The Supreme Court: Reflections on the Constitutional Protection of Human Dignity

By Earl. L Neal

> Under our Constitutional system, courts stand against any winds that blow as a haven of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement.[1]

These truths stated by justice Black a half century ago are as valid today as they will be tomorrow. It is our responsibility as advocates of the Bar to remain vigilant - advancing with the commitment of our convictions the cause of justice so that our system will continue to be a safe harbor from the winds that blow, albeit blown by different administrations with shifting philosophies and concepts of justice.

We must be alert to any erosion of either the fundamental protections our Constitution grants or the independent interpretation by the Supreme Court of precedent that has withstood the winds of time. The possibility of an expedient intrusion by the ever changing administration is today, more than ever, a real threat.

The Constitution of the United States is the foundation of democracy and the protector of human rights, guaranteeing the equality of justice regardless of race, sex, or social status. Since *Marbury v. Madison*,[2] the Supreme Court has stood as the final arbiter and interpreter of the principles espoused in our Constitution; a document drafted and adopted in a different era, reflecting the principles of a young country based upon an unsophisticated agricultural society. Historically, the debate over the meaning and philosophy of the Constitution has been almost exclusively the domain of academia and the decisions of the Supreme Court. As a society, we leave it to the Supreme Court to sort out and protect the enduring values of society. However, the Reagan Administration's aggressive advocacy of its perception of constitutional justice has driven the debate from the isolated hallowed halls of the universities to the front pages of the news.

While Supreme Court justices have traditionally avoided direct involvement in political controversies, several current justices have become increasingly outspoken in recent years. Never before have they felt such an obligation, on an individual basis, to speak out in defense of their independence and their view of the Constitution.

Attorney General Edwin Meese III and Assistant Attorney General for Civil Rights William Bradford Reynolds have criticized many of the supreme Court's decisions as well as the alleged liberal views of individual justices. The Administration has campaigned for a "new vision of the Constitution" and has delighted conservative jurists by arguing that the federal judiciary must be restrained and that the Constitution should be interpreted based solely on the intent of the framers. To advance its views the Administration has a potent tool in Solicitor General Charles Fried. Traditionally, the Solicitor General has a dual role as an advisor to the Court, through his amicus briefs, and a spokesman for the President. Mr. Fried, however, sees no problem with acting strictly as an advocate of the Administration's views. Whereas the previous Solicitor General, Rex Lee, refused to be, as he said, "Pamphleteer General" - in other words, one who aggressively asserts the Administration's politics despite their appropriateness to the case; Mr. Fried has no problem with that role.

This was exemplified when the Attorney General actively criticized a series of recent decisions wherein the Court adhered to the separation of Church and State. Mr. Meese has also publicly stated several times that he believes that the Exclusionary Rule should be abolished entirely and that the Bill of Rights should never have been applied to the States. It is this aggressive Administrative attack on the well-established Supreme Court decisions protecting our civil liberties which has brought the influence of the Executive Branch on the Supreme Court to the forefront of current discourse.

The civil rights community has responded to all of this with both outrage and resignation. The NAACP's Julius Chambers has termed Mr. Meese's views "ludicrous but typical" Anthony Podestra, President of People for the American Way, has come out strongly against the Administration's position. He recently said that Mr. Reagan's suggestion that the Bill of Rights is being too vigorously enforced by the judicial branch seems to tinker with our very Constitutional system.

The Administration's attempt to exert an increasingly pervasive influence on the Supreme Court is illustrated through its appointments to the Supreme Court and lower federal judiciary, its management of trial advocacy, and its constant effort to influence public opinion. Professor Lawrence Tribe of Harvard University has pointed out that the power of appointment can far

surpass even the power of amendment in reversing the most basic legal precedents and transforming the way the Constitution shapes our lives.

