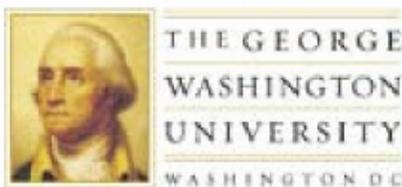


# The Burger Court Opinion Writing Database

## *Clements v. Fashing*

457 U.S. 957 (1982)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

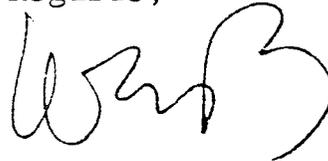
May 5, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

I join your dissenting opinion in this case.  
It now appears that there are four votes for your  
result which makes it a majority.

Regards,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

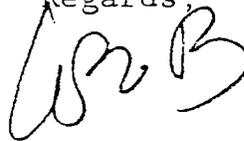
May 5, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

It appears that Lewis, John, Sandra and I support Bill Rehnquist's result in this case and accordingly I reassign the opinion to him.

Regards,



Justice Brennan

Copies to the Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 7, 1982

Re: 80-1290 - Clements v. Fashing

Dear Bill:

I join.

Regards,

Handwritten signature of William Rehnquist, consisting of the letters 'WRB' in a cursive, stylized font.

Justice Rehnquist

Copies to the Conference

pp 2, 3, 10, 14

V

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Brennan  
Justice Stevens  
Justice O'Connor  
Justice Scalia  
Justice Souter  
Justice Ginsburg  
Justice Breyer

Approved: \_\_\_\_\_  
Date: MAR 28 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

**WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS, v.  
JOHN L. FASHING, ET AL.**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

[March —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

Two sections of the Texas Constitution restrict holders of specified elective offices from campaigning for, or serving in, other elective offices. The question presented on this appeal is whether these prohibitions violate the limitations the First Amendment and the Equal Protection Clause of the Fourteenth Amendment impose upon a State's power to restrict candidacy for public office.

I

The two challenged provisions of the Texas Constitution are Art. 3, § 19 and Art. 16, § 65. The former provides:

"No judge of any court, Secretary of State, Attorney General, Clerk of any court of record, or any person holding a lucrative office under the United States, or this state, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

Article 16, § 65 applies generally to county and other local offices. See n. 13, *infra*. Only the constitutionality of the last paragraph is at issue. This paragraph states:

"[I]f any of the officers named herein shall announce

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 8, 1982

RE: No. 80-1290 Clements v. Fashing

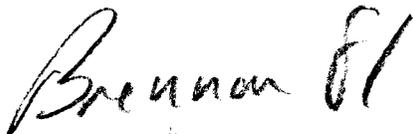
Dear Sandra:

In light of your concern that the judgment in this case not rest upon the First Amendment but upon the Equal Protection Clause, I have revised the opinion to accommodate that view. Don't hesitate to let me know if this does not meet with your approval.

Sincerely,



Justice O'Connor



- Opinion revised to rest judgment solely on equal protection grounds. Pages 5-12 substantially revised.
- Other non-sylistic changes on pages 1, 3, 4, 16, 17.

To: The Chief Justice  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: APR 8 1982

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
 STATE OF TEXAS ET AL., APPELLANTS, *v.*  
 JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
 FOR THE FIFTH CIRCUIT

[April —, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

Two sections of the Texas Constitution restrict holders of specified elective offices from campaigning for, or serving in, other elective offices. The question presented on this appeal is whether these prohibitions violate the Equal Protection Clause of the Fourteenth Amendment.

I

The two challenged provisions of the Texas Constitution are Art. 3, § 19 and Art. 16, § 65. The former provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.”

Article 16, § 65 is applicable to certain county and local offices. See n. 13, *infra*. Only the constitutionality of the last paragraph is at issue. This paragraph states:

“[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office

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To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: Jun 10 1982

Recirculated: \_\_\_\_\_

1st Draft

CLEMENTS v. FASHING--NO. 80-1290

JUSTICE BRENNAN, dissenting.

In rejecting appellees' equal protection challenge on the basis that the State is proceeding "one step at a time," the Court today gives new meaning to the term, "legal fiction." The Court's summary dismissal of appellees' First Amendment claim vastly oversimplifies the delicate accommodations that must be made between the interests of the State as employer and the constitutionally protected rights of state employees. I dissent.

