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JUSTICE BRENNAN: LEGACY OF A CHAMPION

*Dawn Johnsen**

JUSTICE BRENNAN: LIBERAL CHAMPION. By *Seth Stern* and *Stephen Wermiel*. Boston and New York: Houghton Mifflin Harcourt. 2010. Pp. xiv, 547. $35.

INTRODUCTION

In June 2012, the *New York Times* prominently reported that three-quarters of Americans believe that U.S. Supreme Court decisions sometimes are influenced by the Justices' personal or political views, while only 13% view their rulings as based solely on legal analysis without regard to such views.[1] At one level, this should be unsurprising, a "dog bites man" story. Who sits on the Supreme Court—each Justice's personal as well as legal views—of course affects the Court's rulings. The *Times*, however, paired this poll result with the finding that the Court's approval rating had fallen to 44%, from 66% in the 1980s,[2] thereby suggesting that the Court's reputation may have fallen because the public perceived those influences as improper. It singled out the Court's five-to-four decisions in *Bush v. Gore*[3] and *Citizens United*,[4] as well as the debate over the constitutionality of the Patient Protection and Affordable Care Act,[5] which the Court had not yet decided at the time of the poll.[6]

The Court's reputation may well have diminished because of the perception of improper influences, for example in the Court's willingness in *Bush v. Gore* in effect to resolve a presidential election along ideological lines and contrary to widespread expectations that the Court would decline to play that role. Another likely factor behind the fall is the public's substantive

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1. Adam Liptak & Allison Kopicki, *Approval Rating for Justices Hits Just 44% in Poll*, N.Y. TIMES, June 8, 2012, at A1.

2. *Id.*

3. 531 U.S. 98 (2000) (per curiam).

4. Citizens United v. FEC, 130 S. Ct. 876 (2010).

5. Pub. L. No. 111-148, 124 Stat. 119 (2010).

6. Liptak & Kopicki, *supra* note 1. The *Times* story noted that other possible explanations for the decreased approval rate included the lowered esteem in which Americans generally held the government, with approval ratings for Congress at 15% and the President at 47%. *Id.* After the Court upheld Congress's authority to enact the health care law a few weeks later (also by a five-to-four vote), *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), the Court's approval rating declined further to 41%. Adam Liptak & Allison Kopicki, *Public's Opinion of Supreme Court Drops After Health Care Law Decision*, N.Y. TIMES, July 18, 2012, at A21.

disagreement with the Court's rulings and the values they reflect, which seems especially likely in the case of the extraordinarily unpopular *Citizens United* decision.[7]

The *Times*' presentation of the poll results, however, risks perpetuating the myth that the content of the Court's rulings should be—and can be—wholly unrelated to the identities of the Justices sitting on the Court, and that the ideal should be judicial interpretations reached entirely without regard to the Justices' personal views and values.[8] The poll's phrasing is unfortunate: although "personal or political views"[9] evokes negative associations with such improper factors as personal or partisan gain or prejudice, the scope of the term is not so limited, especially in the context of the poll's two options. It also includes views and values that properly and inevitably inform legal analyses, particularly on the close constitutional questions most familiar to the American public: the meaning of broad, undefined guarantees such as "liberty," "equal protection," "cruel and unusual punishment," and "freedom of speech."[10]

During the 1980s, when the Court's approval rating was relatively high, commentators from both ends of the ideological spectrum remarked on the importance of Justices' values and views, and bemoaned the public's utter lack of attention to the Court and judicial appointments. President Ronald Reagan's Department of Justice prefaced an extensive analysis of the momentous issues at stake for the Court and the Constitution with a call for attention to the "critical" yet "often overlooked" "values and philosophies" of federal judges.[11] Professor Laurence Tribe similarly introduced a historical analysis of the Court's vital role by describing Justices' "powerful, if often unseen and rarely understood, impact on nearly every aspect of our lives."[12] Both were correct: because under our Constitution, "We, the People" govern, public appreciation of the actual influences on judicial

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7. Only 17% of Americans agreed with the Court's decision. *Public Approval of Major Court Decisions*, N.Y. TIMES (July 18, 2012), http://www.nytimes.com/interactive/2012/07/19/us/public-approval-of-major-court-decisions.html (citing a poll taken in 2010 after the decision's release).

8. In editorializing about the Roberts Court, the *New York Times* implied that personal or political views should not influence Justices: "It is no wonder that the court's standing in public opinion polls is at its lowest level in a quarter of a century, with just one in eight Americans believing that the Justices decide cases based only on legal analysis." Editorial, *The Radical Supreme Court*, N.Y. TIMES, July 1, 2012, at SR10.

9. Results of the New York Times/CBS Poll: May 31–June 3, 2012, N.Y. TIMES, 4 (June 7, 2012).

10. The Constitution of course is clear on some questions, and the Supreme Court often rules with a strong majority or even unanimously, but such questions do not tend to make the news or constitutional law casebooks.

11. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, at v (1988) [hereinafter CONSTITUTION IN 2000]; *see* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 387–89 (2003) (discussing CONSTITUTION IN 2000).

12. LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT 3 (1985).

decisionmaking should be seen as desirable, even if the Court's popularity suffers when the public disagrees with it.[13]

The Reagan Administration and Professor Tribe diverged, predictably, on the desirable content of Justices' values and philosophies, and both pointed to the example of Justice William J. Brennan, Jr. While Reagan officials singled out Justice Brennan as possessing precisely the wrong "values and philosophies" and targeted many of his "activist" decisions for overruling,[14] Professor Tribe held him up as an exemplar of a "catalytic" Justice whose work on the Court greatly improved Americans' lives.[15]

Around this time, Justice Brennan agreed to cooperate in the writing of his biography by Stephen Wermiel,[16] to whom he gave extraordinary access during his final few years of service before his 1990 retirement.[17] Wermiel later partnered with coauthor Seth Stern[18] to complete the project,[19] and in 2010, they published *Justice Brennan: Liberal Champion*, an engaging account of the life and work of one of the Court's most influential, effective, and controversial Justices. Over those decades, the Court's vital role in American life advanced from "often overlooked" and "rarely understood" to a frequent subject of news reports and popular cable comedy shows. For example, the Court's ruling in *Citizens United* sparked a valuable nationwide conversation, from President Barack Obama's State of the Union

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13. Justice Stephen Breyer argues persuasively that, in the long run, the Court will benefit from improved public understanding: "In a democracy, enduring institutions depend upon the enduring support of ordinary citizens. And citizens are more likely to support those institutions they understand." STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 217 (2010). Of course, at various points in U.S. history, public attention to the Court has soared—especially at times of strong dissatisfaction (for example, the Court's pre-1937 invalidation of numerous progressive economic statutes)—and scholars have assessed the extent to which the Court generally adheres to public opinion. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE 12–13 (2009) (discussing "four critical periods in the American people's changing relationship with judicial review and the Supreme Court").

14. For example, William Bradford Reynolds, then–Assistant Attorney General of the Civil Rights Division of the U.S. Department of Justice, said in a 1986 speech, "Justice Brennan thus prefers to turn his back on text and historical context, and argues instead for a jurisprudence that rests, at bottom, on a faith in the idea of a living, evolving Constitution of uncertain and wholly uninhibited meaning." P. 507. Gary McDowell, a top advisor to Attorney General Edwin Meese, later recalled, "Brennan was the most articulate and consistent activist" and "pretty much our guy [to target]." P. 503 (alteration in original); *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter GUIDELINES] (listing by issue Supreme Court opinions that the Reagan Administration believed were wrongly decided); Stephen J. Markman & Alfred S. Regnery, *The Mind of Justice Brennan: A 25-Year Tribute*, NAT'L REV., May 18, 1984, at 38 ("Brennan is among the purest of the result-oriented judges who first determine how they want a decision to come out (the 'fundamental fairness' standard) and then go about trying to find a legal justification.").

15. TRIBE, *supra* note 12, at 12, 36.

16. Fellow in Law and Government, American University Washington College of Law.

17. Authors' Note, pp. 549–50.

18. Legal Affairs Reporter, *Congressional Quarterly*.

19. Authors' Note, p. 550.

address,[20] to "Occupy" demonstrations across the nation,[21] to a running "joke" by comedian Stephen Colbert that included the formation of an active Super PAC and Colbert's indirect candidacy in a state presidential primary.[22]

Although the public better appreciates the extent of the Court's power, partisan battles fuel continued confusion about the proper role of Justices' personal views and values. During Senate confirmation proceedings marked by lengthy holds, filibuster threats, and little constructive dialogue, judicial nominees strive to say as little of substance as possible. They seek to minimize the extent to which their legal views—let alone their personal values—matter by emphasizing that their role is simply to interpret, not make, law.[23] As the charge of "judicial activism" once leveled at Justice Brennan increasingly focuses on the ideological right of the Court for overruling precedent and striking down statutes, nominees from both political parties engage in misleading oversimplification of the Justices' role. Chief Justice John Roberts, for example, during his confirmation hearing analogized a Justice to a baseball umpire who merely calls balls and strikes.[24] President Obama's modest suggestion that a capacity for empathy is a desirable characteristic in a judge met with widespread Republican ridicule,[25] which in turn led Justice Sonia Sotomayor to disavow the President's position in her confirmation hearing: "I . . . wouldn't approach the issue of judging in the way the President does. . . . [J]udges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law."[26] Reform of our broken appointment process should be a national priority, but Senate confirmation hearings are unlikely to be

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20. Address Before a Joint Session of the Congress on the State of the Union, 2010 DAILY COMP. PRES. DOC. 55, at 8 (Jan. 27, 2010).

21. *See* Meghan Barr, *Occupy Wall Street: Protestors to Demonstrate Outside Courthouses*, HUFFINGTON POST (Jan. 20, 2012, 4:30 PM), http://www.huffingtonpost.com/2012/01/20/occupy-wall-street-courthouses_n_1218196.html.

22. *See* Dahlia Lithwick, *Colbert v. the Court: Why, in the Battle over* Citizens United*, the Supreme Court Never Had a Chance*, SLATE (Feb. 2, 2012, 5:30 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/02/stephen_colbert_is_winning_the_war_against_the_supreme_court_and_citizens_united_.html (explaining how Colbert formed his Super PAC and used it to support Herman Cain in the South Carolina primary after Cain had withdrawn from the presidential race).

23. *See generally* Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463 (2005) (discussing the use of vacuous and misleading language in the context of judicial confirmations).

24. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.).

25. *See, e.g.*, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Sen. Jeff Sessions, Ranking Member, S. Comm. on the Judiciary) ("I fear that [the President's] 'empathy standard' is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning . . . [and] unelected judges set policy.").

26. *Id.* at 120 (statement of Sonia Sotomayor).

conducive to nuanced conversations and enhanced public understanding about difficult and divisive constitutional questions.

The words and work of Justices who have run the political gauntlet to life tenure are far more promising sources to educate the citizenry—in the words of Justice Stephen Breyer, quoting Thomas Jefferson, a valuable means "to illuminate . . . the minds of the people at large"[27] about the Court's "role in protecting the Constitution."[28] In that vein, Stern and Wermiel's biography of Justice Brennan instructs by example about the complex relevance of a Justice's views, values, and philosophies to the interpretive process. Justice Brennan is an ideal case study, for "while he remains a hero to two generations of progressive lawyers, including Presidents Bill Clinton and Barack Obama, he is also still the very symbol of judicial activism decried by conservatives" (p. xiv). Part I of this Review endorses Stern and Wermiel's central claim that Justice Brennan's personal abilities, attributes, and values, including his strong capacity for empathy, enabled him to become a "liberal champion." Part II examines Justice Brennan's extraordinary behind-the-scenes work in representative cases drawn from the biography through the lens of his famed "Rule of Five"—the number of Justices needed for a majority—as the composition of the Court changed dramatically over three distinct periods of Justice Brennan's service. Part III assesses Justice Brennan's legacy on the overarching issue of interpretive methodology by examining how his support for the constitutional value of "human dignity" and the concept of a "living Constitution" has fared against calls for judicial restraint and originalism.

By chronicling the life's work of one of the Court's greatest Justices, Stern and Wermiel show that judicial selection is a choice not among umpires but between a Justice William Brennan and a Justice Felix Frankfurter, a Justice Sonia Sotomayor and a Chief Justice John Roberts—all exceptionally smart and well-trained lawyers who fully understand the rules of the game and the relevance of what they personally bring to the awesome responsibility of interpreting the Constitution.

I. Liberal Champion

Stern and Wermiel ably establish their central claim that Justice Brennan was a liberal champion. Even readers generally familiar with Justice Brennan's work will be impressed to read about the many landmark opinions he authored to establish constitutional protections now viewed as fundamental: the justiciability of electoral redistricting questions[29] which paved the way for the "one person, one vote" principle;[30] vibrant First Amendment speech

27. Breyer, *supra* note 13, at 218 (alteration in original) (internal quotation marks omitted).

28. *Id.* Justice Breyer also approvingly cites the words and efforts at public education of Justices David Souter and Sandra Day O'Connor. *See id.* at 218–19.

29. Baker v. Carr, 369 U.S. 186 (1962).

30. Reynolds v. Sims, 377 U.S. 533 (1964).

protections for unpopular expressive conduct[31] and "vehement, caustic" criticism of government and public officials;[32] protections for racial minorities[33] and individuals discriminated against on the basis of sex;[34] the incorporation of Bill of Rights protections against the states;[35] and basic access to justice in federal court for those challenging criminal convictions[36] and before administrative agencies for those living in "brutal need."[37] Even more striking, the biography also documents many significant opinions that do not bear Justice Brennan's name but on which he labored to achieve a majority and shape the Court's approach and the nation's future.[38]

The title "Liberal Champion" captures the two key characteristics of Justice Brennan's career on the Court. His contributions were substantively "liberal" in the common meaning of the word: strongly protective of individual rights and liberties, especially "to ensure justice for all 'who do not partake of the abundance of American life,' including the poor, minorities, and the criminally accused."[39] Justice Brennan earned the title "champion" for his remarkably effective leadership and tireless work on a Court that moved steadily to the right during most of his service.

Justice Brennan's tenure illustrates that both descriptors are relative terms. The press tends to speak of "liberal" and "conservative" wings of any

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31. United States v. Eichman, 496 U.S. 310 (1990) (finding a law banning flag desecration to be inconsistent with the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (same).

32. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

33. *E.g.*, Green v. Cnty. Sch. Bd., 391 U.S. 430 (1979) (rejecting a "freedom of choice" approach to remedying desegretation); NAACP v. Button, 371 U.S. 415 (1963) (protecting the NAACP's First Amendment right to advocate for racial equality).

34. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that discrimination on the basis of sex triggers heightened scrutiny); Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (finding that discrimination on the basis of sex should trigger strict scrutiny).

35. *E.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (holding that the Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment's Due Process Clause).

36. Fay v. Noia, 372 U.S. 391 (1963) (holding that the failure to appeal a conviction does not bar the issuance of a writ of habeas corpus), *overruled in part by* Wainwright v. Sykes, 443 U.S. 72 (1977).

37. Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (internal quotation marks omitted) (recognizing strong procedural protections for certain public benefits).

38. *E.g.*, *infra* text accompanying notes 62–68 (discussing Cooper v. Aaron, 358 U.S. 1 (1958)); notes 79–80 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973)); and note 101 (discussing Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 (1971)).

39. Pp. 306–07 (quoting a 1968 speech by Justice Brennan). Professor Frank Michelman's review notes that Stern and Wermiel do not define what they mean by "liberal," and after a thoughtful discussion of the term's possible meanings concludes with a helpful summary: "[T]he contemporary egalitarian/Kantian liberalism of Rawls et al . . . . jibe[s] neatly and suggestively with the authors' designation of Brennan (but presumably not Roberts, Rehnquist, Friedman, Hayek, Posner, Epstein, Peckham, or Nozick) as 'liberal.' " Frank I. Michelman, *Our Liberalism*, 89 TEX. L. REV. 1409, 1414 (2011) (reviewing *Justice Brennan: Liberal Champion*).

Court, including the Roberts Court,[40] but the dramatic ideological shifts during Justice Brennan's thirty-four-year tenure, following his recess appointment by Republican President Dwight D. Eisenhower, drive home the radically different meanings of the terms. In Justice Brennan's early years, he sat at the ideological center of the Court, wooed toward the right wing by Justice Frankfurter and "somewhat less willing than Black, Douglas, or Warren to support civil liberties claims and economic underdogs" (p. 137). By the end of the 1985–86 Term, not only Justices Brennan and Thurgood Marshall (the only remaining Justice appointed by a Democratic President), but Republican appointees Harry Blackmun and John Paul Stevens, "once considered part of the traditional center, found themselves firmly in the liberal camp."[41]

What makes someone a champion also depends on where one sits. Justice Brennan appreciated that his friend and strong ally on the Court, Justice Marshall, was one of the United States' great liberal champions for his civil rights work before joining the Court.[42] But Justice Brennan privately expressed disappointment that Justice Marshall failed to do his part on the Court to preserve the Warren Court's legacy.[43] As a Supreme Court Justice, Justice Brennan was the more effective champion of the liberal constitutional values that they shared.[44] Indeed, Stern and Wermiel make a strong case that he was "the most forceful and effective liberal ever to serve on the Court" (p. xiii), and note that "[e]ven Antonin Scalia, not a fan of much of what Brennan accomplished, called him 'probably the most influential justice of the century' " (p. 545). They also convey a strong sense of what enabled Justice Brennan to work so effectively with Justices who were not

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40. *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS.COM (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

41. P. 495 (quoting Al Kamen, *Supreme Court's Moderate Bloc Is Shrinking*, WASH. POST, July 14, 1986, at A1) (internal quotation marks omitted). Justices Blackmun and Stevens both said that they believed that the Court, not their ideological positions, had shifted. *See Supreme Court Justice Says High Court Not Always Enjoyable*, ASSOCIATED PRESS, July 7, 1986, *available at* http://www.apnewsarchive.com/1986/Supreme-Court-Justice-Says-High-Court-Not-Always-Enjoyable-With-AM-Scotus-Rdp-Bjt/id-cb81831f7cf10036b6f914583f1218a4; Bill Mears, *Justice Stevens Reveals His Thoughts on "Radical" Court*, CNN.COM (Sept. 30, 2011), http://articles.cnn.com/2011-09-30/us/us_scotus-preview-stevens_1_high-court-rulings-justice-stevens?_s=PM:US.

42. *See* p. 431.

43. Justice Brennan said of Justice Marshall in 1988, "What the hell happened when he came on the Court, I'm not sure, but he doesn't seem to have had the same interest . . . . He has some areas where he does and when he really gets involved with a case . . . he just does an absolutely superb job. But when he's not interested, whatever I do, that's all right with him." P. 431 (second alteration in original). Brennan's guess was that Marshall had given up in despair. P. 431.

44. Stern and Wermiel speculate that Justice Marshall may have been less effective because he lacked Justice Brennan's earlier, positive experience of being part of a solid liberal majority on the Court. *See* p. 432. They also cite Justice Marshall's health problems and very different temperament. *See* pp. 431–32.

inclined to agree with him: they portray a "keen workplace politician"[45] with a strong work ethic who treated his colleagues with respect and patience and who was also a man of humility[46] and great empathy.[47]

Because they published their work many years after beginning it and after Justice Brennan's retirement and death (events that naturally prompted assessments of his jurisprudence and legacy[48]), Stern and Wermiel will be judged in part by what their biography adds to earlier writings about Justice Brennan and the Justices with whom he served. Theirs is the most comprehensive work on Justice Brennan to date, contributing a bounty of details, from the mundane to the fascinating. They offer some of their own valuable perspectives, but the biography's greatest value lies in its accessible review of how the Justices decided cases during Justice Brennan's thirty-four years on the Court, with Justice Brennan often leading the way. They primarily present his life and achievements chronologically, but also successfully integrate thoughtful thematic discussions in chapters devoted to, for example, civil rights, crime, death and dignity, and sex discrimination. Some readers may find the biography excessively dense—by one count, 452 of 547 pages are devoted to describing how the Court decided cases[49]—but other readers, whether or not formally trained in the law, will delight in the richness of that

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45. P. 192. Stern and Wermiel also quote Professor Mark Tushnet, who captured well what made Justice Brennan so effective: "Like all good political leaders, Brennan structured the process of decision and gave his colleagues reasons for doing what he understands to be the right thing." P. 464 (quoting Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. Rev. 748, 764 (1995)).