The federal judiciary is being remade in a new image as President Reagan quietly fills nearly half of the federal judgeships in the nation. Those judges are bound by Supreme Court precedent, but as all of you are aware, five of the nine justices on the Court are already over 76 years old and, therefore, it too is now vulnerable to presidential court-packing on a scale that this nation has rarely seen. The effect of large scale appointments of judges sympathetic to the Administration's philosophy will shape the rights of individuals in every aspect of their lives. The most fundamental rights will be influenced, including employment, the relationship between Church and State, fair housing, and the overall system of adjudicating rights. The role of the trial lawyer will be affected as well. Under the guise of protecting the "framers intent," euphemistically supporting the political bias of the elected leaders, the culmination of this effort may alter the constitutional guarantees we have heretofore perceived as being inalienable.

The Reagan Administration has espoused the strict construction theory of Constitutional interpretation, which represents an easy sell to the populace, since it is at least superficially consistent with our heritage. The appeal of this theory is that it harkens back to so-called "traditional values" The Court itself lends support to this in that the elegance of the judicial tradition, the long black robes and dramatic majestic aura all enhance the vision of neutrality. Strict constructionism reinforces the illusion. The cornerstone of strict constructionism is the abiding belief that the justices do not make law, they are merely divining the true intent of the original framers as reflected in the words and phrases of the Constitution. This "phonographic theory of constitutional adjudication" denies the existence of any judicial creativity in the process. Instead, its premise is that there should be a neutral, passive court which merely gives voice to a self-evident Constitution.

In the guise of limiting the judicial remedial power when enforcing protected human rights, the current administration has embraced a theory which they have titled "judicial restraint" This view is espoused in contrast to supposedly undemocratic judicial activism. In order to avoid judicial activism, Mr. Meese has said that the Supreme Court is to resurrect the original meaning of Constitutional provisions and statutes as the only reliable guide. On matters which were not ever considered by the framers, he believes that the substantive choices of elective government officials should be given deference. The flaws in this argument are manifest. To quote justice Brennan:

> It is the very purpose of a Constitution - and particularly the Bill of Rights - to declare certain values transcendent, beyond the reach of temporary political majorities. The majoritarian process cannot be expected to rectify claims of minority rights that arise as a response to the outcome of that very majoritarian process.[3]

President Reagan has vowed to appoint only federal judges who follow a pattern of judicial restraint, ignoring candidates who might attempt to use the courts as vehicles for so-called “political action or social experimentation.”[4] Many critics assert that these efforts are a badly-disguised attempt to clamp down on individual rights. Justice Brennan agrees and argues that a position that upholds constitutional claims only if they were within the specific contemplation of the framers, in effect establishes a presumption that ambiguous constitutional phrases should be interpreted narrowly, so as to avoid finding violations of individual rights. He goes on to say that this is a choice no less political than any other; it expresses antipathy to claims of the minority seeking to assert rights against the majority.[5]

In a recent article for the *New York Times*, Judge Irving R. Kaufman of the Second Circuit Court of Appeals claimed that he and his fellow judges find it extremely difficult to ascertain the intent of the framers on any given matter. He said that the methodology of strict interpretation would conflict with the judge's duty to apply the Constitution's underlying principles to changing circumstances. Furthermore, by attempting to erode the basis for judicial affirmation of the freedoms guaranteed by the Bill of Rights and the 14th Amendment, the original intent theory threatens some of the greatest achievements of the federal judiciary. The entire incorporation process would be at risk, as would the body of law based on the fundamental right to privacy, since neither are explicitly discussed by the Constitution or the framers.

Justice Stevens has come out squarely against the Administration's views in this matter. In a speech just a few months ago at a Federal Bar Association luncheon in Chicago, justice Stevens said that the development of Mr. Meese's argument is somewhat incomplete:

> [I]ts concentration on the original intention of the framers of the Bill of Rights overlooks the importance of subsequent events in the development of our law. [In particular] it overlooks the profound importance of the Civil War and the

post-war amendments on the structure of our government, and particularly upon the relationship between the Federal Government and the separate states.[6]

In taking its stand, the Administration has adopted one of three separate and distinct philosophies of constitutional interpretation. We have already discussed the "framers' intent" or strict construction theory. The second is so-called "legal realism" which is virtually devoid of precedent, but which is the favorite of several constitutional scholars.

