

Brennan

members of the High Court have expressed dissatisfaction with the reasoning and result of the *Boilermakers Case*, the strict separation doctrine it established has endured.

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Further Reading

Deryck Thomson, 'The Separation of Powers Doctrine in the Commonwealth Constitution: The *Boilermakers' Case*' (1958) 2 *Syd LR* 480

Brennan, (Francis) Gerard (b 22 May 1928; Justice 1981–95; Chief Justice 1995–98). In many respects, Brennan embodied the tension that is at the heart of the **judicial oath**. He believed that it was a primary function of law to protect minorities and the disadvantaged, and his decisions struggled to achieve this result. Yet Brennan was also a strong adherent of the **rule of law**, believing that a Justice was limited in his or her ability to engage in **judicial law-making**. The tension between these imperatives characterised Brennan's judgments throughout his time as a Justice of the High Court.

Brennan was born in Queensland, the grandson of an Irish immigrant, and the son of Frank Brennan (a Justice of the Supreme Court of Queensland). He grew up in what he later described as a 'loving' Catholic household, attending the Range Convent School, the Christian Brothers College in Rockhampton, and Downlands College in Toowoomba. Brennan excelled at school, passing his exams so early that he was deemed too young to go to university (he was only 16 at the time). After waiting a year, Brennan enrolled in a combined BA/LLB degree at University of Queensland. While at university, Brennan was active in student affairs, and was elected President of the National Union of Students in 1949.

Brennan began work as an associate to his father at the Supreme Court of Queensland. On his own admission, Brennan's first day in this position was not a resounding success. Misreading an indictment, he mistakenly accused the prosecutor ('a most upright man') of sexual assault. Fortunately, counsel for the accused leapt to his feet, announcing 'Your Honour, I appear for My Learned Friend ... We plead not guilty!'

After his father's death in 1949, he worked at the Australian National University and then as associate to Kenneth Townley, a newly appointed Justice of the Supreme Court of Queensland. Townley had recently been appointed to preside over the war crimes trials on Manus Island, New Guinea, and his work provided Brennan with an early insight into the complexities of **international law**.

Brennan was admitted to the Queensland Bar in 1951. His first reported case appears to have been a fairly humble matter involving letters of administration granted to a person outside the jurisdiction (*Re McKee* (1952)). Although modest, his early practice was diverse, consisting of matters ranging from committal proceedings to commercial disputes. In each of these matters, Brennan demonstrated his comprehensive knowledge of the law through his clear and lucid argument. His talent soon gained him respect, and he became one of the first Catholic barristers to cross the strong sectarian line that permeated the Brisbane Bar by receiving briefs from the Protestant end of town.

Brennan was appointed a QC in Queensland in 1965. He was later admitted in NSW, the Northern Territory, **Papua and New Guinea**, and Fiji. Notable cases in which he appeared included his 1969 representation of the Fijian Alliance Party in an arbitration matter before Lord Denning (concerning the Fijian sugar industry) and his 1972 prosecution in Rabaul of the murder of a District Commissioner. He was also one of the first advocates to argue a case for Aboriginal land rights, representing the Northern Land Council before the Woodward Royal Commission into Aboriginal Land Rights in the Northern Territory in 1974.

During his time at the Bar, Brennan played a leading role within the **legal profession**. He was elected President of the Bar Association of Queensland (1974–76), President of the Australian Bar Association (1975–76), and member of the Executive of the Law Council of Australia (1974–76). He also began to influence the development of Australian law through his position as a part-time member of the Australian Law Reform Commission (1975–77).

Despite these demanding positions, Brennan managed to be a dedicated father. In 1953, he married Dr Patricia O'Hara, with whom he had seven children (three sons and four daughters). His first child, Frank Brennan, born in 1954, would become a Jesuit Priest and achieve fame as an advocate for the rights of **Aboriginal peoples**.