46. The biography is sprinkled with examples of cases and incidents for which Justice Brennan later acknowledged regret. For example, he drafted a concurrence in *Miranda v. Arizona*, 384 U.S. 436 (1966), that would have allowed the states more flexibility in crafting their own procedures; later, as *Miranda* warnings became ubiquitous and successful, he expressed relief that he had not published the concurrence: "Obviously, it would have been just dead wrong . . . . Thank heavens I woke up." P. 239. For another example, see *infra* note 54.

47. Stern and Wermiel refer to "the empathy for which Brennan would become famous." P. 249. Among the many others who have commented on Justice Brennan's capacity for empathy, Professor and former-Brennan-clerk Larry Kramer related this characteristic to Justice Brennan's success as a Justice: "Justice Brennan believed in the goodness of people. He believed in the dignity of each individual and in the capacity of each person to be better." Larry Kramer, *Believing in the Goodness of People*, 89 Tex. L. Rev. 1403, 1406 (2011) (reviewing *Justice Brennan: Liberal Champion*). Several of Justice Brennan's other former clerks help complete the picture. For example, Judge Marsha Berzon's review affectionately emphasizes that Justice Brennan was a relatively ordinary man—like many judges, "not all that *interesting*"—whose extraordinary accomplishments depended on his "willingness to sacrifice doctrinal purity and perfectly organized opinions in an effort to put together majority decisions." Marsha S. Berzon, *The Common Man?*, 89 Tex. L. Rev. 1395, 1395–96 (2011) (reviewing *Justice Brennan: Liberal Champion*).

48. *See, e.g.*, Robert C. Post, *William J. Brennan and the Warren Court*, *in* The Warren Court in Historical and Political Perspective 123, 123 (Mark Tushnet ed., 1993) ("Justice William J. Brennan's eminent, if not preeminent, position in the annals of the Warren Court is now well established. The depth and clarity of his vision, the lucidity of its doctrinal expression, his uncanny knack for creating crucial court majorities from the splinters of disparate perspectives have all been amply documented.").

49. Kramer, *supra* note 47, at 1404.

detail, which can be mined for a host of ends. Following the biography's lead, this Review focuses on Justice Brennan's work on the Court: what he accomplished in his exceptional tenure as a Justice.[50]

II. RULE OF FIVE

The title of Dahlia Lithwick's *New York Times* review of *Justice Brennan: Liberal Champion*[51] could have titled the biography itself: *Getting to Five*. Here is how Stern and Wermiel tell the widely known story of Justice Brennan's "Rule of Five":

> Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything. (p. 196)

Many earlier books and articles recount versions of this story,[52] which may explain Stern and Wermiel's decision to relegate it to a single paragraph in the middle of the eighth chapter. Regardless, the principle of "getting to five" implicitly dominates the biography, as it did Justice Brennan's career on the Court, and Stern and Wermiel succeed, at least indirectly, in the essential challenge of illuminating this "Rule" that is so closely associated with him.

Justice Brennan's struggle with the inexorable need for five votes raises general questions of pragmatism versus principle, but for a Justice, that familiar balance is radically defined by the unusual nature of Supreme Court decisionmaking. The "Rule of Five" reflects the fact that a Justice writing for the Court does not write solely for himself. Justice Brennan was very skilled at attracting and holding a majority to advance his constitutional position, but his unusual ability and willingness to accommodate the necessary range of Justices meant that "his" opinions often little resembled his ideal. He was impatient with criticism of these opinions when it failed to appreciate what it took to get to five (pp. 156–57). Contrary to the accusations

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50. Dahlia Lithwick's insightful review makes the point that Stern and Wermiel are less successful in conveying "what animated this man, what drove and moved him," and that after reading about the early chapters of his life, "one is hard pressed to know how these early experiences shaped him or his jurisprudence." Dahlia Lithwick, *Getting to Five*, N.Y. TIMES, Oct. 8, 2010, at BR20 (reviewing *Justice Brennan: Liberal Champion*).

51. *Id.*

52. For example, Professor H. Jefferson Powell, in a fascinating book chapter entitled "The Rule of Five," sketches four fictional Justices, the most attractive of whom believes in a "strong Rule of Five"—as did Justice Brennan—and favors interpreting the Constitution to achieve the "humanly best outcome" consistent with the text (which almost always allows for the humanly best outcome). H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16–37 (2008). Professor Powell draws on an earlier work by Professor Tushnet, who explained that "Brennan's 'rule of five'—or as the narrative of activism and restraint would have it, rule *by* five"—was susceptible to different interpretations: "Some clerks understood Brennan to mean that it takes five votes to do anything, others that with five votes you could do anything." Tushnet, *supra* note 45, at 763.

that Justice Brennan was somehow improperly outcome driven, he emerges from Stern and Wermiel's meticulous descriptions of the internal deliberations of case after case, on Court after Court, as a Justice who was consistently motivated by what he believed was the constitutionally correct and principled outcome. Several of the cases highlighted in the biography suffice to illustrate. This Review considers those cases in three distinct time periods of Justice Brennan's service: his initial six years on the Court, his six years on the Warren Court with a firm five-Justice "liberal" majority, and his remaining twenty-two years of service on the Burger and Rehnquist Courts.

A. *1956 to 1962*

Justice Brennan joined the Court just two years after *Brown v. Board of Education*.[53] In his first years on the Court, his former law professor Justice Frankfurter energetically recruited him to the cause of extreme judicial restraint and legislative deference, with early occasional success that Justice Brennan later repudiated.[54] In the most significant example, *Roth v. United States*,[55] Justice Frankfurter, with the help of a clerk's memo on the regulation of speech in the colonies and thirteen original states, convinced Justice Brennan to change his approach in writing the majority opinion and to uphold an obscenity conviction by finding that obscene speech is not speech at all within the meaning of the First Amendment (p. 124). Justices Hugo Black and William Douglas dissented and would have reversed the conviction (p. 123). Professor and former-Brennan-clerk Robert O'Neil has speculated that *Roth* would be the near-unanimous choice among Justice Brennan's former law clerks for the Brennan decision most deserving of being overruled.[56] Despite its deep flaws, with *Roth*, Justice Brennan effectively expanded constitutional protection for sexually explicit material,[57] and for years after, Justice Brennan led the Court's difficult search for a workable definition of unprotected obscenity.[58] He was uncharacteristically unsuccessful and would write at the center of a fractured Court unable to give general guidance, in part because obscenity was a rare issue on which

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53. 347 U.S. 483 (1954).

54. Justice Brennan reported that his biggest mistake on the Court was joining Justice Frankfurter in upholding the government's decision to strip a man of his U.S. citizenship for voting in a Mexican election. Pp. 134–35 (discussing Perez v. Brownell, 356 U.S. 44 (1958), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253 (1967)).

55. 354 U.S. 467 (1957).

56. Robert M. O'Neil, *A Justice for All Seasons*, 89 TEX. L. REV. 1417, 1421–22 (2011) (reviewing *Justice Brennan: Liberal Champion*).

57. *See Roth*, 354 U.S. at 487–90 (distinguishing between obscene material and sexual material).

58. In 1964, for example, press reports described him as "the Court spokesman on obscenity cases" and a "chief arbiter" on obscenity. P. 254.

Chief Justice Earl Warren sat to Justice Brennan's right.[59] In 1973 Justice Brennan finally abandoned the effort to define a category of unprotected obscenity, which he concluded was unworkable censorship, and dissented when the Court (which had moved to the ideological right) finally achieved a majority for a three-part test for obscenity.[60]

Obscenity notwithstanding, within a couple of years Justice Brennan stood firmly with Chief Justice Warren—and the Chief Justice leaned heavily on him. Stern and Wermiel speculate that Chief Justice Warren "saw that Brennan could theorize about the law in a way he could not" (p. 106). They favorably cite one scholar's conclusion that "it was 'the Brennan Court,' " not the Warren Court.[61] By the end of this initial six-year period, the two voted reliably together and often with Justices Black and Douglas, and Justice Brennan served as the chief strategist for getting the four to five. Before each of the conferences during which the Justices would discuss and preliminarily vote on cases, and the Chief Justice would assign cases when in the majority, Chief Justice Warren would meet separately with Justice Brennan and solicit his advice (p. 183).

One remarkable assignment came early: Justice Brennan drafted and maintained unanimity behind the Court's historic 1958 opinion in *Cooper v. Aaron*,[62] which took a hard line against Southern resistance to racial desegregation (pp. 145–50). Rather than simply operating by the "Rule of Five," in this rare case the Justices saw a strong need for unanimity—in effect a "Rule of Nine." They agreed that equal protection prohibited segregation, but divided on what specifically it required by way of remedy. Stern and Wermiel examine at length this early instance of consensus building, which foreshadowed Justice Brennan's later "reputation among Supreme Court reporters for his willingness to sacrifice style in order to build consensus," often resulting in "nearly colorless compromises" (p. 147). Justice Brennan's first draft in *Cooper* was "bland by design" to maintain unanimity (p. 147), but he nonetheless had to accept numerous suggestions from Justices John Harlan and Black; at one point Justice Tom Clark actually drafted a dissent (pp. 147–50). Justice Brennan's challenge peaked when the Justices decided to issue a jointly signed opinion, rather than the traditional opinion

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59. P. 252. Chief Justice Warren concurred separately in *Roth* because he felt that Justice Brennan's opinion went too far in protecting sexually explicit speech. P. 125. Stern and Wermiel speculate that Justice Brennan may have subsequently ruled against protecting the sexually explicit speech at issue in *Ginzburg v. United States*, 383 U.S. 463 (1966), out of deference to Chief Justice Warren, p. 263, a decision that Brennan later appeared to regret, *see* p. 275.

60. Pp. 365–68 (discussing Justice Brennan's evolving views and his dissents in Miller v. California, 413 U.S. 15 (1973), and Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)). Stern and Wermiel note that he waited until after Chief Justice Warren left the Court to make this radical change. P. 366.

61. P. 491 (quoting Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 923 (1983) (book review)) (internal quotation marks omitted).