This I will discuss in a moment. The third philosophy is one which I see as being the happy medium between the previous two extremes. It sees the Constitution as a living document that builds upon precedent while constantly remaining aware of shifting societal needs. If you were to make a general survey of the great body of material written on the topic of constitutional interpretation, you would notice, as I have, that the majority of authors, unfortunately, have tended to take a position at the extremes.

Let us look at the so-called "legal realists" who claim that the rulings of the judges are personal to those judges, and reflect only the views of the individuals with the power to decide the outcome of the particular case before them. In other words, the realists believe that the judges look to nothing more than their own values in order to make their decision.

This minority and rather extreme view is embraced by several academicians. At the end of a lengthy treatise on the subject, John Nowak of the University of Illinois came to the conclusion that "the law" is a fraud. He said that there is no demonstrably correct set of legal principles which will dictate the resolution of constitutional issues apart from political philosophy and the exercise of political power by the Justices.[7] He intended for this to encapsulate the theory of legal realism. I cannot help but think that with this he goes too far.

There have clearly been times over the course of constitutional history that Supreme Court justices have subsumed their personal views and gone along with a decision that was deemed to be in the interest of institutional stability. In order to follow the doctrine of stare decisis they had to sometimes go against their personal beliefs and other times they found that the written words of the Constitution mandated a particular holding.

Legal realists generally claim Charles Evans Hughes as one of their own due to his often quoted comment that we are under a Constitution, but the Constitution is what the judges say it is. However, several years later when he became Chief justice he made it clear that by this he did not mean that precedent should be disregarded or that the justices should be permitted to create law as they saw fit, but rather that the Constitution cannot stand alone - it requires interpretation and, thus, decision making.

Are not all decisions value-based to some degree? Each of us brings to our decision making processes a perspective, a philosophy - our own set of values which, regardless of our capacity to be objective and professional, shapes our analysis. Yet, "strict construction" allows us to believe that judicial decision-making is somehow different. It is as if the act of taking the oath of office of the High Court imbues the justice, once a mere mortal, with the ability to impassively and brilliantly "divine" the law. The Constitution of the United States is a document couched in broad principles, it does not contain all of the answers. If it did, surely we would have outgrown it by now.

When one asks what the justices are to look to in order to glean this all important original intent, one is often directed to *The Federalist Papers*, which were written in 1788. However, one of the authors of that work, James Madison, let it be known that he did not believe he was writing a gospel to which all future jurists would refer. He wrote in essay no. 14:

Is it not the glory of the people of America that ... they have not suffered a blind veneration for antiquity to overrule the

suggestion of their own good sense?

In light of this statement it seems ironic to look only to the Framers to solve the problems of today.

If I had to claim one of these theories, I guess I am more of a realist, but I am also an idealist. I believe that we must understand the text of the Constitution and the laws as well as the social and political back-ground of the justices in order to fully appreciate how their decisions are made. I agree with justice Brennan when he said that the Administration's demand that the Justices discern exactly what the Framers thought about a question under consideration and simply follow that intention in resolving the case before them, is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. In truth, as he said, it is little more than arrogance cloaked as humility It is arrogant to pretend that from our vantage we can gauge accurately the intent of the Framers on application of principles to specific contemporary questions.[8]

As I said, however, I am also an idealist. I agree with Robert Bennett, the Dean of Northwestern University School of Law, when he said that he is optimistic, even exuberant, about the role that courts may play in bringing about social change, largely through constitutional interpretation. I, too, believe that courts, and we as its officers, should strive to protect the fundamental values espoused in the Constitution.

In its broad attack on judicial activism, the Administration is attempting to curb the previously aggressive protection which individual rights received from the Supreme Court. The red flag of "judicial activism" is generally raised by this Administration whenever the Court uses its power of judicial review to strike down an act by the government and enforce fundamental rights. However, for the 183 years since *Marbury v. Madison*, judicial review and, thus, judicial activism, has been a fact of life.

