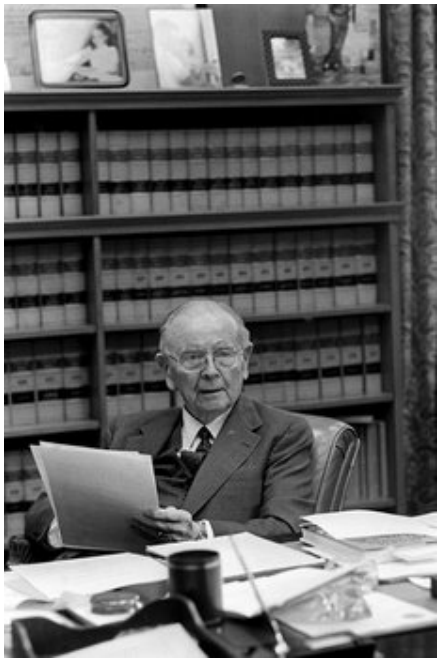
The New York Review of Books

The Most Skillful Liberal

APRIL 7, 2011

Anthony Lewis

Justice Brennan: Liberal Champion
by Seth Stern and Stephen Wermiel
Houghton Mifflin Harcourt, 674 pp., $35.00



Paul Hosefros/The New York Times/Redux
Justice William J. Brennan in his Supreme Court chambers, Washington, D.C., 1986

In 1946, in the case of *Colegrove* v. *Green*, the Supreme Court rejected an attempt to get the federal courts to address the festering problem of political districts grossly unequal in population. At the time, for example, Connecticut was districted so that the 177,000 citizens of Hartford elected two members of the state House of Representatives; so did the town of Colebrook, population 592. Of course the largely rural beneficiaries of the malapportionments were disinclined to correct the distortions. But Justice Felix Frankfurter, in finding that a claim of unconstitutional discrimination was not fit for judicial resolution, wrote: "Courts ought not to enter this political thicket."

In the years after that decision the Court rejected ten more challenges to unequal districts—summarily, without opinions. The issue seemed to be dead. Then, in 1960, a case called *Baker* v. *Carr* came to the Court from Tennessee, and the Court agreed to hear it. One of Justice William J. Brennan Jr.'s law clerks that year, Richard S. Arnold, noted in his diary that four justices had voted to hear the case, the minimum number required. He added:

> They want to overrule Colegrove. The boss doubts they will have the votes. So do I.

After argument—twice—of *Baker* v. *Carr*, the Court was divided: four for sticking to *Colegrove* and four for overruling it. The ninth justice, Potter Stewart, was willing to have districting questions go to the courts, but with no intimation of what constitutional test would be applied. Chief Justice Earl Warren assigned the opinion of the Court to Justice Brennan, believing that he would have the best chance of building a majority.

Justice Brennan wrote an opinion aimed at securing Stewart's vote. It eschewed any discussion of what the Constitution would require if unequal apportionments were put to the test. The opinion was a scholarly examination of what are called political questions, matters on which courts should

stay their hand, concluding that districting was not one. Justice Stewart joined unreservedly. Then Justice William O. Douglas wrote a concurring opinion demanding absolute population equality in political districts. That moved Justice Stewart to add a concurrence emphasizing the limited nature of what the Court was actually deciding. The situation was in danger of unraveling, but Justice Brennan held it together. Then one of the original four opponents, Justice Tom C. Clark, switched to Brennan's side. And another, Justice Charles E. Whittaker, retired because of ill health. The vote to overrule *Colegrove* was 6–2.[1] The day after the decision a former Brennan law clerk, Daniel Rezneck, wrote him:

> Bravo! That was a memorable day yesterday, one of the great ones in the Court's history…. I think a certain dissenting colleague of yours must have been reminded of the last words of General Custer: "Where did all those damned Indians come from?"

Baker v. *Carr* set off an explosion of lawsuits challenging unequal districts around the country. Just two years later the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required substantial equality in all its legislative districts. Apportionments were adjusted without any of the political-judicial conflict that Justice Frankfurter had feared. Chief Justice Warren said later that the districting cases were the most important of his years on the Court.

