

# The Burger Court Opinion Writing Database

## *Papasan v. Allain*

478 U.S. 265 (1986)

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

June 24, 1986

Re: 85-499 Papasan v. Allain

Dear Lewis,

Please join me in your dissent.

Regards,

A handwritten signature in black ink, appearing to be 'W. Powell', written in a cursive style. The signature is positioned below the typed word 'Regards,'.

Justice Powell

Copies to Conference

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

From: **Justice Brennan**

Circulated: JUN 11 1986

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

*WLF*  
*Please join me in your opinion*  
*concurring, etc*  
*WJ*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, concurring in part, concurring in the judgment in part, and dissenting in part.

Although I join Parts I and III of the Court's opinion and agree with the result in Part II-C, I cannot join Parts II-A and -B for the reasons stated in my dissent in *Atascadero State Hospital v. Scanlon*, — U. S. —, — (1985) (BRENNAN, J., dissenting).

The Court makes a valiant effort to set forth the principles that determine whether a particular claim is or is not barred by the Eleventh Amendment. See *ante*, at 9-12. To my mind, the Court's restatement simply underscores the implausibility of the entire venture, for it clearly demonstrates that the Court's Eleventh Amendment jurisprudence consists of little more than a number of ad hoc and unmanageable rules bearing little or no relation to one another or to any coherent framework; indeed, the Court's best efforts to impose order on the cases in this area has produced only the conclusion that "[f]or Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct," *ante*, at 12. This hodgepodge produces no positive benefits to society. Its only effect is to impair or prevent effective enforcement of federal law. It is highly unlikely that, having created a system in which federal law was to be supreme, the Framers of the Constitution or of the Eleventh

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 16 1986

STYLISTIC CHANGES THROUGHOUT.  
 SEE PAGES: /

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part, concurring in the judgment in part, and dissenting in part.

Although I join Parts I and III of the Court's opinion and agree with the result in Part II-C, I cannot join Parts II-A and II-B for the reasons stated in my dissent in *Atascadero State Hospital v. Scanlon*, 473 U. S. —, — (1985) (BRENNAN, J., dissenting).

The Court makes a valiant effort to set forth the principles that determine whether a particular claim is or is not barred by the Eleventh Amendment. See *ante*, at 9-12. To my mind, the Court's restatement simply underscores the implausibility of the entire venture, for it clearly demonstrates that the Court's Eleventh Amendment jurisprudence consists of little more than a number of ad hoc and unmanageable rules bearing little or no relation to one another or to any coherent framework; indeed, the Court's best efforts to impose order on the cases in this area has produced only the conclusion that "[f]or Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct," *ante*, at 12. This hodgepodge produces no positive benefits to society. Its only effect is to impair or prevent effective enforcement of federal law. It is highly unlikely that, having created a system in which federal law was to be

Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

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Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Brennan**

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

**JUN 24 1986**

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

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in part, concurring in the judgment in part, and dissenting in part.

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Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

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Recirculated: **JUN 27 1986**

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in part, concurring in the judgment in part, and dissenting in part.

Although I join Parts I and III of the Court's opinion and agree with the result in Part II-C, I do not join Parts II-A and II-B for the reasons stated in my dissent in *Atascadero State Hospital v. Scanlon*, 473 U. S. —, — (1985) (BRENNAN, J., dissenting).

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

From: Justice White

Circulated: MAY 30 1986

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS v. WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

*WJB*  
*11/27/86*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we consider the claims of school officials and schoolchildren in 23 Northern Mississippi counties that they are being unlawfully denied the economic benefits of public school lands granted by the United States to the State of Mississippi well over 100 years ago. Specifically, we must determine to what extent these claims are barred by the Eleventh Amendment and, with respect to those claims that are not barred, if any, whether the complaint is sufficient to withstand a motion to dismiss for failure to state a claim.

I

The history of public school lands in the United States stretches back over 200 years.<sup>1</sup> Even before the ratification of the Constitution, the Congress of the Confederation initi-

<sup>1</sup> Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record, such as documentation of the history of the Mississippi and other school lands grants. The historical facts recited here comprise in large part the factual allegations of the complaint and are not disputed by the parties; the parties disagree only on the legal significance of these facts.

Justice Brennan  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice White**

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

Recirculated: JUN 24 1986

- pp. 20-22 and stylistic -

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

From: **Justice White**

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

Recirculated: **JUN 25 1986**

**STYLISTIC CHANGES THROUGHOUT.  
 SEE PAGES:**

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 11, 1986

Re: No. 85-499-Papasan v. Allain

Dear Bill:

Please join me in your opinion concurring in part,  
concurring in the judgment in part, and dissenting in  
part.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 16, 1986

Re: No. 85-499, Papasan v. Mississippi

Dear Byron:

For now, I shall wait to see what Lewis has to say  
in his dissent.

Sincerely,



Justice White

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 26, 1986

Re: No. 85-499, Papasan v. Allain

Dear Bill:

Although I, too, am writing separately, would you please join me in your separate writing in this case.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 26, 1986

Dear Bill:

I think No. 85-499, Papasan v. Mississippi, should not be scheduled for Monday. I indicated this morning that I was writing in this case. I may not get my breathless prose out in time. Perhaps one of the Tuesday cases could be moved to Monday.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath it.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

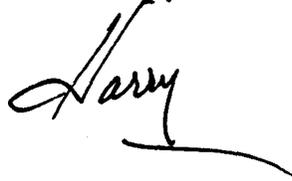
June 26, 1986

Re: No. 85-499, Papasan v. Allain

Dear Byron:

I am writing separately in this case, but I am also joining Bill Brennan. This means that I join parts I and III of your opinion and agree with the result in part IIC.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a long horizontal flourish extending to the right.