62. 358 U.S. 1 (1958).

with a single author joined by others.[63] As a result, Chief Justice Warren announced the decision and Justice Brennan's central role remained largely unknown for many years—another early example of his effective but often-uncredited work on the Court (p. 150). Justice Brennan later would urge the *Cooper* approach of a consensus joint opinion—albeit unsuccessfully—in two cases of extraordinary importance: *United States v. Nixon*, rejecting President Richard Nixon's assertion of executive privilege,[64] and *Buckley v. Valeo*, setting forth First Amendment limitations on Congress's authority to regulate campaign contributions and setting the stage for *Citizens United*.[65]

Stern and Wermiel briefly discuss *Cooper*'s significance beyond the issue of race, intriguingly revealing what Justice Brennan resisted changing in his draft opinion. Contrary to his later general accommodation of other Justices' views, Justice Brennan refused Justice Harlan's request that he omit a passage equating the Court's decisions interpreting the Constitution with the words of the Constitution itself (p. 149). Decades later, this characterization of the Court's interpretive authority became the target of conservative attacks on the "activist" Court, led by President Reagan's Attorney General Edwin Meese.[66] Although his attack proved politically unsuccessful, which is unsurprising given *Cooper* responsed to Southern resistance to *Brown*, Attorney General Meese made a good point: Justice Brennan's language was overstated—perhaps understandably so given that the context was a challenge to the Court's fundamental authority.[67] Another telling detail is Justice Brennan's initial resistance to Justice Harlan's suggestion that the opinion note that all three Justices who had joined the Court since *Brown* supported that decision; Justice Brennan feared that such a statement might signal that "the Constitution only has the meaning that can command a majority as that majority may change with shifting membership" (p. 149). The Reagan Administration later would frame its attack on Justice Brennan and the Warren Court on precisely these grounds.[68] At this early stage in his service, Justice Brennan foresaw the danger and disfavored an acknowledgment that Justices' identities matter: "Whatever truth there may be in that idea, I think it would be fatal in this fight to provide ammunition from the mouth of this Court in support of it" (p. 149). In both instances, Justice Brennan sought to avoid being open about the Court's role in order to avoid controversy.

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63. P. 149. Justice Frankfurter infuriated Justice Brennan and the other Justices when he later insisted on issuing a separate concurrence. Pp. 150–52.

64. Pp. 379–80 (discussing United States v. Nixon, 418 U.S. 683 (1974)).

65. P. 442 (discussing Buckley v. Valeo, 424 U.S. 1 (1976)).

66. *See* Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986–87 (1987).

67. *See generally* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 112–20 (2004) (describing theories of judicial supremacy and departmentalism).

68. *See* Meese III, *supra* note 66; sources cited *supra* note 14.

Among the biography's most valuable contributions are Justice Brennan's own assessments of his legacy as he related them to Wermiel. The opinion that Justice Brennan cited as his safest and most "completely accepted" comes from this early period.[69] In *Baker v. Carr*, Justice Brennan led the Court in 1962 to hold that concerns about the judicial role and justiciability did not foreclose review of electoral districts that afforded dramatically disproportionate power to some voters.[70] For example, in Tennessee, some urban districts were populated with twenty-five times the number of voters as some rural districts.[71] *Baker* abrogated a 1946 precedent[72] to pave the way for a case that established the then-revolutionary principle of "one person, one vote."[73] Stern and Wermiel describe striking interactions among the Justices in crafting this opinion that exemplify the sacrifices in coherence of argument sometimes required to secure the critical five (pp. 184–90). The initial post-argument vote was four-to-four, with Justice Potter Stewart undecided and requesting reargument. Securing Justice Stewart's vote required omitting any "hint of a remedy or what standards lower courts should employ" (p. 187). At the same time, Justice Brennan feared that too narrow an opinion would have lost Justice Douglas, who might have written a concurrence that would have alienated Justice Stewart. Justice Clark surprisingly supplied a fifth vote, but only after Justice Brennan drove to Justice Clark's home in a snowstorm to discuss the case. This created for Justice Brennan the dilemma of whether to strengthen the opinion and allow Justice Stewart to dissent. In the end, Justice Brennan opted for keeping Justice Stewart and a six-Justice majority with a watered-down opinion, criticized by the press for what it left unanswered.[74] Justice Frankfurter felt so strongly that the Court had exceeded its authority[75]—at one point comparing the situation to the disastrous Bay of Pigs invasion[76]—that he blamed the Court's decision for a disabling stroke that he suffered shortly after the case was announced (p. 191).

Justice Brennan's principle of equality in voting is certain to remain constitutional bedrock. He celebrated his hard-fought victory by reading the

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69. P. 190 ("There's nothing that the Court's done in my time that was so completely accepted as the whole result of the reapportionment fight . . . ."); *see also* p. 544 ("They're not going to unstitch Baker and Carr . . . .").

70. Pp. 184–90 (discussing Baker v. Carr, 369 U.S. 186 (1962)).

71. P. 184. The inequity was even larger in some other states. *See, e.g.*, p. 183 ("One state senator represented Los Angeles County, which had a population of more than 6 million people, while another represented three northern California rural counties with a total population of 14,294.").

72. Baker v. Carr, 369 U.S. 186 (1962), *abrogating* Colegrove v. Green, 328 U.S. 549 (1946).

73. Reynolds v. Sims, 377 U.S. 533, 557–58 (1964).

74. Pp. 189–90. The *Washington Post* editorialized, "On the basis of legal scholarship, judicial tradition and forensic ability a jury would award victory to the minority." P. 190.

75. *See* p. 184.

76. P. 184 ("[Justice Frankfurter] argued that taking up reapportionment would be an error akin to the disastrous Bay of Pigs invasion . . . .").

entire opinion from the bench (pp. 189–90). Chief Justice Warren passed him a congratulatory note along the bench that read, "[I]t is a great day for the Irish" with "Irish" crossed out and replaced by "country" (p. 190).

B. *1962 to 1968*

When Justice Frankfurter's health compelled him to resign in 1962, President John F. Kennedy appointed Arthur Goldberg and thereby provided the generally reliable fifth vote that propelled the Warren/Brennan Court to its peak for the next six years.[77] During the first four Terms of Justice Goldberg's service, Justice Brennan "voted with the majority an astounding 97 percent of the time" (p. 279). Earlier works document well the accomplishments of the Warren Court, but the biography adds Justice Brennan's own perspectives, including his perception of his most secure legacy from this remarkable period: his part in supplying the Court's rationale for applying Bill of Rights protections to the states through selective incorporation.[78] Stern and Wermiel also demonstrate that "perhaps no justice deserves more credit for advancing the cause of the civil rights movement during the first half of the 1960s than Brennan" (p. 211). They describe Justice Brennan's tireless behind-the-scenes work on opinions that did not bear his name, singling out the 1965 case of *Griswold v. Connecticut*,[79] which invalidated a Connecticut ban on contraception as violating the constitutional right to privacy, as an outstanding example "of the silent hand of Brennan shaping an opinion" (p. 279). Stern and Wermiel also detail Justice Brennan's substantial contributions to Justice Blackmun's opinion for seven Justices in *Roe v. Wade*.[80]

Still, the "Rule of Five" continued to constrain Justice Brennan's opinions because the agreement among the five "liberals" sometimes did not extend beyond the bottom line. The biography's most illuminating contributions from this period describe disputes among the five, often not apparent from the opinions themselves, in which it was Justice Brennan's "stalwart allies that made his job as coalition builder harder" (p. 228). Justice Brennan's best-known opinion from this period, *New York Times Co. v. Sullivan*,[81] announced dramatic new constitutional limitations on state defamation law which protect the right to criticize public officials by requiring proof of "actual malice."[82] The Justices were "unanimous on the ultimate goal, but did not agree about how to get there" (p. 223), and they recognized the great value in unanimity in a case that would dramatically disrupt state

77. *See* pp. 191, 195–96.

78. P. 544 ("Brennan . . . predict[ed] he had built up a considerable legacy that would be difficult to undo. 'They're not going to unstitch the extension of the Bill of Rights against the states—that is the most important thing I can guess will not happen,' Brennan said in 1988."); *see also* p. 239 (discussing the process of selective incorporation).

79. 381 U.S. 479 (1965).

80. Pp. 371–74; 410 U.S. 113 (1973).

81. 376 U.S. 254 (1964).

82. *See* pp. 220–27.

law.[83] After eight grueling drafts during which the majority threatened to unravel (p. 224), Justice Brennan crafted an unusually eloquent opinion for the Court that elaborated on the "central meaning" of the First Amendment: that the protection of "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" is vital to the success and integrity of the United States.[84] Three Justices from the "liberal" bloc, however, joined concurring opinions because they favored greater speech protections than the balancing inherent in the actual malice test.[85] Justice Brennan later regretted having used the word "malice" (p. 227), and though Stern and Wermiel do not note it, he dissented from the Court's later refusal to extend *New York Times* beyond public officials and public figures to protect "vehement" speech even against private figures on matters of public interest.[86]

During this period, Justice Brennan's reputation as a liberal champion was sullied by an incident in which he acted pragmatically and cautiously—many would say excessively so. In 1965, he came under political heat from the right for offering Michael Tigar a position as a law clerk because, as a student at Berkeley, Tigar had taken part in activities described by some as pro-Communist (pp. 264–74). Justice Brennan ultimately succumbed to the pressure by withdrawing the offer (pp. 269–70), which he later regretted.[87] This incident was reminiscent of Justice Brennan's confirmation hearing, when he was also criticized for taking an overly cautious approach, again to avoid embroiling the Court in controversy. In 1954 before joining the Court, and while the country suffered the excesses of Senator Joseph McCarthy's "guilt by association" efforts to rid the government, unions, and Hollywood of alleged Communists, Justice Brennan had publicly warned against overreacting to communism's threat by sacrificing "all of the guarantees of justice and fair play and simple human dignity which have made our land what it is" (p. 63). Later, when Senator McCarthy took part in his confirmation hearing to grill him about such statements, then-nominee Brennan adopted an extremely conciliatory stance typical of many nominees, seemingly agreeing with Senator McCarthy's concerns about the Communist threat (pp. 115–16). Justice Brennan later explained that he had felt the need to take special care to avoid controversy because he had been recess appointed and had already been serving on the Court (p. 117).

C. *1968 to 1990*

In June 1968, in a fateful move of enormous consequence for the nation, Chief Justice Warren decided to resign so that President Lyndon B. Johnson

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83. *See* pp. 225–26.

84. *N.Y. Times*, 376 U.S. at 270, 273.

85. P. 226; 376 U.S. at 293–97 (Black, J., concurring); *id.* at 297–305 (Goldberg, J., concurring in the result). Justice Douglas joined both concurrences.