I

Putting to one side the question of the proper level of equal protection scrutiny to be applied to these restrictions on candidacy for public office,<sup>1</sup> it is clear that no genuine justifica-

---

<sup>1</sup>It is worth noting, however, that the Court's analysis of the level of scrutiny to be applied to these restrictions gives too little consideration to the impact of our prior cases. Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters. See, e. g.,

Footnote continued on next page.

STANDARD FORM NO. 64  
SEE PAGE: 1, 7

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: 6/10

Recirculated: 6/14

1st PRINTED DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and  
JUSTICE BLACKMUN join, dissenting.

In rejecting appellees' equal protection challenge on the basis that the State is proceeding "one step at a time," the Court today gives new meaning to the term "legal fiction." The Court's summary dismissal of appellees' First Amendment claim vastly oversimplifies the delicate accommodations that must be made between the interests of the State as employer and the constitutionally protected rights of state employees. I dissent.

## I

Putting to one side the question of the proper level of equal protection scrutiny to be applied to these restrictions on candidacy for public office,<sup>1</sup> I find it clear that no genuine justifi-

<sup>1</sup> It is worth noting, however, that the Court's analysis of the level of scrutiny to be applied to these restrictions gives too little consideration to the impact of our prior cases. Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters. See, e. g., *Illinois Elections Bd. v. Socialist Workers Party*, 440 U. S. 173, 184 (1979); *Lubin v. Panish*, 415 U. S. 709, 716 (1974); *American Party of Texas v. White*, 415 U. S. 767 (1974); *Bullock v. Carter*, 405 U. S. 134, 142-143 (1972); *Williams v. Rhodes*, 393 U. S. 23, 31 (1968). With this consideration in mind, we have applied strict scrutiny in reviewing most restrictions on ballot access; thus we have required the State to justify any discrimination with respect to candidacy with a showing that the differen-

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Stylistic Changes,  
Court changed to plurality in I,  
pp. 1, 4

To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Brennan

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_ JUN 17 1982

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, and with whom JUSTICE WHITE joins as to Part I, dissenting.

In rejecting appellees' equal protection challenge on the basis that the State is proceeding "one step at a time," the plurality today gives new meaning to the term "legal fiction."<sup>1</sup> The Court's summary dismissal of appellees' First Amendment claim vastly oversimplifies the delicate accommodations that must be made between the interests of the State as employer and the constitutionally protected rights of state employees. I dissent.

I

Putting to one side the question of the proper level of equal protection scrutiny to be applied to these restrictions on candidacy for public office,<sup>2</sup> I find it clear that no genuine justifi-

<sup>1</sup> I note that a majority of the Court today rejects the plurality's mode of equal protection analysis. See *ante*, at 4 (STEVENS, J., concurring).

<sup>2</sup> It is worth noting, however, that the plurality's analysis of the level of scrutiny to be applied to these restrictions gives too little consideration to the impact of our prior cases. Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters. See, *e. g.*, *Illinois Elections Bd. v. Socialist Workers Party*, 440 U. S. 173, 184 (1979); *Lubin v. Panish*, 415 U. S. 709, 716 (1974); *American Party of Texas v. White*, 415 U. S. 767 (1974); *Bullock v. Carter*, 405 U. S. 134, 142-143 (1972); *Williams v. Rhodes*, 393 U. S. 23, 31 (1968). With this

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

March 24, 1982

Re: 80-1290 - Clements v. Fashing

Dear Bill,

I voted to affirm, but I shall await the  
dissent.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 14, 1982

Re: 80-1290 - Clements v. Fashing

Dear Bill,

Please join me in Part I of your  
dissenting opinion.

Sincerely yours,



Justice Brennan

Copies to the Conference

cpm

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 25, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

Please join me.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

April 8, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

I am still with you.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 11, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

Please join me in your dissent.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 12, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

Please join me in your recirculation of April 8.

Sincerely,



Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 11, 1982

Re: No. 80-1290 - Clements v. Fashing

Dear Bill:

Please join me in your dissent.

Sincerely,



Justice Brennan

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 24, 1982

80-1290 Clements v. Flashing

Dear Bill:

I will await the dissent.