That constitutional revolution would not have happened without Justice Brennan. The record as now known makes that clear. *Baker* v. *Carr* is a powerful example of a phenomenon that runs through Brennan's thirty-four years on the Supreme Court (1956–1990): his ability to produce majorities for liberal outcomes in difficult cases. His colleague Thurgood Marshall once said to me, "I don't know how he does it."

How did he do it? is the question underlying much of the book by Seth Stern and Stephen Wermiel. The largest part of the book is devoted to an examination of Justice Brennan's work on the Supreme Court term by term. And the focus is on how he struggled to build majorities. The authors disclose a good deal of the process that went on before the decision in many cases. They could do that because they had unusual access to Justice Brennan's papers—which in turn stems from the unusual history of the book.

Justice Brennan agreed in 1986 to cooperate in a biography by Stephen Wermiel, a lawyer-journalist who was then covering the Supreme Court for *The Wall Street Journal*. He opened his files to Wermiel and was interviewed by Wermiel more than sixty times in the coming years. He also gave Wermiel copies of the narrative histories of Supreme Court decisions he had his law clerks prepare each term—something that, to my knowledge, no other justice has done.

Wermiel spent years doing research and writing a few draft chapters but put the biography aside after Brennan's death in 1997. Finally, in 2006, he enlisted another lawyer-journalist as coauthor, Seth Stern, who did further research after absorbing Wermiel's. Stern wrote most of the book. (Wermiel now teaches constitutional law at American University's Washington College of Law; Stern is a reporter for *Congressional Quarterly*.)

The book is not an authorized biography in the sense of one controlled by its subject. Brennan did not direct Wermiel's research or his early drafts, and he died before most of the writing was done. The authors do not write as advocates of his liberal views in criminal law, obscenity, separation of church and state, or other subjects. They seem detached recorders rather than supporters. And on some matters they are critical.

One such matter is Brennan's decision in 1966 to withdraw an invitation to Michael Tigar to become one of his law clerks. Wermiel and Stern say the decision "seems at odds with his principles." Tigar was a student at Boalt Hall, the law school of the University of California at Berkeley, ranked first in his class. After Brennan made the offer, a public storm blew up over Tigar's left-wing political activities as an undergraduate and a law student at Berkeley. Among other things he had gone to a youth festival in Helsinki and written an article about it for *People's World*, a Communist newspaper on the West Coast. Justice Brennan was visited by his newest colleague, Abe Fortas, and warned that members of Congress would attack him if he went through with the Tigar appointment; Brennan knew that Fortas was close to President Lyndon Johnson and may have had connections to the FBI. He withdrew the clerkship offer. In extenuation, the authors fairly note that in this case, apart from any question of courage, Brennan was always concerned about the Court's public standing.

One thing that emerges from the book's detailed accounts of the way decisions developed is how willing Brennan was to accept suggestions from colleagues. He was never an absolutist, as Justice Hugo L. Black proudly called himself on issues of free speech. Thus in the great libel case *New York Times* v. *Sullivan*, in which Justice Brennan's opinion for the first time applied the First Amendment's protections to libel cases, Justices Black, Douglas, and Arthur Goldberg wanted to protect all critical comments about public officials, true or false; Justice Brennan's opinion for the Court left knowing or reckless falsehoods open to libel suits. That view attracted the other five votes. But the hope for a majority was not the only reason for Brennan's position. He thought there should be some room for officials to repair their reputations. He remembered Senator Joseph McCarthy's attacks on supposed Communists in government.

Any Supreme Court justice would be pleased to have his view supported by a majority. But that was not as strong a concern for others as it was for Brennan. Justice Black was a fierce advocate of freedom of speech and press. His views had a profound influence on the Court over the years, but they were mostly expressed in dissenting opinions. Holding on to a position untempered by compromise mattered more to him than gathering majorities in particular cases.

