in addition to walking, family support, and even the much-abused crossword puzzle not only add to the quality of that longer life, but may increase its duration? Surely poor people, too, need to be told to walk a lot and watch their diet and engage in mentally sharpening activities, none of which are necessarily class-based remedies.

For far too many Americans, Jacoby's hazard-strewn road through later life is an accurate depiction, and she hammers that point home in chapter after evidence-supported chapter. She shines a glaring spotlight on the consequences of social inequality, and on the huge group of the elderly and soon-to-be elderly who have indeed been deluded by a modern concept of aging that ignores the reality of the disabilities, the restrictions, and the losses that the years inevitably bring if they are not actively fought. It is a concept that denies the decade-by-decade increase in frequency of disease, poverty, and loneliness among the old, which may—when heaped on top of cultural handicaps—prevent any useful and proven measures from being so much as attempted.

Civic planners, makers of public policy, sociologists, geriatricians, cultural historians, and advocates of the elderly should make their way through Jacoby's book. And so should every one of the many others whose moral philosophy is offended by the knowledge that social disparities stand in the way of providing known remedies for the depredations of aging, whether of mind, body, or soul. It will be many decades, if ever, before the 50 percent of those over age eighty-five who suffer from dementia can be afforded some relief or prevention of that dreaded plague of the final years, but in the meantime there is so much that can lighten the burden that they impose, and justice cries out for its universal implementation. There is nothing false or cold-hearted about such "privileged" measures. Compassion for the aged can take many forms.

Regardless of their studied outrage and air of sanctimony, Susan Jacoby and the fulminating fellow who engaged me at the medical center deserve the gratitude of the rest of us, who might otherwise continue in our own form of self-righteousness without stopping to consider that privilege has its responsibilities. Paramount among those responsibilities is to support the sweeping societal changes without which the bodily benefits accruing to us are unavailable to men and women who have not had our good fortune. One wishes only that Jacoby's call to our public and individual consciences had been couched in more personalized, more human, terms. ◆

Justin Driver
ROBUST AND WIDE-OPEN

JUSTICE BRENNAN: LIBERAL CHAMPION
By Seth Stern and Stephen Wermiel
(Houghton Mifflin Harcourt, 674 pp., $35)

In September 1956, when the eminently forgettable Justice Sherman Minton announced his retirement from the Supreme Court, President Eisenhower's motivation in selecting a replacement stemmed less from legal considerations than from political calculations. With the upcoming presidential election just weeks away, he instructed Attorney General Herbert Brownell Jr. to locate a nominee who, in addition to being younger than sixty-two, was both a Catholic and a Democrat. These criteria were designed to strengthen Eisenhower's reelection bid against Adlai Stevenson in the northeast. They also had the unintended consequence of excluding all but a few plausible candidates. The short list was so short, in fact, that Brownell subsequently said that discovering an obscure judge on the New Jersey Supreme Court named William J. Brennan Jr. "was like manna from Heaven." Those celestial sentiments, of course, proved fleeting.

Although Brennan's initial media coverage dwelled on neither his religious nor his party affiliation, the press did fixate upon the land from which his parents emigrated—or, more precisely, upon a cartoonish version of Ireland's people. In a profile headlined "The Ninth Justice: A Happy Irishman," *Time* magazine termed Brennan "an affable, storytelling Irishman." Similarly, *The New York Times* quoted a former colleague of Brennan's as observing: "He's the friendly Irish type. Very convivial, easy-going. A great storyteller. We used to think of him as the Jimmy Walker type. Dapper and jaunty."

It is hardly astonishing that familiar ethnic caricature would figure prominently in the coverage of an unknown Supreme Court nominee during the mid-1950s. As Nathan Glazer and Daniel Patrick Moynihan noted in *Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York City*, "The more amiable qualities of the stage Irishman have persisted in tradition. The Irish are commonly thought to be a friendly, witty, generous people, physically courageous and fond of drink." What is genuinely surprising, though, is that this stock figure—with the brawling and boozing replaced by a dash of Tammany Hall—continued to shape the perception of Brennan even when he retired in 1990. The *Times*'s coverage of Brennan's departure detailed "a man described by friends as a gregarious Irish politician whose enjoyment of people enhanced his effectiveness on the Court." Nina Totenberg, in a *Harvard Law Review* tribute, saw Brennan, with his "mischievous Irish grin and a springy step reminiscent of Jimmy Cagney," as nothing less than "the leprechaun of the Supreme Court."