86. Gertz v. Robert Welch, Inc., 418 U.S. 323, 367 (1974) (Brennan, J., dissenting).

87. *See* p. 274 ("I wish to hell maybe that I'd had guts enough to tell them all to go to hell and then taken them on.").

could appoint the next Chief Justice before the November presidential election (p. 304). Almost immediately, "[e]verything seemed to go wrong" (p. 305), and ultimately no Democratic President would make a Supreme Court appointment for the next quarter-century. The Senate filibustered Justice Abe Fortas, whom President Johnson nominated to serve as Chief Justice, with searing attacks on the Warren Court (pp. 305–07); eventually President Nixon appointed Warren Burger to replace Chief Justice Warren (p. 318). As the Warren Court's "liberal" majority gradually diminished to only Justices Brennan and Marshall, the "Rule of Five" acquired new significance.

Justice Brennan told Wermiel that he considered his 1970 opinion in *Goldberg v. Kelly*[88] to be "probably the most important thing that came out of these chambers from me."[89] In *Goldberg*, Justice Brennan built on his 1969 opinion for the Court in *Shapiro v. Thompson*, which found that Connecticut's denial of welfare benefits to a young mother who had moved from Massachusetts to be with family violated a fundamental right to travel.[90] Justice Brennan wrote that Connecticut's one-year residency requirement put at stake "the very means to subsist—food, shelter, and other necessities of life,"[91] a phrase his clerks had warned risked losing the Court (p. 337). The five-Justice majority in *Goldberg* held that the Fourteenth Amendment's guarantee of due process required the government to provide welfare recipients basic procedural safeguards before terminating subsistence-level benefits.[92] After a welfare caseworker placed him in a hotel that he found dangerous and uninhabitable, John Kelly moved out; the caseworker responded by terminating Kelly's benefits (p. 340). New York City's welfare system did not afford him an opportunity to challenge the termination and explain the reason for his move. In order to find a right to a pretermination hearing, the Court found that the provision of welfare benefits, though voluntarily provided and not a substantive right, constituted a form of property for purposes of the Due Process Clause.[93]

Although five Justices initially voted to provide some process, Justices Harlan and Byron White did not support treating government benefits fully like other property, while Justice Douglas believed that welfare should be treated as other recognized forms of property (pp. 341–42). In typical fashion, Justice Brennan acceded to substantial changes to his draft opinion in order to retain the votes of those to his ideological right, including substituting a discussion of the values of "self-sufficiency and patriotism" for the plight of the poor and the societal causes of poverty, and eliminating any hint of a substantive due process right to subsistence-level benefits (pp. 342–43). With these concessions, "Brennan had his fifth vote for a ruling laying

88. 397 U.S. 254 (1970).

89. P. 346; *see also* p. 336 (noting that Justice Brennan considered *Goldberg* to be "perhaps the proudest achievement of his entire tenure on the Court").

90. 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

91. *Shapiro*, 394 U.S. at 627.

92. *Goldberg*, 397 U.S. 254.

93. *See id.* at 262 n.8; *see also* pp. 340–42.

out much of what he wanted, in an opinion that afforded welfare recipients substantial new rights" (p. 343). As Stern and Wermiel describe, Justice Brennan had foreseen the sacrifices that might be necessary and had suggested in a note when Justice Douglas was assigning the opinion that Justice Douglas assign it to Justice Harlan in order to "leave us free to join him + write more broadly" (pp. 341–42).

For all their promise, *Shapiro* and *Goldberg* did not mark the beginning of additional judicial protections for "the very means to subsist"[94] or against wealth discrimination. For Justice Brennan, these victories must have been tinged with regret about what might have been had they come five years earlier—or had Chief Justice Warren not resigned. Stern and Wermiel say remarkably little about a series of decisions that immediately followed.[95] *San Antonio v. Rodriguez*[96] marked an especially devastating blow for Justice Brennan's views on constitutional protections for social and economic rights. Texas's system of funding education through property taxes resulted in extreme disparities depending on the wealth of each school district, a system that Justice Brennan denounced as "devoid of any rational basis."[97] He would have held that education is a fundamental right, the unequal provision of which triggers strict scrutiny, for "education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[98]

Stern and Wermiel's chapter "Frustration Rising" outlines the shifts on the Court and Justice Brennan's reactions as President Nixon appointed four new Justices in three years:[99] "Brennan's combined seventy-two dissenting votes in the 1970–71 and 1971–72 terms exceeded the sixty-seven he cast during the entire 1960s, and the number per term would only rise as the decade progressed" (pp. 351–52). In 1975 President Gerald Ford appointed John Paul Stevens to Justice Douglas's seat (p. 427). Of the five new Justices, Justice William Rehnquist "emerged as the most committed opponent to Brennan's vision of the Constitution" and "the justice with whom Brennan agreed with least often" (p. 440). That year, Justice Rehnquist gave a speech, clearly aimed at Justice Brennan, in which he disparaged decisions based on human dignity or a "living constitution" (p. 440). The chapter "Darkest Years" describes not only the death of Justice Brennan's wife Marjorie after a long struggle with cancer but also President Reagan's elevation of

94. *Shapiro*, 394 U.S. at 627.

95. They quote a 1990 assessment from Professor Charles Reich: "[T]wenty years later, we must confront the fact that the road opened by *Goldberg v. Kelly* has not been taken." P. 345 (quoting Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731 (1990)). Reich was the author of an earlier article, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964), that apparently influenced Justice Brennan (and many others) to see government benefits as a form of property. Pp. 338–39.

96. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

97. *Id.* at 62 (Brennan, J., dissenting).

98. *Id.* at 63.

99. Chapter 15. Warren Burger, Harry Blackmun, Lewis Powell, Jr., and William Rehnquist replaced Earl Warren, Abe Fortas, Hugo Black, and Marshall Harlan, respectively.

Justice Rehnquist to Chief Justice and appointment of three Justices to shift the Court further to the ideological right.[100] President Jimmy Carter, the only Democratic President elected during this period, was the only President in U.S. history to serve a full Term without the opportunity to appoint a single Supreme Court Justice.

The biography makes clear that Justice Brennan struggled with how best to respond to the radically changed Court. He disliked Chief Justice Burger and did not attempt to conceal his lack of respect for him from his law clerks (p. 356). Yet in the first years of the Burger Court, he occasionally managed to work with the Chief Justice to great effect. In an important school desegregation case that Chief Justice Burger questionably assigned to himself even though he seemed to be in the minority, Justice Brennan worked the Court through six drafts until "[o]nce again, the result looked far more similar to what Brennan sought than what Burger had ever intended."[101]

For a time after Justice Douglas's 1975 retirement, Justice Brennan abandoned the pragmatic approach that had brought him such success, in favor of extremely harsh dissents. Stern and Wermiel describe these "shrill" dissents, especially during the 1975–76 Term when he used the word "eviscerate" to describe the Court's treatment of precedent on six separate occasions (p. 438). The *Washington Post* labeled his 1976 dissent in *National League of Cities* "as caustic as any written in recent decades."[102] Justice Brennan quickly realized that he had erred, both because he had alienated the new Justices, including Justice Lewis Powell who would later become a "key and unexpected partner" (p. 444), and because, as one of his clerks from the period later explained, "[t]elling the lower courts that the majority opinion was, however wrong, narrow was a better strategy than telling them that the . . . sky was falling" (p. 443). The year that Justice Sandra Day O'Connor joined the Court, Justice Brennan seemed briefly to forget this lesson; "increasingly frustrated by what he viewed as her reflexive conservatism," he issued a scathing dissent to a 1982 majority opinion she wrote in a habeas case, which alienated her and "appalled" Justice Powell (pp. 478–80).

Nonetheless, through hard work and accommodation, Justice Brennan managed to continue to champion liberal constitutional values with surprising success against the mounting odds. In describing an early visit to the Court by President Reagan and Attorney General Meese, "who would become Brennan's chief antagonist," Stern and Wermiel note that President Reagan and Attorney General Meese probably would not have believed the degree to which Justice Brennan would thwart their agenda (p. 472). For

100. Chapter 19. Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy replaced Potter Stewart, Harry Blackmun, and Lewis Powell.

101. Pp. 356–58 (discussing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)).

102. P. 441 (discussing Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)).

example, in 1981 as the Court was deciding *Plyler v. Doe*[103] Justice Brennan exerted "enormous effort" to convince Justice Powell to provide the fifth vote to strike down a Texas law that denied children a public education if they were in the country illegally (pp. 475–76). During months of negotiations, Chief Justice Burger privately lobbied Justice Powell; in the end, Justice Powell sided with Justice Brennan, but at the cost of any suggestion in the opinion that education was a fundamental right or that discrimination against children because of their immigration status triggered strict scrutiny and required a compelling justification.[104] Under the pressures of such fundamental compromises, Justice Brennan developed a reputation for planting in his opinions "the seemingly innocuous casual statement or footnote—seeds that would be exploited to their logical extreme in a later case" (p. 343). By President Reagan's second term in 1985, the President's "brash young aides . . . . had come to realize they had severely underestimated Brennan" (p. 503).

Although Justice Brennan apparently did not himself mention it to Wermiel, his list of greatest achievements and lasting legacies must include the line of opinions issued by the Burger Court that extended the guarantee of equal protection to women. Readers will find "Pedestals and Cages" (Chapter Sixteen) one of the biography's most intriguing chapters. When then-ACLU attorney Ruth Bader Ginsburg first asked the Court to apply heightened scrutiny to sex discrimination in 1971, the Justices themselves—Justice Brennan included—discriminated against women in the hiring of law clerks (pp. 386–91). In the late 1960s, Justice Brennan worried about having to change his behavior if Justices were to hire female clerks, and he told his clerks that if a woman were ever appointed to the Court, he might have to resign.[105] In a poignant story of Justice Brennan's refusal in the early 1970s to hire now–federal appellate judge Marsha Berzon (his second refusal to hire a candidate because she was a woman), Berkeley Professor Stephen Barnett directly and honorably confronted the Justice with a thoughtful letter explaining that Justice Brennan's decision was unprincipled and probably illegal.[106] Justice Brennan, to his great credit, changed his mind and hired Berzon (pp. 400–01), though it would be another seven years before he hired another female clerk (pp. 476–77).

The great challenge of incorporating evolving values and constitutional rules into settled personal practices is illustrated by Justice Brennan's response to the constitutional question of sex discrimination in a case just months before he refused to hire Berzon in his own workplace (p. 399). Justice Brennan fervently—and somewhat ironically—advocated for applying

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103. 457 U.S. 202 (1982).