One subject on which Justice Brennan inadvertently became a leader—obscenity—turned out not to be suitable to agreement among the justices. In 1957, in his first term on the Court, Brennan got the assignment from Chief Justice Warren to write the Court's opinion in *Roth* v. *United States*. Samuel Roth, a seller of books with titles such as *Wanton by Night*, had been convicted of violating the Comstock Act, a federal statute named for the anti-obscenity crusader Anthony Comstock. The Supreme Court had given little guidance on the question of what should be considered bannable as obscene. Lower courts had set aside official orders barring James Joyce's

Ulysses from the United States. But as late as 1948 eight justices of the Supreme Court divided equally and thus upheld the suppression of Edmund Wilson's novel *Memoirs of Hecate County*, surely a work of literature. (Felix Frankfurter, to Wilson's disgust, recused himself on grounds of acquaintance with the author.)

Brennan's opinion in the *Roth* case said that obscene matter was not protected by the First Amendment. That left just one question: What was the proper definition of obscenity? And here Justice Brennan, having seemingly joined the book-banners, opened the way to a more liberal American culture. "Sex and obscenity are not synonymous," he wrote. "Obscene material is material which deals with sex in a manner appealing to prurient interest."

The constitutional test, Brennan concluded, was "whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest." That definition gave far less room for findings of obscene material than the formula traditionally used, derived from a Victorian British decision, *Regina* v. *Hicklin*. The *Hicklin* test called for a judgment of obscenity if (1) even a small part of a work might deprave and corrupt (2) the most susceptible readers, such as children. Both those factors were eliminated in the Brennan definition.

There were four dissenters from the *Roth* decision: Chief Justice Warren, a puritan on these issues, objected to Brennan's narrowing of what could be considered obscene. Justice John Marshall Harlan similarly thought Brennan had gone too far toward liberation. Justices Black and Douglas held to their view that the First Amendment bars any limit on expression. (About Justice Harlan: in 1971, in *Cohen* v. *California*, he wrote the Court's opinion reversing the conviction of Paul Cohen for disturbing the peace by wearing in a courthouse, during the Vietnam War, a jacket bearing the words "Fuck the Draft." The result of the First Amendment, Harlan said, may seem to some "to be only verbal tumult, discord and even offensive utterance." But they are "in truth necessary side effects of the broader enduring values [of open debate]…. That the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength.")

In time Justice Brennan added another liberating element to the process of deciding whether something could be censored. Even if it failed the first test, he said, a work could escape banning if it had redeeming social importance. But the divisions on the Court in the *Roth* case foretold the long course of obscenity decisions in the ensuing years. Sometimes a fractured Court could not produce a majority opinion. Some cases were decided by a brief, unsigned per curiam judgment. To decide whether movies could be banned, the justices watched the contested film in a basement room—except Black and Douglas, who thought nothing could be censored—and then gave a thumbs up or down. It struck many as absurd that the Supreme Court should be acting as a national censorship board, and the Court eventually tired of it.

Justice Brennan finally proposed that the Court prohibit all censorship except to protect children. The majority rejected that course and chose a stricter test that would in theory allow more censorship of books and magazines and films. But it was only in theory. In fact, Americans in

time could read or view just about anything without fear of legal interference. Justice Brennan, in case after case, had a large part in freeing the marketplace from the hand of the censor—with one striking and mysterious exception, *Ginzburg* v. *United States (1966)*.

Ralph Ginzburg published a high-toned quarterly called *Eros*, in hard covers and with nothing racier inside than eighteenth-century engravings. A federal grand jury indicted him for publishing the first issue of *Eros* and a book called *The Housewife's Handbook of Selective Promiscuity*. What got Ginzburg into difficulty was not the contents of these publications so much as the way he sold them—with nine million direct-mail solicitations to addresses that included convents. Ginzburg and his lawyers were convinced that the trend of Supreme Court decisions would protect him. But he was convicted in the trial court and sentenced to five years in prison.