More often than not, the term judicial activism has been used as a pejorative term. However, once it has been admitted that the justices may invalidate actions of the other branches of government, all complaints about judicial review seem self-serving. Some said that the Warren Court was "dangerous" because it was judicially active. Now there are those who accuse the Burger Court of activism by its blunting or dismantling of many of the holdings of the Warren Court. What it all comes down to is "whose ox is being gored."

Edwin Meese and William Bradford Reynolds have been the most vocal opponents of so-called judicial activism in the past several years. In a recent speech, Robert Bennett called the Administration's attack on judicial activism simplistic. Mr. Meese and Mr. Reynolds perceive an apparently precise benchmark for spotting inappropriate activism. To them it is anything beyond the jurisprudence of the original intention. The Attorney General encourages the current Court to go back to a time before the now famous footnote four of the 1938 *Carolene Products* [9] decision, in which the Court first noted that an active judicial role is justified when the Court is either protecting the rights of discreet and insular minorities or basic Constitutional values. For it was after this decision that the Court really set itself to the task of identifying which rights or values were so fundamental that they should be applicable to the states through the 14th Amendment and judicially enforced against the other branches of government. A prime target for attack by Mr. Meese has been this entire incorporation process. In fact, in a line that was omitted from a speech he gave last year, but came out in its published version, he said, "Nowhere else has the principle of federalism been dealt so politically inviolate and constitutionally suspect a blow as by the theory of incorporation."[10]

The fact that Mr. Meese and Mr. Reynolds, as well as many others in the Administration, hold these views is not something to be noted and then filed away as Reagan generation trivia. Its impact is already being felt and will continue to be felt at an increasing rate in the future. Senator Paul Simon, who heads the Democrats' judicial nomination screening effort, complained that the Reagan Administration has been systematically trying to pack the federal bench with staunch conservatives and has been making more idealogical nominations than any Administration since that of Franklin Delano Roosevelt. Grover Rees, a special assistant to Attorney General Meese, has responded to these complaints by saying that the Administration is selecting nominees according to his or her willingness to interpret the Constitution as the Founding Fathers; intended it to be understood, and not according to conservative political philosophy. As I have already pointed out, however, these may be one and the same.

The term "conservative political philosophy" raises an interesting question. Is the Burger Court really *conservative*? I am sure no one here has any doubts about the answer to that question, but let us really think about it. *Webster's Dictionary* defines conservative as "tending to preserve established traditions and to resist or oppose any changes" A conservative court would be

one that is wedded to the doctrine of stare decisis. However, with this the Burger Court faces a particular dilemma because among the precedents of the court are the Warren Court decisions. No doubt there are those on the Court who find those decisions very hard to live with, but the balance between the conflicting idealogies on the current Supreme Court has prevented drastic changes. It seems to have settled into a fairly steady pattern of limiting, but not overruling, many of the major decisions of the Warren Court.

Even so, the Burger Court does have a definite philosophy, and, as justice Blackman has said, it is "moving to the right."[11] This is evidenced by decisions such as *Grove City College*,[12] in which the Supreme Court gave a very narrow reading to the prohibition against sex discrimination contained in Title IX of the Civil Rights Act of 1964. In this case the Court held that the receipt of federal educational grants by students at a private college cannot, by itself, serve as a basis for forcing that institution to comply with all of the provisions of Title IX. Unfortunately, this case has often been cited for the broad contention that the government cannot cut federal aid to a college because it practices sex discrimination. Shortly after this decision, William Bradford Reynolds said that the Court's restrictive interpretation would be applied to three other laws as well. They were Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by recipients of federal assistance; Section 504 of the Rehabilitation Act of 1973, which extends that same protection to the disabled; and the Age Discrimination Act of 1975, which protects the elderly. A recent joint report of the NAACP Legal Defense and Educational Fund and the American Civil Liberties Union complained of serious erosions in all of these areas.