One of Brennan's greatest achievements was the contribution he made to the development of Australian **administrative law**. In 1976, the Fraser government appointed him as the first President of the Administrative Appeals Tribunal. The Tribunal occupied a novel position at the time, straddling the divide between executive and **judicial power**. As the first President of the new institution, Brennan was in a unique position, able to develop the tribunal along lines consistent with either an administrative or judicial model. Brennan consciously adopted a judicial model, and, through his strong leadership, guided the tribunal through the difficult period of its establishment and early development. This, together with his work as the first President of the newly created Administrative Review Council (whose role was to advise the government on matters relating to administrative law), considerably strengthened the new administrative structures.

In 1979, Brennan retired from his position as President of the Tribunal to concentrate full-time on his duties as a judge of the **Federal Court**, to which he had been one of the original appointees in 1977. However, Brennan's service as a full-time member of the Federal Court was short-lived. In 1981, the Fraser government appointed him a Justice of the High Court (filling the vacancy created when **Barwick** retired and **Gibbs** became **Chief Justice**). Brennan had moved to **Canberra** shortly after his appointment as President of the Tribunal and remained there until his **retirement** from the High Court.

From his earliest days on the High Court, Brennan displayed characteristics that would stamp his **judicial style** for nearly two decades. Espousing a well-defined conception of a limited judicial role, Brennan strove for certainty in the exposition and application of legal principle. He was nevertheless willing to develop the law when he considered this to be necessary to achieve a just result consistent with the demands of modern society. As part of the majority in *Koowarta's Case* (1982) and the *Tasmanian Dam Case*

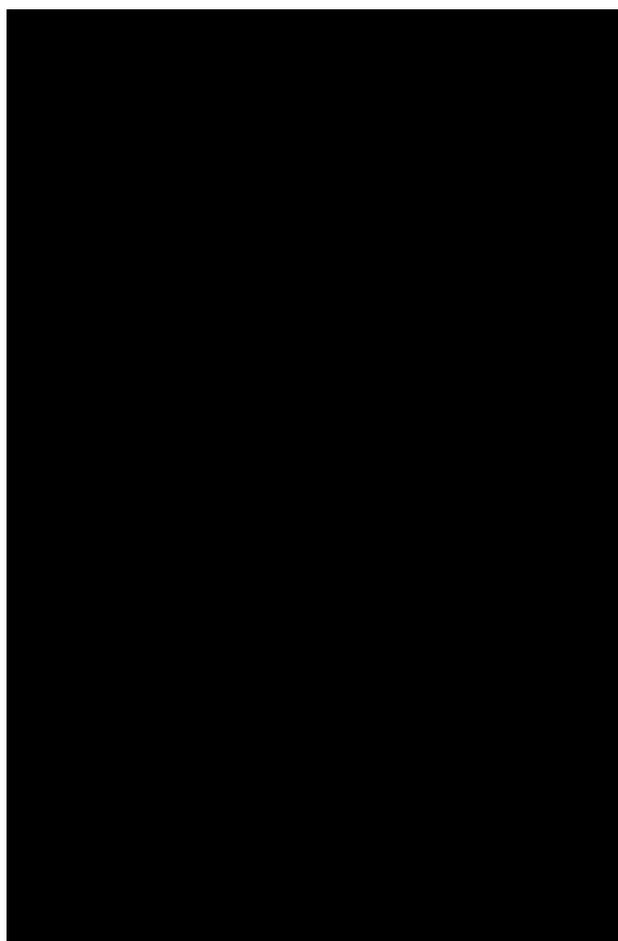
(1983), he gave wide scope to the **external affairs power**. In *Kioa v West* (1985), he expounded the importance of **natural justice** to the exercise of administrative power while emphasising its fundamental difference from judicial power. In *He Kaw Teh v The Queen* (1985), he carefully distilled a mass of conflicting case law into clearly expressed presumptions concerning the mental element of statutory offences.

Together with **Mason** and **Deane**, Brennan played a prominent role within the **Mason Court**. Yet his judicial method and his view of a limited role for the judiciary led him to frequent dissents. Unlike Mason and Deane, Brennan saw no place for social **policy** in the development of the law. He was prepared to embrace the notion of community **values** as a guide to judicial **decision making**, but only to a very limited extent. The fundamental difference between the role of the judiciary and the role of the parliament and the executive was to Brennan constantly to be borne in mind. Those values that could legitimately inform judicial decision making were confined to the 'relatively permanent values of the Australian community'. They were not the 'ephemeral opinions of the community' as they may exist from time to time.