Sincerely,



Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 23, 1982

80-1290 Clements v. Fashing

Dear Bill:

Please join me in your dissent.

Sincerely,



Justice Rehnquist  
Copies to the Conference

LFP/vde

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 18, 1982

80-1290 Clements v. Fashing

Dear Bill:

Please join me.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

May 28, 1982

80-1290 Clements v. Fashing

Dear Bill:

Although I have joined your opinion, I would appreciate your considering some revision in the sentence on page 8 to the effect that "only invidious discrimination" offends the Equal Protection Clause.

The language often was used by Potter to avoid applying "strict" or "heightened" scrutiny. I have used language - and I think you have also - that is not entirely synonymous with "invidious". In Schweiker v. Wilson, 101 St. Ct. 1074 (1981) I argued that a statute was invalid because it was wholly irrational.

Perhaps you could substitute for "invidious" the words "arbitrary and irrational".

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST



February 11, 1982

Re: No. 80-1290 Clements v. Fashing

Dear Chief:

I will be happy to undertake the dissent in this case.

Sincerely,

*WIN*

The Chief Justice

cc: Justice Powell  
Justice Stevens

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

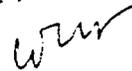
March 25, 1982

Re: 80-1290 Clements v. Fashing

Dear Bill:

In due course I will circulate a dissent in this case.

Sincerely,



Justice Brennan

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

pp. 2, 8, 11

From: **Justice Rehnquist**

Circulated: APR 21 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

**WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS ET AL., APPELLANTS, v.  
JOHN L. FASHING ET AL.**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

[April —, 1982]

JUSTICE REHNQUIST, dissenting

The Court today invokes the Equal Protection Clause to invalidate two provisions of the Texas Constitution that limit a prospective candidate's access to the ballot by prescribing qualifications for public office. The first provision, Art. III, § 19,<sup>1</sup> declares that state, local, and federal officeholders are ineligible for the Texas Legislature during their elected or appointed term. The second provision, Art. XVI, § 65,<sup>2</sup> is commonly referred to as a "resign-to-run" rule. A holder of the elected offices enumerated in that provision automatically resigns his position if he becomes a candidate for another elective office unless the unexpired portion of his term does

---

<sup>1</sup>"No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this state, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature."

<sup>2</sup>"[I]f any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in a General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held. . . ."

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAY 17 1982

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

**WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS v.  
JOHN L. FASHING ET AL.**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

[May —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

I

Art. III, § 19 of the Texas Constitution provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.”

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee v. Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the Legislature to which he seeks election. *Ibid.* In other words, § 19 requires an office-

P 2

P. 8

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

Recirculated: MAY 28 1982

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

I

Art. III, § 19 of the Texas Constitution provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.”

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee v. Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the Legislature to which he seeks election. *Ibid.* In other words, § 19 requires an office-

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: **Justice Rehnquist**

Circulated: \_\_\_\_\_

JUN 2 1982

Recirculated: \_\_\_\_\_

STYLISTIC CHANGES THROUGHOUT

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

### I

Art. III, § 19 of the Texas Constitution provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.”

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee v. Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the Legislature to which he seeks election. *Ibid.* In other words, § 19 requires an office-

pp. 10-11

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: June 12, 1982

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

I

Art. III, § 19 of the Texas Constitution provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.”

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee v. Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is ineffective to avoid § 19 if the officeholder's current term of office overlaps the term of the Legislature to which he seeks election. *Ibid.* In other words, § 19 requires an office-

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pp. 1, 8

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: JUN 21 1982

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[June —, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court with respect to Parts I, II, and V, and delivered an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE O'CONNOR joined.

Appellees in this case challenge two provisions of the Texas Constitution that limit a public official's ability to become a candidate for another public office. The primary question in this appeal is whether these provisions violate the Equal Protection Clause of the Fourteenth Amendment.

I

Art. III, § 19 of the Texas Constitution provides:

“No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible for the Legislature.”