Employment, the key to success - family stability - hope - and most importantly, pride in self worth, have been addressed directly by Congress through the enactment of Title VII of the Civil Rights Act of 1964. This act grants equality of opportunity in employment, particularly in the public sector. The federal courts, in enforcing the provisions of Title VII, found egregious discriminatory practices being employed by many states and municipalities, north and south, east and west, and addressed the issue squarely with integrity. They then fashioned remedies, though sometimes unpopular, to redress the wrongs.

Almost with an unanimous voice citizens verbalize a disdain for discrimination, but many also feel that the courts have overreached in fashioning remedies which sound like quotas for future employment. The criticism, however, neglects the historical setting which caused Congress to act and created the facts upon which the courts have based their remedies.

Selection procedures were often employed which acted as a closed door to the public employment that is financed by all citizens. Medical examinations failed minorities at a disproportionate rate for such spurious reasons as "flat feet" or "heart murmur" Efficiency ratings also served to perpetuate past discriminatory practices. The court properly struck down these impediments to equality and fashioned appropriate remedies.

The current Administration is totally opposed to quotas and numerically or statistically based affirmative action. It would urge limiting the remedial power of the courts. This is being attempted through the Department of justice as well as through the power of judicial appointment. As employment is the key to liberty, this is an area to which we must pay particular attention. The way I see it, you can't have very much freedom without money.

A recent decision of the Supreme Court hailed by the Administration and intentionally misinterpreted by the justice Department is *Firefighters Local No. 1784 v. Stotts*.[13] The Justice Department claims that this case drastically changed the state of the law and it has been citing it as justification for implementing an anti-affirmative action philosophy.

The actual holding of this case was fairly narrow. It held that Title VII protects a bona fide seniority system and only permits an award of competitive seniority when the beneficiary of the award has actually been a victim of discrimination. The Justice Department has sought to expand this holding and claims that it implicitly overrules the legality of race-conscious affirmative relief. It has filed suit in over 50 jurisdictions seeking to have locally implemented affirmative action plans declared unconstitutional, primarily on the basis of *Stotts.* Up until now, however, it has not been very successful. Virtually all the federal circuit courts that have considered the matter have refused to extend the holding of *Stotts*. These losses have not put a damper on the justice Department, however. It remains persistent in its attack on affirmative action.

The unequivocal position of the Administration is that Title VII proscribes all affirmative action plans that require employers to meet specific numerical goals and that injunctive decrees requiring such relief are invalid. The lower courts throughout the country have established remedial relief appropriately fashioned to address the proven discriminatory acts. In spite of the vigorous attack by the Justice Department upon the existing decrees in virtually every state, the district courts have, in almost an unanimous voice, denied all requests to modify existing orders. The Justice Department has not been selective in its attack, nor has it attempted to balance the equities. The message, however, from the courts is clear: relief in the form of numerical goals will continue as long as it is rationally based on the societal need to deal with past acts of discrimination and as long as it is directed against the appropriate defendants.

The issue is once again squarely before the Supreme Court in three cases which were argued earlier this year and are awaiting decision possibly to be announced before adjournment of the current term. One of these is *Local 93, International Association of Firefighters v. City of Cleveland*.[14] There, the union sought to reverse an affirmative action plan requiring numerical goals for promotion of black firemen. Although this plan was the basis of a consent decree, the union claimed that it constituted reverse discrimination and was in violation of both Title VII and the Fourteenth Amendment. The justice Department actively supported the union in this contention through an amicus brief.

The second case before the Court is *Local 28, Sheet Metal Workers v. EEOC*[15] in which the union asked the Supreme Court to reverse a court order requiring the union to remedy its pattern and practice of discrimination by meeting a 29% minority membership goal. The union admitted that for over two decades it has thwarted court-ordered affirmative action plans. Now it claimed that the plans constituted reverse discrimination and that the remedy ordered by the Court was beyond its authority because it was a so-called "quota."

The final case consolidated with the previous two for decision this summer is *Wygant v. Jackson Board of Education*.[16] Here, a Michigan school board's voluntary affirmative action plan, as contained in their collective bargaining agreement, is at issue. The contention is that the plan violates the Equal Protection Clause of the Constitution because it limits minority lay-offs where there is no direct finding of past discrimination against the individuals involved.