104. Pp. 475–76. Justice Powell sent a note thanking Justice Brennan for his " 'painstaking and generous' accommodation of his views." P. 476.

105. P. 388; *see also* pp. 476–80 (describing Justice Brennan's early interactions with Justice O'Connor).

106. Professor Barnett warned of a possible lawsuit against the Justice for discrimination, and that if subpoenaed he would have to tell the truth. Pp. 399–400.

strict judicial scrutiny to protect women; he wrote for four Justices in an eloquent opinion in *Frontiero v. Richardson* of the "long and unfortunate history of sex discrimination" that was "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."[107] Unable to convince a majority to adopt strict scrutiny for sex discrimination, he wrote a few years later for a seven-to-two Court in *Craig v. Boren* (with Chief Justice Burger and Justice Rehnquist dissenting), adopting a heightened standard of review in the form of intermediate scrutiny,[108] which has since served to provide women strong protection. Later, when serving on the Court, Justice Ginsburg indicated that Justice Brennan's initial refusal to hire women was not surprising: "He was a man brought up in a certain age" (p. 405). This assessment will resonate with women of a certain age, and the history "Pedestals and Cages" recounts will instruct people of all ages.

The biography appropriately opens and closes by spotlighting a success that Justice Brennan believed would survive: *Metro Broadcasting, Inc. v. FCC*,[109] Justice Brennan's last majority opinion before his 1990 retirement (pp. xiii, 532–33). The case involved the constitutionality of preferences for historically disadvantaged racial minorities in the absence of particularized discrimination (pp. 532–33). Justice Brennan had long provided leadership on this issue popularly described as affirmative action. A dozen years earlier in 1978, Justice Brennan wrote for four Justices in *Bakke* that courts should defer to the government's determinations to use race to benefit minorities.[110] He persuaded Justice Powell, who wrote the controlling opinion in *Bakke* (though only for himself), to write more favorably and make clear his view that some forms of affirmative action were constitutional (though "quotas" were not) (pp. 448–49). In 1988, following several victorious affirmative action decisions in which he helped persuade Justice Powell to join (pp. 498–99), Justice Brennan opined to Wermiel, "They're not going to unstitch affirmative action" (p. 544).

Within two years, that assessment seemed wrong. By 1990, Justice Powell had retired and been replaced by Justice Anthony Kennedy, President Reagan's nominee after the Senate refused to confirm Robert Bork (pp. 518–20). Justice Kennedy disappointed and angered Justice Brennan by providing the fifth vote (with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia) for a major civil rights defeat in *Patterson v. McLean Credit Union*.[111] In the end, Justice White (who found it a "tough" case) provided the fifth vote for Justice Brennan's compromise approach in *Metro*

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107. 411 U.S. 677, 684, 688 (1973).

108. 429 U.S. 190, 197–98 (1976).

109. 497 U.S. 547 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

110. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

111. P. 522; Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Stern and Wermiel fail to note that Congress responded with the Civil Rights Act of 1991, which effectively reversed *Patterson* and the harmful effects of several other five-to-four rulings. *See* Civil Rights Act of 1991, 42 U.S.C. § 1981(b) (2006).

Broadcasting, which upheld the use of affirmative action under a heightened "intermediate scrutiny" standard of review—the same standard that Justice Brennan had crafted as a compromise in the context of sex discrimination (pp. 407, 533–35). Justice Brennan did not believe that intermediate scrutiny was the ideal standard in either context, but the compromise allowed the Court to reach what Justice Brennan viewed as the constitutionally correct outcome, recognizing essentially the correct constitutional values.

Five years after Justice Brennan's retirement, the Court explicitly overruled *Metro Broadcasting*'s adoption of intermediate scrutiny, with Justice O'Connor writing in *Adarand* that the Court should strictly scrutinize any governmental use of race.[112] In 2000, Attorney General Meese cited the Court's shift on affirmative action as one of the "Reagan Revolution's" greatest accomplishments,[113] but in *Grutter v. Bollinger*,[114] with Justice O'Connor again writing for five Justices and relying heavily on Justice Powell's *Bakke* decision, the Court moved back in Justice Brennan's direction and held that the University of Michigan Law School's use of race in admissions satisfied strict scrutiny.[115] The standard of review for affirmative action is now firmly set at strict scrutiny, an unfortunate change but, as Justices O'Connor and Powell applied it, not one that necessarily dooms a program. Now the outcome almost certainly will turn on how Justice Kennedy applies it, because four of the current Justices are committed to a "colorblind" approach that is hostile to all affirmative action.[116] Early on, Justice Brennan spoke against the notion of colorblindness, and under his vision of equal protection, affirmative action—if properly tailored—can clearly survive strict judicial scrutiny (p. 210).

Despite its general comprehensiveness, the biography neglects a few surprising areas. For example, the Reagan Administration not only targeted the Court's authority to protect rights under the charge of "judicial activism" but also pursued its own "judicial activism" through new, judicially enforced, federalism-based limits on Congress's authority to enact laws,

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112. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 207 (1995).

113. When asked in 2000 what he regarded as "the Reagan Administration's biggest originalist success in litigation," former Attorney General Meese cited the Rehnquist Court's treatment of congressional power and federalism, as well as affirmative action. Edwin Meese, III & James C. Ho, Dialogue, *Reagan's Legal Revolutionary*, 3 GREEN BAG 2D 193, 199 (2000) ("One area of litigation in which the Reagan Administration was most successful in returning to constitutional principles was in the area of discrimination on the basis of race and sex through quotas and preferences.").

114. 539 U.S. 306 (2003).

115. The issue remains live: as this book review goes to press, a challenge to the University of Texas's admission program pending before the Court threatens *Grutter*. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

116. In *Parents Involved*, Justice Kennedy recognized constitutionally relevant distinctions between laws aimed at harming African Americans and those that take note of race in order to achieve compelling interests. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

including laws that protect rights.[117] These efforts came to partial fruition under Chief Justice Rehnquist's leadership, including in *City of Boerne v. Flores*, a decision that undermined Justice Brennan's important civil rights-era opinion in *Katzenbach v. Morgan*.[118] Stern and Wermiel do not discuss *Katzenbach*, which expansively interpreted Congress's authority to protect rights pursuant to section five of the Fourteenth Amendment and upheld a provision of the Voting Rights Act of 1965 that prohibited certain uses of literacy tests as a prerequisite to voting. Also surprising, the biography devotes only a few paragraphs to describing the "epic" battle in which the Senate refused to confirm Robert Bork to the Court (pp. 518–19), an incident that provided one natural vehicle for fleshing out details of the competing constitutional vision that the Reagan Administration offered to replace that of Justice Brennan and the Warren Court.

In a few respects, Stern and Wermiel's assessments of Justice Brennan's legacy seem unduly negative and unsupported: among them, that Justice Brennan's decisions contributed to a "forty-year-long conservative backlash" (pp. xiii–xiv) and that he was prone to "what ifs" that sidestepped his own responsibility (pp. 316–18). In light of the twenty-three years during which Justice Brennan toiled without new Democratically appointed colleagues, some readers will feel that he is entitled to his "what ifs"—and that progressives today might take inspiration from them.[119] This biography gives rise to another "what if": what if his wife Marjorie (among others) had not persuaded Justice Brennan to reconsider when in 1979 he had all but decided to retire, in large part to take care of her during her thirteen-year struggle with cancer (pp. 456–60)? Instead, over another decade, he continued to build a legacy that remains in force, in the words of Supreme Court journalist Linda Greenhouse, to a "quite remarkable" extent.[120]

On the overarching issue of interpretive methodology, Stern and Wermiel seem too quick to give the legacy edge to Attorney General Meese's call for originalism and judicial restraint over Justice Brennan's "increasingly anachronistic" notion of "a living constitution to be adapted flexibly to contemporary circumstances" (p. 546). Stern and Wermiel cite "liberal ambivalence about Brennan's style of activism" and the "growing sense even among his fans that his unabashedly activist approach to judging belonged to a bygone era" (p. 546). Among their evidence that "[c]onservatives had gained the upper hand in the public debate over the proper method of constitutional interpretation," they note President Obama's statement that although Justice

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117. *See* Johnsen, *supra* note 11 (discussing Department of Justice documents targeting congressional authorities for new, judicially enforced limitations).

118. City of Boerne v. Flores, 521 U.S. 507 (1997); Katzenbach v. Morgan, 384 U.S. 641 (1966).

119. *See, e.g.*, Geoffrey R. Stone, *Selective Judicial Activism*, 89 TEX. L. REV. 1423, 1429–30 (2011) (reviewing *Justice Brennan: Liberal Champion*) (imagining what constitutional law might look like if a majority of Justices shared Justice Brennan's constitutional vision).

120. P. 544 (quoting Linda Greenhouse, who then served as the Supreme Court reporter for the *New York Times*).

Brennan is one of his heroes, Justice Brennan's judicial philosophy may not be appropriate for today, as well as then-nominee Sotomayor's efforts to distance herself from Justice Brennan's philosophy and the value of empathy.[121] The final section of this Review will make the contrary case—that with regard to constitutional interpretation, Justice Brennan continues to prevail over traditional originalists. In the end, these are relatively small quibbles with a biography that provides a thorough, useful, and inspiring account of the work of one of our greatest Justices.

III. Enduring Legacy

The context in which Justice Brennan labored to "get to five" on the Burger and Rehnquist Courts bears repeating: When Justice Brennan retired in 1990, a Democratic President had not appointed a Supreme Court Justice since 1967. During those twenty-three years, Republican Presidents appointed eight Justices and promoted Justice William Rehnquist to Chief Justice. When Justice Clarence Thomas succeeded Justice Marshall, that number rose to ten consecutive Republican appointments in twenty-four years. Beyond the numbers, the Reagan Administration sought to use its judicial appointments to effectuate radical legal change on the major constitutional issues of the day. It specially targeted Justice Brennan's "judicial activism" and constitutional methodology, seeking to replace his "living Constitution" approach with "originalism."[122] Voluminous Department of Justice reports detailed the Administration's substantive agenda, including lists of Court decisions deemed wrongly decided, many of which Justice Brennan had authored or critically shaped.[123] The reports cited approvingly the opinions and views of Chief Justice Rehnquist and Judge Robert Bork. At the political and semantic levels, "[o]riginalism remains even now a powerful vehicle for conservative mobilization."[124] The terms "living Constitution" and "liberal" are out of vogue, largely replaced by "progressive." This hardly proves, however, that the substantive content of Justice Brennan's constitutional vision and interpretive approach has become "anachronistic" and abandoned by progressives, or that originalism has fared better in the realm of doctrine. To the contrary, almost a quarter-century later, Justice Brennan's extraordinary achievements on the Burger and Rehnquist Courts endure in substantial measure.