In the Supreme Court, Justice Brennan astonished most observers by voting to uphold Ginzburg's conviction. He wrote the Court's opinion, which focused on what it called Ginzburg's "pandering" and advertisements with the "leer of the sensualist." In a companion case, about the eighteenth- century English erotic novel *Fanny Hill*, Brennan came down once again against censorship, writing that a work could not be held obscene if it had any literary merit. But why had he, in the *Ginzburg* case, broken a string of opinions on the side of freedom? Some thought he was revolted by Ginzburg's behavior, others that he was weighed down by Catholic and other critics of his obscenity opinions—though he had never lacked courage in cases involving Communists and other outcasts. The most convincing explanation, I think, is that Chief Justice Warren pressed him hard to make this gesture toward "decency."

Warren and Brennan were unusually close, as Stern and Wermiel convincingly describe. The Chief Justice would come to Brennan's chambers on Thursday afternoon or Friday morning —before the justices' conference on Friday. They talked privately for an hour or two about matters before the Court. Brennan denied, to Wermiel, that he ever told the Chief how to vote in pending cases. In interviews with Wermiel in 1987 and 1988 he explained:

> People jumped to the conclusion that I must have been telling him how to decide cases because he did not have a reputation of being a very great intellect, that he'd been a good governor all right, but he was a politician and not an intellect. Well they're just wrong about that…. He'd come in and say, "This is the way I feel about it, this is the way it looks to me on this and that and the other issue—what do you think?" And we'd talk about it. He was just interested in how the case ought to come out.

Chief Justice Warren announced his intention to retire in 1968. When President Johnson chose to replace him by elevating his old friend Justice Fortas, Brennan was not happy. He was uncharacteristically sharp when he spoke to Wermiel about Fortas in a 1990 interview:

> I don't believe I could ever have worked with Abe Fortas as I worked with Earl Warren. As a matter of fact, I'm inclined to think I would never have tried it because I wouldn't have trusted him. You couldn't work with him. Abe had to be the greatest and everybody had to kowtow to him. He could be very mean.

When a scandal killed Fortas's nomination to be chief and forced him to leave the Court, Richard Nixon was president. He picked Warren E. Burger as chief justice—to what turned out to be the distress of Brennan. It wasn't a matter of ideology alone. Brennan and others felt that Burger was unfair in handling the mechanics of Court business, including the assignment of opinions. When he retired and was succeeded by the most conservative member of the Court, William H. Rehnquist, Brennan told me he was delighted—because the Court functioned efficiently and fairly.

In the post-Warren years Brennan's ability to shape majorities for liberal outcomes inevitably declined as conservative appointees changed the balance of the Court. But there were still surprises. One was the flag-burning case *Texas* v. *Johnson* in 1989. By a vote of 5–4, the Court held that burning an American flag as a protest was expression protected by the First Amendment. One of the five was Antonin Scalia, whose conservatism included devotion to freedom of speech. Brennan held the slim majority together behind an opinion of the Court that said expression could not be banned because it was offensive.

The flag decision set off public outrage, to an extent that today seems mad. The Senate, by a vote of 97–3, adopted a resolution deploring it. President George H. W. Bush called for a constitutional amendment. Congress passed, and Bush signed, a federal law against burning the flag. A year later the Supreme Court held it unconstitutional, too. Justice Brennan, again writing for the Court, concluded:

> Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering.

Perhaps most striking was Justice Brennan's victory in a 1990 case in which he denied a challenge to the Federal Communications Commission's power to give preference to minority owners in awarding broadcast licenses.That outcome led Justice Marshall to express amazement at Brennan's ability to build majorities. (The decision was overruled by the Court five years later, after Brennan's retirement.)

Brennan also had significant influence in some cases in which he did not write an opinion. He would make important suggestions for changes to others' draft opinions, and many were accepted. Among the decisions he influenced were *Griswold* v. *Connecticut*, striking down a Connecticut law against the use of contraceptives and opening the way to the use of privacy as the basis for decisions protecting the right to an abortion; *United States* v. *Nixon*, the presidential tapes case; and *Bakke* v. *California*, in which Justice Powell's opinion for himself in a divided Court preserved the right of universities to weigh an applicant's race in the interest of a diverse student body.