Solicitor General Fried exhibited his total lack of appreciation for the real matters at stake in these cases when he challenged the school board's affirmative action provisions in his *Wygant* brief. He compared the degrading effects on black workers to the lack of respect people would have shown for Hank Aaron if the fences had been moved in 10 feet so that he would have a better chance of breaking Babe Ruth's home run record.

Putting Charles Fried and his demeaning analogies aside, in my judgement there are important and distinct factual circumstances differentiating these three cases. All challenge the authority of the courts to establish numerical relief to remedy discrimination and many have lumped the three cases together on this basis. However, in *Sheet Metal Workers v. EEOC*, the right of a district court to fashion a remedy in the face of a constitutional violation and after a lengthy hearing and finding of discrimination by the Court is at stake. I would seriously doubt that the Supreme Court will overturn the holding in this case, as that would involve circumscribing the powers of the lower court. Clearly in these cases a numerical remedy is not precluded.

In *Firefighters v. Cleveland*, the Supreme Court is faced with the possibility of reversing a consent decree that has gone through a thorough review. This is an extremely difficult area in which to predict a Supreme Court decision, but I believe the Court will give deference to the lower court's review of the facts. However, it may be a *Bakke*-type decision, recognizing that race-conscious relief is possible, but limiting the application of that relief so that the ultimate goal is to have the percentages mirror those within the work force. In general, though, I think, that the Court is less likely to rule out numerical relief when it serves as a basis for a consent decree.

How the *Wygant* decision will come down is anybody's guess. I would only venture to say that the Court is more likely to overrule the numerical relief ordered in this case than in the previous cases, since the *Wygant* judgment was based on a purely voluntary affirmative action plan. The absence of lower court involvement in the plan here would make it easier for the Court to overturn it on review. We will all just have to wait and see.

Affirmative action remedies are an attempt to correct a system of degradation imposed by the many upon the few. Constitutional law commentator Kenneth Karst discusses this at length in his writings:

> Inequality is harmful *chiefly* in its impact on the psyches of the disadvantaged .... In modern constitutional parlance, race is a suspect classification primarily because the dignity of being recognized as a person -a citizen -is itself a basic right, a "fundamental interest."
>
> Furthermore, the dignity of citizenship is fundamental in the same way that the right to vote is fundamental: it is instrumental in the attainment of a wide range of other goods in an -achievement-oriented society.[17]

These principles embody the value of respect for one's basic humanity, as well as the value of allowing each to participate as a member of the community. This is the philosophy that served as the basis for the constitutional right to vote as well as the Voting Rights Act.

The area of the law involving franchise rights demonstrates clearly the interplay between judicial decision, legislative action, and executive enforcement. The first major apportionment case was dismissed by the Supreme Court as involving an unjusticiable political question. justice Frankfurter strongly urged that the courts should not enter this "political thicket;' but enter it they did. During the years before the Voting Rights Act the Supreme Court upheld the right to vote by relying variously on the equal protection guarantees of the 14th Amendment, the right to vote under the 15th Amendment, and the command of Article 1, Section 2 that representatives be chosen "by the people of the several states" Congress, however, decided that a comprehensive attack on continuing voting discrimination was needed and so it passed the 1965 Voting Rights Act.

In the 1980 case of *City of Mobile v. Bolden*,[18] the Supreme Court determined that plaintiffs had to prove actual and intentional discrimination in order to recover under the Voting Rights Act. The impact of Bolden on the enforcement of one of our most precious constitutional guarantees was unmistakable. After *Bolden*, the number of voting dilution cases dropped sharply. As in the days prior to the passage of the Voting Rights Act, a plaintiff's chances of prevailing were minimal in all but the most flagrant cases of discrimination.