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121. P. 546; *see also supra* text accompanying note 26.

122. *See* pp. 472–73, 504–07. Soon after President Reagan's election, Attorney General Smith gave a speech indicating that the Department of Justice would change its approach to busing and affirmative action, and in a later speech, he promised judicial appointees "who understand the meaning of judicial restraint." P. 473. *See also supra* note 14 (discussing statements of Reagan Administration officials).

123. *E.g.*, Constitution in 2000, *supra* note 11; Guidelines, *supra* note 14; *see also* Johnsen, *supra* note 11, at 367, 385–86, 389–90, 398–99 (discussing reports).

124. Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 546 (2006).

A. *"Judicial Activism"*

As to the charge of judicial activism, Justice Brennan spoke to when and why the Court should take an active role in upholding the Constitution less in his judicial opinions—which, again, must be read as they were written, through the lens of the "Rule of Five"—and more in his public speeches and interviews.[125] From early in his tenure, Justice Brennan emphasized the Court's duty to act: "Where the Constitution is violated, judges have no choice but to say so" (p. 233). He denied the caricature of his decisions as driven by mere political preferences: "The Court is not a council of Platonic guardians given the function of deciding our most difficult and emotional questions according to the Justices' own notions of what is just or wise or politic" (p. 233). Rather, he explained, "Just as an individual may be untrue to himself, so may society be untrue to itself . . . . The Court's reviewing function, then, can be seen as an attempt to keep the community true to its own fundamental principles."[126]

Supreme Court rulings since Justice Brennan's retirement disprove the charge that judicial activism is a liberal phenomenon and judicial restraint a virtue of the ideological right. In dispute instead is the content of the "fundamental principles" (p. 234) that, as Justice Brennan correctly observed, at times demand active judicial review. Each of the three prominent cases that the *New York Times* recently cited as possible factors influencing the Court's greatly diminished public approval rating[127] involve "activism" from the right that reflects the Justices' contrasting values: in the case of *Bush v. Gore*, reaching out to resolve a presidential election,[128] and in *Citizens United*, reaching out to overrule longstanding precedent and a federal statute to afford corporations new constitutionally protected rights to electioneer without congressional regulation.[129] The third case, *Sebelius*,[130] is complicated by Chief Justice Roberts's decision to provide the fifth vote to uphold core provisions of the Affordable Care Act, yet agree with the four dissenters—who would have struck down the law—that the law exceeded Congress's commerce power.[131] The ideological right's positions in these

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125. P. 233. Professor Tushnet has observed that the Warren Court was surprisingly unconcerned with articulating a theory of judicial restraint and explaining when a more active role was warranted. Tushnet, *supra* note 45, at 750.

126. P. 234. Criticism has been leveled at Justices for speaking publicly. *E.g.*, Editorial, *Supreme Court Sows Distrust with Justices' Political Activity*, BOS. GLOBE, June 11, 2012, at A12. This criticism is misguided and shortsighted. As the comments quoted in the preceding paragraph demonstrate, public understanding, and ultimately democracy, benefit from Justices taking part in public discourse and sharing their legal and personal views and philosophies.

127. *See* Liptak & Kopicki, *supra* note 1.

128. 531 U.S. 98 (2000) (per curiam).

129. Citizens United v. FEC, 558 U.S. 310 (2010), *overruling* Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990).

130. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

131. *Id.* at 2591 (opinion of Roberts, C.J.); *id.* at 2642–44 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting).

and many other cases decided after Justice Brennan's retirement called for a strong judicial role, counter to congressional statute or Supreme Court precedent, thereby flipping the charge of activism leveled at Justice Brennan.

Disagreements among Justices thus often fundamentally rest not on whether, but under what circumstances, the Court should take an active stance. On which issues and in furtherance of which constitutional values should a Justice be active? For example, the Court's ruling in *Citizens United* that Congress could not limit corporations' independent campaign expenditures reflected highly contested views on a range of issues: Are corporations merely associations of individuals entitled to the same "free speech" rights as natural persons?[132] Are they among the most valuable participants in public discourse on economic policy?[133] Are unlimited corporate campaign expenditures likely to undermine Americans' confidence in the outcome of elections?[134] How does the right of a corporation to engage in unlimited independent expenditures relate to other restrictions the Court previously upheld, for example, on the ability of letter carriers and other government employees to participate in electoral politics?[135] The Roberts Court not only came down on the pro-corporate side of these questions in *Citizens United* but also increasingly has ruled in favor of corporate interests across cases and issues—and without the support of originalist arguments.[136]

In another review of the biography, Professor Geoffrey Stone helpfully explores the principles that guided Justice Brennan in his "selective judicial activism."[137] Professor Stone notes that all Justices are selectively activist, so the challenge is to discern the principles that dictate when they take an activist

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132. *See Citizens United*, 130 S. Ct. at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.' " (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978))).

133. *See id.* at 912 ("On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."); *id.* at 929 (Scalia, J., concurring) ("Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.").

134. *Id.* at 910 (majority opinion) ("The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.").

135. *Id.* at 899 ("The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.").

136. *See* Neil Weare, *Developing: Court Rules in Chamber's Favor in Every Case Decided So Far This Term*, CONSTITUTIONAL ACCOUNTABILITY CTR. (June 21, 2012), http://www.theusconstitution.org/text-history/1484/developing-court-rules-chamber's-favor-every-case-decided-so-far-term (discussing the significant increase in the U.S. Chamber of Commerce's success rate during the Roberts Court as compared with earlier Courts); *see also* CONSTITUTIONAL ACCOUNTABILITY CTR., ISSUE BRIEF NO. 6, BIG WINS FOR BIG BUSINESS: THEMES AND STATISTICS IN THE SUPREME COURT'S 2010–2011 BUSINESS CASES (2011), *available at* http://theusconstitution.org/sites/default/files/briefs/Download %20Big%20Wins %20for%20Big%20Business%20Here.pdf (same).

137. Stone, *supra* note 119.

stance.[138] After describing Alexander Hamilton's view that judges "have a duty to resist invasions of constitutional rights," Professor Stone explains, "It was this 'originalist' conception of judicial review that informed Justice Brennan's selective judicial activism."[139] Professor Stone finds that for Justice Brennan, the rights that triggered heightened judicial protection centered on process concerns akin to those articulated in the Supreme Court's famous footnote four in *Carolene Products*.[140] This captures much of what informed Justice Brennan's approach to judicial review, but not all.[141]

Beyond the protection of historically disadvantaged groups and democratic processes, Justice Brennan repeatedly identified human dignity as a substantive constitutional value that should guide judicial review across contexts. In a 1961 speech, he described "the dignity and worth of the individual" as the "supreme value of our American democracy" (p. 418). At the end of his tenure, he stated that human dignity was "the basic premise on which I build everything under the Constitution" (p. 418). Justice Brennan's focus on dignity helps explain many of his constitutional interpretations, including his commitments to reproductive liberty, criminal defendants, death row inmates, and justice for the poor in accessing education and the basic necessities of life. He would later highlight as triumphs of human dignity both *Goldberg v. Kelly* and the Court's protection of women from discriminatory laws that perpetuated archaic stereotypes (p. 423). Stern and Wermiel tie his concern for the dignity of people in poverty as well as victims of discrimination to his ability to empathize with the plight of others, even in circumstances such as these where "personal experience did not fuel his empathy" (p. 342). Stern and Wermiel are, however, somewhat critical of his invoction of dignity, noting that the word does not appear in the Constitution's text and lacks significant precedent (pp. 419, 422). In another insightful review of this biography, Professor Frank Michelman helpfully characterizes Justice Brennan's concern with dignity as grounded in "the capacity of a being of the human kind for ethical and moral self-direction."[142] The concept has continued to inform the Court's interpretation of the constitutional guarantee of liberty to protect decisionmaking autono-

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138. *Id.* at 1429.

139. *Id.* at 1426.

140. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see* Stone, *supra* note 119, at 1424.

141. More specifically, Professor Stone writes that Justice Brennan closely scrutinized "(1) when the governing majority systematically disregarded the interests of a historically underrepresented group . . . and (2) when there was a risk that a governing majority was using its authority to stifle its critics, entrench the status quo, and/or perpetuate its own political power." *See* Stone, *supra* note 119, at 1426. Professor John Hart Ely was the most famous proponent of a process-based grand theory that would, in Professor Powell's words, "escape the limitations of clause-bound interpretivism." POWELL, *supra* note 52, at 45. Professor Powell has written that "Ely has had many admirers but few followers." *Id.*

142. Michelman, *supra* note 39, at 1413.

my on matters fundamental to self-direction.[143] Justice Kennedy—a Justice who often casts the deciding fifth vote—places special emphasis on the constitutional value of dignity.[144]

Justice Brennan appreciated the challenges and nuances of the proper role of a Justice's values and took extraordinary care not to allow his personal values and beliefs, including religious beliefs, to influence his constitutional decisionmaking in ways that would have been inappropriate.[145] He often felt duty bound to rule counter to his personal values, his religious beliefs, or the teachings of the Catholic Church, including with regard to prayer and Bible reading in school, contraception and abortion, obscenity, and gender discrimination. Nor did he limit his involvement to working behind the scenes in such cases of conflict to avoid controversy. In *Eisenstadt v. Baird*,[146] he authored an exceptionally powerful, often-quoted statement on the right of unmarried individuals to use contraception, a decision that he recognized would support the legalization of abortion.[147] In *School District of Abington Township v. Schempp*,[148] he labored mightily over a lengthy, separate concurrence explaining why school-led reading of Bible passages violated the Establishment Clause (pp. 172–74). His leadership on obscenity and the unavoidable viewing of sexually explicit material caused him great public embarrassment, including in his church. He described the "terrible experience" of being the only member of a large Catholic congregation who refused to stand to recite a pledge not to view indecent and immoral motion pictures (p. 172). Justice Brennan explained his approach to the protection of controversial constitutional rights with which his personal beliefs were in conflict when discussing the issue of abortion in a 1987 interview with Wermiel:

> I wouldn't under any circumstances condone an abortion in my private life . . . . But that has nothing to do with whether or not those who have

143. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)) (internal quotation marks omitted)).

144. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694 (2008) (relating dignity as a constitutional value to both liberty and equal protection).

145. In fact, far from merely deciding cases based on personal values, Justice Brennan devoted great care to his work and found some of his close allies on the Court lacking in this regard. Justice Brennan expressed disappointment in the work ethic of both Justice Douglas and Justice Marshall. *See* p. 283 ("[Justice Douglas] was slipshod in what he did."); *supra* note 43 (describing Justice Marshall's apparent lack of interest).

146. 405 U.S. 438 (1972).

147. P. 370 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (quoting *Eisenstadt*, 405 U.S. at 453)).

148. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring).

> different views are entitled to have them and are entitled to be protected in their exercise of them. That's my job in applying and interpreting the Constitution. (p. 372)

B. *Originalism and the Living Constitution*

When Justice Brennan described a living Constitution approach to constitutional interpretation in an October 1985 speech delivered at Georgetown University, the press incorrectly assumed that it was a direct response to one delivered by Attorney General Meese shortly before, even though Justice Brennan used "language identical to what he said in speeches for two decades" and had begun preparing this particular speech several weeks before Attorney General Meese's address (pp. 504–06). Thus began an unusually sharp and very public debate between executive branch officials and a sitting Supreme Court Justice.[149] Attorney General Meese's speech, "Jurisprudence of Original Intention," presented a search for the Framers' original intent as a desirable, objective alternative to "the radical egalitarianism and expansive civil libertarianism" that resulted when Justices—a clear but unspoken reference to Justice Brennan—interpreted the Constitution "to mean whatever they wanted" (p. 504).

Justice Brennan provided a powerful critique of originalism, warning of the difficulty of ascertaining the Framers' intent and, in colorful, quotable terms, of the impropriety of originalism's "facile historicism" and "arrogance cloaked as humility" (p. 505). In describing the proper interpretive approach, Justice Brennan used language rooted in the Court's longstanding interpretive tradition: Brennan described "the genius of the Constitution" as resting on "the adaptability of its great principles to cope with current problems and current needs" (p. 505). This language was reminiscent of Chief Justice John Marshall's words in *McCulloch v. Maryland*: "[W]e must never forget, that it is *a constitution* we are expounding," a Constitution "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[150] The debate continued the next year in the context of President Reagan's nomination and the Senate's rejection of Robert Bork, whose writings on originalism attacked as illegitimate Supreme Court rulings that expansively protected, for example, expression under the First Amendment, women under the guarantee of equal protection, and the right to privacy recognized in *Griswold*.[151]

Justice Brennan prevailed in the immediate sense, as Stern and Wermiel acknowledge: "[T]he originalism that Attorney General Edwin Meese advocated . . . in his public debate with Brennan never took hold" (p. 546). No such traditional version of originalism has in any legal sense prevailed. In the decades since the Brennan–Meese debate, constitutional scholars, Su-

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149. Justice John Paul Stevens also delivered a speech that mentioned Attorney General Meese by name twenty-eight times. P. 506.

150. 17 U.S. (4 Wheat.) 316, 407, 415 (1819).

151. *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–9, 11–12 (1971).

preme Court Justices, and government lawyers have developed and critiqued numerous variations on originalism, which run the full ideological gamut: from Justice Scalia's heavy dependence on original expected application, which is flatly inconsistent with Justice Brennan's approach, to an approach that Professor Jack Balkin recently detailed in a book entitled *Living Originalism*,[152] to Justices and scholars who consider original meaning (whether or not they use the term) as one among the range of sources to which the Court has traditionally looked in interpreting the Constitution. This diversity of "originalisms" enabled Justice Elena Kagan in her confirmation hearing to declare, "[W]e are all originalists," and to describe a form of originalism much more akin to Justice Brennan's living constitutionalism than Attorney General Meese's originalism.[153] She noted that the Framers looked ahead "generations and generations and generations" when crafting the Constitution: "[S]ometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists."[154]

Thus, even as progressives vigorously debate the value and propriety of expressly adopting some version of originalism, rather than ceding the term to those on the ideological right, Justice Brennan's essential approach lives on among all sides. For example, Professor Balkin's affirmation of a form of original meaning he calls "framework originalism" embraces a form of living constitutionalism: "[W]e do not face a choice between living constitutionalism and fidelity to the original meaning of the text. They are two sides of the same coin."[155] In an earlier article, Professor Balkin made a strong though controversial argument that fidelity to text and principle at the

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152. JACK M. BALKIN, LIVING ORIGINALISM (2011).

153. *Confirmation Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62–63 (2010) (statement of Elena Kagan).

154. *Id.* at 61–62. She also implicitly rejected Justice Roberts's "umpire" analogy while acknowledging the value of a judge's capacity for empathy:

> Judging is not a robotic or automatic enterprise, especially on the cases that get to the Supreme Court. A lot of them are very difficult. And people can disagree about how the constitutional text or precedent—how they apply to a case.
>
> But it's law all the way down, regardless.
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> . . . .
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> . . . [I]n approaching any case, a judge is required really, not only permitted, but required to think very hard about what each party is saying, to try to see that case from each party's eyes; in some sense, to think about the case in the best light for each party, and then to weigh those against each other.
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> . . . .
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> But at the end of the day, what the judge does is to apply the law. And as I said, it might be hard sometimes to figure out what the law requires in any given case, but it's [law] all the way down.

Id. at 103.

155. BALKIN, *supra* note 152, at 20.

proper level of generality supports a constitutional right to decide whether to have an abortion.[156] Professor David Strauss, on the other hand, rejects progressive efforts to appropriate the originalism label in his book, unabashedly entitled *The Living Constitution*.[157] Professor Strauss, however, recognizes that some originalists "define 'original meaning' in a way that ends up making originalism indistinguishable from a form of living constitutionalism."[158] The mainstream of both judicial interpretation and academic commentary—to my mind correctly—considers the Framers' original understanding as just one among many traditional sources and methods of interpretation, in essentially a "living" approach to interpretation.[159]

Additional indirect support for Justice Brennan's legacy of living constitutionalism may be derived from an unlikely source: attempts to reconcile traditional, narrow forms of originalism with now-bedrock cases that protect individual rights in applications not specifically contemplated by the Framers. Most well known among them, Professor Michael McConnell's originalist argument for *Brown v. Board of Education*[160] is generally viewed as an impressive but ultimately unsuccessful effort.[161] Justice Scalia, an originalism adherent who would preserve at least some bedrock cases either by declaring the text clear (as in *Brown*) or by resorting to stare decisis, has repeatedly stated that the Court's gender discrimination doctrine is wrong as an original matter because the Framers of the Fourteenth Amendment clear-

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156. Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2008).

157. DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

158. *Id.* at 10–11.

159. For example, Professors Geoffrey Stone and William Marshall emphasize fidelity to the Framers at the level of principle, as well as the lessons of the Court's most famous footnote: footnote four in *Carolene Products*. Geoffrey R. Stone & William P. Marshall, *The Framers' Constitution*, DEMOCRACY, Summer 2011, at 61, 61–63, *available at* http://www.democracyjournal.org/pdf/ 21/the_framers_constitution.pdf. In an influential early article published the same year as the Brennan–Meese debate, Professor Powell marshals the evidence that the Framers did not intend their specific expectations to be the primary tool for future generations to use when interpreting the Constitution. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). In a later insightful book, Professor Powell offers a "historicist" account of constitutional law, with illustrative historical episodes, that concludes with "shared constitutional first principles"—among them an interpretive tradition that relies upon a range of sources and methods, from text and original meaning to the consequences of differing interpretations. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 7, 205, 208 (2002). Justice Breyer similarly argues for the use of "traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences" when interpreting the Constitution, with an emphasis on purposes and consequences. BREYER, *supra* note 13, at 74.

160. Professor Marshall persuasively explains that several now-landmark cases—including *Reynolds v. Sims*, which articulated the principle of "one person, one vote" and was made possible by Justice Brennan's efforts—resulted from "progressive constitutionalism" and could not be explained by either originalism or judicial restraint. William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251 (2011).

161. *See* BALKIN, *supra* note 152, at 105, 226–27 (discussing Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995)).

ly did not intend the Equal Protection Clause to protect women from discrimination.[162] In a sign that Justice Brennan's gender discrimination cases may be entering the category of iconic cases alongside *Brown*, Federalist Society cofounder and leading originalist Professor Steven Calabresi, writing with Professor Julia Rickert, recently offered an originalist argument in favor of these cases.[163] A vibrant debate has ensued among traditional and new originalists about the implications of the Calabresi–Rickert spin on originalism for reproductive rights and marriage discrimination on the basis of sexual orientation.

Thus, perhaps it can be said that not only are we all originalists, but at least with regard to the superprecedents we are also all living constitutionalists. We are all judicial activists as well, though in pursuit of different constitutional values premised on varying constitutional theories. Stern and Wermiel's biography paints a clear picture of Justice Brennan's view of a judiciary properly active on behalf of protecting individual rights, human dignity, and democratic legitimacy. The biography's detailed recounting of cases spanning Justice Brennan's more than three decades on the Court again and again affirms the wisdom of an interpretive approach that remains in the mainstream of both judicial interpretation and academic commentary—one that considers the Framers' original understanding as one of the sources and methods of interpretation which include, in Justice Breyer's words, "traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences."[164] Among their numerous illustrations, Stern and Wermiel remind us that when Justice Brennan led the Court to recognize that romantic paternalism put women in "cage[s]" not on "pedestal[s]," the Justices fortunately did not feel bound by the Framers' prejudices (p. 392). The Justices even proved capable of transcending their own stereotypes and discomfort about women's changing roles in favor of an evolving appreciation of what equal protection of the laws requires. Constitutional debate and change are inherent in the system, but nearly a quarter-century after his retirement, Justice Brennan's legacy remains strong and vital.

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162. Most recently, on NPR in July 2012. *See* Nina Totenberg, *Interviewing Scalia: Verbal Wrestling Match with a Master*, NPR (July 25, 2012), http://www.npr.org/blogs/itsallpolitics/2012/07/25/157384080/interviewing-scalia-verbal-wrestling-match-with-a-master.

163. Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 3 (2011) (noting that they are "taking issue" with Justices Scalia and Ginsburg as well as many legal scholars, most notably Professors Michael Dorf, Ward Farnsworth, and Reva Siegel).

164. BREYER, *supra* note 13, at 74.