Section 19 renders an officeholder ineligible for the Texas Legislature if his current term of office will not expire until after the legislative term to which he aspires begins. *Lee v. Daniels*, 377 S.W. 2d 618, 619 (Tex. 1964). Resignation is

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

March 26, 1982

Re: 80-1290 - Clements v. Fashing

Dear Bill:

Having read your opinion with interest and admiration, I remain unpersuaded that a State may not create more attractive terms of office for a Supreme Court Justice than for an Inspector of Hides and Animals--even in Texas. I shall therefore await the dissent.

Respectfully,



Justice Brennan

Copies to the Conference

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

30-1290 - Clements v. Fashing

From: Justice Stevens

Circulated: APR 22 '82

JUSTICE STEVENS, dissenting.

Recirculated: \_\_\_\_\_

While I agree with most of what JUSTICE REHNQUIST has written in dissent, my disagreement with the Court is even more basic than his.

The Equal Protection Clause prohibits irrational discrimination between similarly situated persons. It requires that certain persons be treated equally.<sup>1</sup> It does not require that officeholders be treated alike, or provide that a State has a duty to make the emoluments of different offices the same. As far as the Federal Constitution is concerned, a State may decide to pay a justice of the peace a higher salary than a Supreme Court justice, require one to work longer hours or to take shorter vacations than the other, or even--I believe--provide that some offices be filled on a part time basis and that others be filled by persons who will not seek any office after they have fulfilled their duties in the first.

---

<sup>1</sup>In relevant part, § 1 of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

*Complete Revision*

*2<sup>nd</sup> DRAFT*

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

80-1290 - Clements v. Fashing

From: Justice Stevens

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JUSTICE STEVENS, dissenting.

In cases presenting issues under the Equal Protection Clause, the Court often plunges directly into a discussion of the "level of scrutiny" that will be used to review state action that affects different classes of persons differently. Unfortunately that analysis may do more to obfuscate than to clarify the inquiry. This case suggests that a better starting point may be a careful identification of the character of the federal interest in equality that is implicated by the State's discriminatory classification. In my opinion, the disparate treatment in this case is not inconsistent with any federal interest that is protected by the Equal Protection Clause. With respect to the state action at issue, there is no federal requirement that the different classes be treated as though they were the same.

It is first helpful to put to one side the claim that the burdens imposed on certain Texas officeholders are inconsistent with the First Amendment. I am satisfied that the State's interest in having its officeholders faithfully perform the

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

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*Printed*  
1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS ET AL., APPELLANTS, v.  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE STEVENS, dissenting.

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It is first helpful to put to one side the claim that the burdens imposed on certain Texas officeholders are inconsistent with the First Amendment. I am satisfied that the State's interest in having its officeholders faithfully perform the public responsibilities they have voluntarily undertaken is adequate to justify the restrictions placed on their ability to run for other offices. Nor is the First Amendment violated by the fact that the restrictions do not apply equally to all of-

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
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1st DRAFT

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No. 80-1290

WILLIAM P. CLEMENTS, JR., GOVERNOR OF THE  
STATE OF TEXAS, ET AL., APPELLANTS, *v.*  
JOHN L. FASHING ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

[May —, 1982]

JUSTICE STEVENS, concurring in part and concurring in  
the judgment.

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p. 4

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 80-1290

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STATE OF TEXAS, ET AL., APPELLANTS, v.  
JOHN L. FASHING ET AL.**

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 31, 1982

No. 80-1290 Clements v. Fashing

Dear Bill,

At Conference I voted to affirm the judgment below. I have some concern, however, about placing so much reliance on the First Amendment claims. I will wait for the additional writing before deciding whether to join your draft.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 4, 1982

Re: 80-1290 Clements v. Fashing

Dear Bill,

After considerable "soul searching" on this case, and after consideration of the various alternatives presented in your opinion, and in Bill Rehnquist's and John's dissents, I have decided that it is not an appropriate case to apply more than a rational basis test. Accordingly, I am joining Bill Rehnquist's dissent. Thank you for your patience.

Sincerely,



Justice Brennan

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 4, 1982

Re: 80-1290 Clements v. Fashing

Dear Bill,

Please join me in your dissent.

Sincerely,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

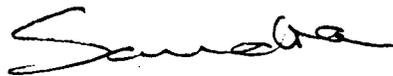
June 2, 1982

No. 80-1290 Clements v. Fashing

Dear Bill,

Please join me.

Sincerely,



Justice Rehnquist

Copies to the Conference