Nowhere is the contrast in style better illustrated than in *Dietrich v The Queen* (1992), where Brennan in dissent argued against the power of a court to stay a criminal prosecution where an accused was indigent. While openly favouring the reform of **criminal procedure** to confer an entitlement to legal aid, Brennan vehemently rejected the ability of the Court to produce such a result through 'judicial legislation'. According to Brennan, the 'responsibility for keeping the **common law** consonant with contemporary values' did 'not mean that the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values'.

For Brennan, judicial method began with a thorough understanding of the existing case law. His judgments uniformly displayed great industry and attention to **history**. From the existing case law, Brennan sought to discern underlying values and principles. Those values and principles were weighed against the enduring values and principles of the Australian legal system as a whole. They were then applied to refine and where necessary reformulate the specific legal rules. Brennan saw that the courts could in this way legitimately develop the law to keep pace with contemporary social and **economic** conditions. However, for Brennan, the courts had no role in rejecting and replacing legal rules in the pursuit of social or economic ends. Nor could they bring about a change in the law simply to achieve tidiness or conceptual purity. **Overruling** was properly confined to those rare cases where specific legal rules had proved to be unworkable, or where to continue to apply them would perpetuate injustice.

In the formulation of the legal rules themselves, Brennan abhorred indeterminacy. He attempted wherever possible to pronounce the law in precise and even syllogistic terms. He drew upon and preferred to maintain traditional legal categorisations. These traits were evident in Brennan's sustained opposition to the doctrine of **proximity** as formulated by Deane. In place of proximity, Brennan favoured an 'incremental' development of the law of negligence by analogy



Gerard Brennan, Justice 1981–95; Chief Justice 1995–98

with existing categories of liability. Other striking examples of this approach were his insistence in dissent in *Australian Safeway Stores v Zaluzna* (1987) on preserving the separate categories of **occupiers' liability** for negligence, and in *Burnie Port Authority v General Jones* (1994) on preserving the rule in *Rylands v Fletcher* (1866 and 1868). In the same way, Brennan resisted the extension of discretionary judicial powers, believing that they 'tended to create a government of men rather than a government of laws'.

However, it was in **constitutional law** and administrative law that Brennan's considered and self-consciously restrained approach to the legitimate province of judicial decision making was most evident. In *A-G (NSW) v Quin* (1990), Brennan observed that the Court 'needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual'. He declared that the 'duty and **jurisdiction** of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'. The 'merits' of an administrative decision were for the repository of power alone. In *McGinty v WA* (1996), Brennan led the Court in rejecting a constitutional implication of electoral **equality**.

Brennan Court

'Implications', he said, 'are not devised by the judiciary; they exist in the text or structure of the Constitution and are revealed or uncovered by judicial exegesis'. The consequence was that no implication could be drawn from the Constitution that was not 'based on the actual terms of the Constitution or on its structure'.

To Brennan, the most important of the values and principles underlying the Australian legal system were the dignity of the individual and equality before the law. It was these that the institutional gulf separating the judiciary from the other branches of government was principally designed to protect. Indeed, Brennan saw the law as 'most needed when it stands against popular attitudes sometimes engendered by those with power and when it protects the unpopular against the clamour of the multitude'. In *Marion's Case* (1992), he stated that 'the law would fail in its function of protecting the weak' if it were to accept a policy of permitting sterilisation of the intellectually disabled simply to avoid the imposition of burdens on others.

This overarching concern for the dignity of the individual and for equality before the law lay at the heart of the most significant of Brennan's judgments and also the most controversial. In *Mabo* (1992), in a judgment that commanded the assent of a majority of the Court, Brennan rejected the common law doctrine of *terra nullius* as offensive to 'the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system'. His careful formulation of a common law doctrine of *native title* involved tracing a path linking medieval *land law* with concepts of *sovereignty* that attended the age of European conquest. The resultant doctrine was deliberately and openly crafted to achieve a result that reversed a strongly perceived yet deep-rooted injustice within the Australian legal system without fracturing 'the skeleton of principle that gives the body of our law its shape and internal consistency'.