Justice White

cc: The Conference

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

From: **Justice Blackmun**

Circulated: JUN 27 1986

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June —, 1986]

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today holds that petitioners' breach of trust claims are barred by the Eleventh Amendment. I cannot agree. Petitioners claim that Mississippi breached legal obligations placed on it by federal law. I agree with JUSTICE BRENNAN that the Eleventh Amendment was never intended to bar such suits. *Ante*, at 1-2 (BRENNAN, J., concurring in part, concurring in the judgment in part, and dissenting in part). But even if the Eleventh Amendment normally would bar suits against a State by its citizens, I believe that when a State willingly accepts a substantial benefit from the Federal Government, it waives its immunity under the Eleventh Amendment and consents to suit by the intended beneficiaries of that federal assistance. See, *e. g.*, *Green v. Mansour*, — U. S. —, — (1985) (BLACKMUN, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U. S. — (1985) (BLACKMUN, J., dissenting); *Edelman v. Jordan*, 415 U. S. 651, 688-696 (1974) (MARSHALL, J., dissenting).

The very Enabling Act that gave Mississippi the benefits of statehood, including the protections afforded by the Eleventh Amendment, expressly incorporated the Northwest Ordinance of 1789, which required the reservation of sixteenth-

May 7, 1986

84-499 Papasan v. Mississippi

Dear Chief:

I hope that Byron writes this "fuzzy" case in a way that we can join. If not, I will be glad to try my hand at a dissent.

In my view it is a "non-case", and my first vote was to DIG.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 2, 1986

85-499 Papasan v. Mississippi

Dear Byron:

As I was in dissent in this case, in due time I  
will circulate a dissenting opinion.

Sincerely,

*Lewis*

Justice White

lfp/ss

cc: The Conference

06/20

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

From: Justice Powell

Circulated: 6/20/86

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

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 85-499

**B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS v. WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

[June —, 1986]

JUSTICE POWELL, dissenting.

The public record refutes petitioners' equal protection claims. Statistics from the State Board of Education show not only that the allegedly deprived Chickasaw Cession districts in fact fall throughout a ranking of expenditures per pupil, but also that funds from Sixteenth Section lands, far from being "a critical element of school funding in Mississippi," Petition 4, account for less than one-and-a-half percent of overall receipts. I therefore find no basis for the belief that petitioners could prove that students in Chickasaw Cession districts have been denied a minimally adequate education and I do not believe that petitioners have asserted an equal protection claim that can survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6).<sup>1</sup>

I

A brief procedural history is helpful in putting this litigation in perspective. Petitioners include a group of county school boards, superintendents of education, and individual school children, all residing in the Chickasaw Cession coun-

<sup>1</sup> I agree with the Court that the bulk of petitioners' claims are barred by the Eleventh Amendment. I also agree that a continuing disparity in the distribution of State funds would constitute a violation of equal protection and would not be barred by the Eleventh Amendment.

06/27

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

From: Justice Powell

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

Recirculated: June 27

2d  
~~3d~~ DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

The public record refutes petitioners' equal protection claims that the disparities in funding from various school lands detrimentally affects students and schools in school districts within the Chickasaw Cession. Statistics from Mississippi's State Department of Education show the statewide ranking of school districts in terms of expenditures per pupil. In this ranking, the Chickasaw Cession districts are scattered widely among the State's 154 school districts. Moreover, far from being a "critical element of school funding in Mississippi," as alleged by petitioners, the Sixteenth Section lands account for only 1½% of overall funds provided for schools.<sup>1</sup> I therefore find no basis for the belief that petitioners could prove that students in Chickasaw Cession districts have been detrimentally affected by this differential, and I do not believe that petitioners have asserted an equal

<sup>1</sup> Mississippi State Department of Education, Annual Report, 1984-1985 (1986). Tables A and B, *infra*, are taken from this Report, pp. 144-146 and p. 48, respectively.

Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: Justice Powell

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

Recirculated: June 30

Changes marked  
 pp 1, 3, 4, 5, 7

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 85-499

B. H. PAPASAN, SUPERINTENDENT OF EDUCATION, ET AL., PETITIONERS *v.* WILLIAM A. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1986]

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 24, 1986

Re: 85-499 - Papasan v. Allain

Dear Lewis:

Please join me in your dissent.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 20, 1986

Re: 85-499 - Papasan v. Allain

Dear Bill:

Please join me in your separate writing in this case.

Respectfully,



Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

June 20, 1986

Re: 85-499 - Papasan v. Allain

Dear Byron:

Please join me in Parts I, and III of your opinion. Frankly, I could also join Part II(C), but since I am joining what Bill Brennan has written, it would probably just complicate the lineup if I did that.

Respectfully,



Justice White

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 30, 1986

No. 85-499 Papasan v. Allain

Dear Byron,

Please join me.

Sincerely,

Justice White

Copies to the Conference