Congress disagreed with the Court's interpretation and so it undertook the amendment of the Voting Rights Act. The 1982 Amendments were especially critical in that they reflect Congressional intent that either a showing of discriminatory intent or discriminatory impact would meet the burden of proof. Since the Justice Department has an integral role in the enforcement of this Act, it is of some concern that Solicitor General Fried has consistently urged a narrow interpretation of the 1982 Amendments which were clearly intended to make effective the Voting Rights Act and grant to litigants the ability to sustain an achievable burden of proof. If we are to look out for the interests of the downtrodden we must pay particular attention to these and other legislative acts as well as the Executive's enforcement of them. For these two branches have the power to influence the fate of our constitutional rights as much as does the judiciary.

On September 17, 1987 we will celebrate the 200th anniversary of the United States Constitution. This is an accolade to those who wrote it. It is a tribute to their foresight in having written a document which could govern us in a world they could hardly have imagined their young country would become. For, as justice Brennan has said, the genius of the Constitution rests not in any static meaning it may 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. Had it been written to contain all the answers, the Constitution would only have contained answers which the brightest of 19th century men could think to ask.

The very fact that it speaks to broad principles of federalism from which we extrapolate to discover the answers to our modern questions is the key to its longevity. The Constitution is the essence, the framework, our guide. It is important to remember that the independence of the courts from improper political influence is a sacred principle. Judicial power must not be allowed to be abused by political manipulation.

The only way to forestall the potential erosion of individual liberties is for us of the Bar to remain vigilant. It is important that we be sensitive to these issues politically, and that we continue to aid in the battle against discrimination by bringing test cases in the lower courts. It is our duty as advocates to stand up and be counted as protectors of the rights of individuals. For, as justice Brennan has so eloquently said:

If we are to be as a shining city upon a hill, it will be because of our ceaseless pursuit of the Constitutional ideal of human dignity.[19]

FOOTNOTES

1 *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

2 *Marbury v. Madison*, 5 U.S. (I Cranch) 137 (1803).

3 Address by Justice William Brennan, Jr., at Georgetown University (Oct. 12, 1985) reprinted in Taylor, *Brennan Opposes Legal View Urged by Administration*, N.Y. Times (Oct. 12, 1985).

4 *" judicial Restraint" Sought by Reagan,* Chi. D. L. Bull. (Oct. 21, 198 5).

5 Brennan Address, *supra.*

6 Address by justice John Paul Stevens to Chicago Federal Bar Association (Oct. 23, 1985) as reported in *Justice Stevens says Meese Errs on Constitutional Views,* N.Y. Times (Oct. 26, 1985).

7 Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court justices,* 17 Suffolk U.L. Rev. 549 (1983).

8 Brennan Address, *supra*.

9 *United States v. Carolene Products Co*., 304 U.S. 144, n.4 (1938).

10 Address by Robert Bennet reprinted in *Attacks on judical Activism Called Simplistic*, Chi. D. L. Bull. (Oct. 23, 1985).

11 Address by justice Harry Blackmun to the Cosmos Club in Washington, D.C. as reported in *Blackmun Criticizes Top Court Colleagues*, Chi. D. L. Bull. (Sept. 20, 1984).

12 *Grove City College v. Bell,* 465 U.S. 555 (1984).

13 *Firefighters Local No. 1784 v. Stotts,* 52 U.S.L.W. 4767 (1984).

14 *Local No. 93, International Association of Firefighters v. City of Cleveland,* 753 F.2d 479 (6th Cir. 1985) *cert. granted* 54 U.S.L.W. 3573 (U.S. Mar. 4, 1986) (No. 84-1999).

15 *Local 28, Sheet Metal Workers v. EEOC*, 753 F. 2d 1172 (2d Cir. 1985) *cert. granted* 54 U.S.L.W. 3573 (U.S. Mar. 4, 1986) (No. 84-1656).

16 *Wygant v.Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984) *cert. granted* 53 U.S.L.W. 3739 (U.S. Apr. 4, 1985) (No. 84-1340).

17 Karst, *A Discrimination So Trivial,* 35 Ohio St. L.J. 546, 550-51.

18 *City of Mobile v. Bolden,* 446 U.S. 55 (1980).

19 Brennan Address, *supra.*

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