *Times v. Sullivan* but dissented the next year from Justice William Douglas' opinion for the Court in *Griswold v. Connecticut*, which established a constitutional right to privacy. 381 U.S. 479, 529 (1965) (Black, J., dissenting).

²⁰²See Kelso & Kelso, *supra* note 112, at 979.

²⁰³Ironically, the four Holmesian justices on the Court at the time of *Times v. Sullivan* joined Brennan's judicial activism. Perhaps future scholarship will attempt to explain this unlikely judicial behavior.

ate,²⁰⁴ the natural law justice probably would have upheld precedent and avoided judicial activism due to a respect for established law.²⁰⁵ Again, justices with non-instrumentalist philosophies likely would have been inclined to avoid the activism which Brennan's instrumentalist philosophy helped to bring about, so the outcome in *Times v. Sullivan* could have been quite different.

CONCLUSIONS

Justice William Brennan's judicial philosophy had an important influence on the Supreme Court's decision in *Times v. Sullivan* and hence on changing the direction of the law as it pertained to criticism of the government. Brennan's instrumentalist philosophy, with its prongs of a living Constitution, the critical importance of individual rights, and judicial enforcement of such rights, helped to shape the actual malice rule and opened the door to greater protection for criticism of the government. One relatively recent material consequence of such a result is that critics of the Bush Administration's war in Iraq have had the opportunity to voice publicly their concerns about the war.

The actual malice rule did not have to be the doctrinal result in *Times v. Sullivan*. If a justice with a non-instrumentalist philosophy had authored the opinion of the Court, the result could have been notably different. For example, had a justice with a formalist, Holmesian or natural law philosophy penned the opinion, observers reasonably could have expected a fit into the previous 173 years of First Amendment history. Instead, Brennan, with the consent of a majority, re-wrote the traditional rules of defamation in an effort to promote democratic ideals.

Rodney Smolla has noted that "[f]ree speech is an indispensable tool of self-governance in a democratic society."²⁰⁶ The successful functioning of democracy calls for informed decision-making, and free speech helps to ensure "that everything worth saying shall be said"²⁰⁷ so that decision-making can be more informed. Public officials may not always like what citizens say about them, since public criticism can be "vehement, caustic, and sometimes unpleasantly

²⁰⁴See Kelso, *supra* note 133, at 1063.

²⁰⁵See Kelso & Kelso, *supra* note 112, at 984.

²⁰⁶RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 12 (1992).

²⁰⁷ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948). For the influence of philosopher Alexander Meiklejohn on the Supreme Court, see William J. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

sharp,”²⁰⁸ but public criticism, along with other types of public discussion, can contribute insight to democratic decision-making. This principle, influenced in part by Justice Brennan’s instrumentalist judicial philosophy in *New York Times v. Sullivan*, opened the door for greater democratic discourse in 1964, and such a principle keeps that door open for the same type of expansive democratic discourse today.

²⁰⁸*Times v. Sullivan*, 376 U.S. 254, 271 (1964).