The measure of Brennan's restraint as a Justice can be seen by contrasting the result in *Mabo* with his judgment in *Wik* (1996), where he joined the minority in finding that pastoral leases extinguished native title. While acknowledging that the common law operated to produce a 'significant moral shortcoming', Brennan nonetheless considered that it was not open to him to alter the law. Rather, the shortcoming, he believed, should have been rectified by legislation.

Following the retirement of Mason in 1995, Brennan was appointed Chief Justice by the Keating government. The appointment was well received by the legal profession, and it was widely expected that under Brennan's leadership, the Court would consolidate rather than further develop the various directions that it had undertaken under the leadership of Mason. These predictions proved well-founded—as in *Lange v ABC* (1997), where the Court unanimously accepted Brennan's more limited formulation of the implied freedom of *political communication* (see *Free Speech Cases* (1992); *Implied constitutional rights*).

Consistently with his strong belief in a limited judicial role, as Chief Justice Brennan made few public statements other than on formal legal occasions. (Brennan's executive associate once joked that his standard reply to journalists was: 'No comment ... and that's off the record'.) This was

despite the sustained criticism from politicians and the media that attended the Court in the aftermath of *Mabo*. Brennan saw it as incumbent on the Commonwealth *Attorney-General* to defend the Court from this criticism—a view not shared by Daryl Williams, who became Attorney-General in the Howard government.

The criticism came to a head in early 1997, when Tim Fischer, then Deputy Prime Minister and leader of the National Party, publicly criticised the Court for delay in publishing its judgment in *Wik*. Brennan's response typified his quiet but forceful leadership of the Court. Shortly after the judgment was published, he wrote a private letter to Fischer (the letter was later published in a national daily newspaper) defending the Court. Brennan received an unreserved apology from Fischer shortly thereafter.

Brennan retired as Chief Justice in 1998. Although he took up a number of academic positions, he has generally refrained from public comment on contemporary legal issues.

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Further Reading

Gerard Brennan, 'Limits on the Use of Judges' (1978) 9 *FL Rev* 1
Gerard Brennan, 'Judging the Judges' (1979) 53 *ALJ* 767
Gerard Brennan, 'The Christian Lawyer' (1992) 66 *ALJ* 259
Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Mon LR* 213

Brennan Court (21 April 1995–21 May 1998). It was recognised that the Brennan Court would be short lived. What was not expected, however, was that in addition to the new Justice, *Gummow*, appointed in consequence of *Mason's* retirement, three further appointments would be made during the life of the Brennan Court. They were brought about by the early retirement of *Deane* (to become Governor-General), *Dawson* and *Toohey*. They were replaced by *Kirby* (appointed February 1996), *Hayne* (September 1997) and *Callinan* (February 1998). The continuity of membership implied in the term 'Brennan Court' was not present.

The changes caused administrative difficulties: reserved judgments in cases involving a departing Justice had to be delivered before the departure; scheduling of hearings had to take account of impending departures, including in the end that of *Brennan*; and six Justices (rather than seven) sat on some important constitutional cases. There was also no very long period where members of the Court became accustomed to sitting with each other, and thus used to each other's idiosyncrasies. Tensions among the members of the Brennan Court were sometimes unusually obvious.

Controversies arising outside the Court itself were also a distraction. A public difference of views emerged between Brennan and the Commonwealth *Attorney-General*, Daryl Williams, over the role of an Attorney-General in defending courts from attacks and ill-informed criticism. Williams' opinion was that the time had passed when such a defence could be expected; Brennan was an emphatic supporter of the traditional view. Deputy Prime Minister Tim Fischer also made a public attack—later withdrawn—on the Court for supposed delay in delivering judgment in *Wik* (1996). Remarks made in the *Federal Court* concerning evidence