Of particular interest now, because of *Citizens United*, is the part that Justice Brennan played, behind the scenes, in its forerunner, the 1976 decision in *Buckley* v. *Valeo*. That case dealt with the complicated provisions of the post-Watergate political reform law, the Federal Election Campaign Act. In a private account of the Court's handling of the case, Brennan said it was "one

of the most difficult the Court has ever faced." The Court gave its judgment in an unsigned opinion that upheld the constitutionality of the law's limits on campaign contributions but struck down limits on campaign expenditure. Five justices, not including Brennan, added individual opinions agreeing or disagreeing with parts of the Court's judgment.

The Court handled the case by having different justices write parts of the unsigned opinion of the Court on various sections of the statute. Brennan wrote the part sustaining the statute's provision for public financing of presidential elections. What he said to his colleagues about other sections of the statute makes clear that he would not have agreed with the decision in *Citizens United*. There was a First Amendment interest in contributing to candidates, he recognized, but it was outweighed by the interest in limiting the corrupting influence of money in campaigns.

Brennan and other justices were highly critical of Chief Justice Burger for tardiness and confusion in handling the construction of the Court's overall judgment. Brennan stepped in to perform much of that role. At the end Justice Lewis Powell wrote him a note saying, "We are indebted to you for your firm leadership in guiding and moving this case forward—as was so urgently needed."

One of his most influential acts was not a judicial decision but a speech, to the New Jersey Bar Association in 1976. At a time when the Supreme Court's protection of the rights of criminal defendants and others seemed to be weakening, he urged state courts to more vigorously enforce state constitutions. State judges have done so, often with profound effects. The best-known example is probably the 2003 Massachusetts decision that prohibiting same-sex marriage violated the constitution of Massachusetts.

Justice Brennan's impact on three decades of Supreme Court history has of course not been universally applauded. Critics accuse him of sweeping precedent aside to reach desired ends, as the conservatives who now control the Court are doing in their hurried, wholesale rewriting of constitutional law. Is there really no difference? I think there is.

No position Brennan took was remotely as devoid of support in law or precedent as *Bush* v. *Gore*. Today's conservatives act again and again on behalf of a narrow, powerful interest: the rich. The apotheosis was the *Citizens United* case, overruling a hundred years of constitutional law to give corporations unlimited power to contribute to election campaigns.

Justice Brennan spoke more often, rather, for disfavored majorities, as in *Baker* v. *Carr*, or for those who had been excluded from rights, like many of the prisoners awaiting execution on death row. The facts moved him. It was after years of reviewing the facts of individual cases that he concluded, along with Justice Marshall, that the death penalty could not be administered justly. Justices Harry Blackmun and John Paul Stevens[2] came to the same conclusion late in their service on the Court—the same conclusion embraced by the Catholic Church and by all other Western governments.

The record of Brennan's thirty-four years on the Supreme Court is astonishing. He was not a flashy judge. Few of his opinions are rich in quotable passages. He lacked the brooding

personality of a Learned Hand. Until quite late in his service he was not generally recognized as the leader he was. But he shaped much of the constitutional law under which we live. He had a liberal vision that will outlast the passions of the moment. He was steadfast in that vision, fearless in the face of controversy. Justice Scalia, speaking from a different constitutional point of view, told the authors of this book:

> In my experience, he is the most skillful "general" on the Court. He is the epitome of skill, subtlety, and yet tenacity and he's always going somewhere.

Stern and Wermiel explore Brennan's record fully and effectively. In the end, what can we say about the mystery of Brennan's ability to build majorities? That it is not a mystery. When Justice Brennan died in 1997, I wrote then—and I believe now—that his extraordinary influence did not arise from Irish charm or some mysterious guile. It came from intellect, conviction, a strong tactical sense, an eye for the essentials rather than a wish list, and a relationship of good faith and confidence with his colleagues.

---

1. 1
   Baker v. *Carr* , 369 U.S. 186 (1962). ↩

2. 2
   See the recent article by John Paul Stevens, " On the Death Sentence ," *The New York Review* , December 23, 2010. ↩