Two works principally account for this persistent notion of Brennan as the cheerful judicial operative, a cross between Lucky the Leprechaun and Boss Tweed. In 1979, Bob Woodward and Scott Armstrong's *The Brethren: Inside the Supreme Court* popularized the image. "He cajoled in conference, walked the halls constantly and worked the phones, polling and plotting strategy with his allies," Woodward and Armstrong wrote. "[Brennan] was thin and gray-haired, and his easy smile and bright blue eyes gave him a leprechaun's appearance as he sidled up and threw his arms around his colleagues." Four years later, Bernard Schwartz's *Super Chief: Earl Warren and His Supreme Court, A Judicial Biography* gave the image a scholarly patina. In addition to the obligatory observation of the justice's "leprechaun-like" appearance, Schwartz depicted him as a kind of jurisprudential sun around whom his colleagues orbited.

In their incisive and absorbing biography of Brennan, Seth Stern and Stephen Wermiel call him "perhaps the most influential justice of the entire twentieth century." This is a bold claim, but the assessment is not merely the product of an artificial elevation of subject that plagues so many biographies. Justice Antonin Scalia has arrived at the same conclusion nearly verbatim, conceding—presumably through gritted teeth—that his erstwhile nemesis was "probably the most

influential justice of the century." Given Brennan's substantial role in shaping our understanding of the modern American Constitution, it is striking that today—two decades after his retirement—widespread misconceptions continue to obscure his legacy. That some of those misconceptions sit uneasily alongside one another does nothing to diminish their potency. Although Brennan has long been vilified by the right and venerated by the left, neither side sees him clearly.

Brennan is commonly viewed as the most unswerving liberal ever to have served on the Court. When the legal left calls for its own version of Scalia to be appointed, Brennan—often dubbed the Court's "liberal lion"—serves as the archetype. David H. Souter's testimony at his Supreme Court confirmation hearings gestured toward this view when he admiringly referred to the man he sought to replace as "one of the most fearlessly principled guardians of the American Constitution that it has ever had and ever will have." In reality, Brennan was not even the most liberal jurist among his colleagues on the Court. And rather than being "fearlessly principled," Brennan was principally pragmatic.

The notion that Brennan was an unbending liberal may be owed primarily to his abolitionist approach to capital punishment. Beginning in the 1970s, Brennan—along with Justice Thurgood Marshall—voted to invalidate each death sentence that came before the Court on the ground that such sentences violated the Eighth Amendment's prohibition on cruel and unusual punishment. But extrapolating from Brennan's condemnation of capital punishment provides a distorted portrait of his standard approach to deciding cases.

From the beginning of his tenure on the Court, Brennan's opinions typically eschewed liberal absolutes. In *Roth* v. *United States*, the Court in 1957 contemplated a criminal conviction for distributing lewd publications. Justice William O. Douglas would have declared that the First Amendment's guarantee of free speech protected even obscenity. But Brennan's opinion for the Court, which upheld the conviction, found that society's interest in free expression was outweighed by the government's interest in regulating obscenity. Thus Brennan instructed courts to consider "whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

Brennan's approach to the job stands nearly in direct opposition to the purist approach of Douglas. Where Brennan sought to identify areas of commonality to cobble together majorities, Douglas prided himself on stating his liberal views unadulterated by concern for whether his colleagues shared them. In *Terry* v. *Ohio*, a significant criminal procedure decision issued at the height of concerns about "law and order," Brennan worked with Chief Justice Earl Warren to refine the Court's opinion finding that police officers needed only reasonable suspicion to stop and frisk citizens. Douglas wrote the sole dissent in *Terry*, suggesting that the Court's resolution should have come in the form of a constitutional amendment. Similarly, Douglas was again the only dissenter in a case that upheld the conviction of a Vietnam War protester for burning his draft card. When Brennan was asked about serving with Douglas, his response revealed at least as much about his own judicial approach as it did about Douglas's: "His great mistake . . . was his insistence—and he repeated it time and time again—'I have no soul to worry about but my own.'" Brennan, by contrast, worried in each case about lining up at least four additional souls.

Brennan's pragmatic streak also appeared in his handling of a controversy that erupted over a law clerk whom he hired during the mid-1960s. At the beginning of his time as a justice, Brennan—following the advice of Felix Frankfurter, his former professor and current colleague—relied upon a Harvard professor to select his clerks. "If you want to get good groceries in Washington, you go to Magruder's," Frankfurter once remarked. "If you wanted to get a lot of first-class lawyers, you went to the Harvard Law School." Eventually Brennan turned the hiring over to former clerks who had become law school professors. Stern and Wermiel suggest that he preferred that others do the selecting in part because of his aversion to conflict. "If there's a kid sitting across the table from me," Brennan said, "I can't tell him no."

Yet Brennan did manage to summon the nerve to reject at least one prospective law clerk. In 1965, he hired Michael Tigar for the term beginning the following year. As an undergraduate and law student at Berkeley, Tigar had participated in various leftist causes. When the press reported on his past, Brennan summoned him to Washington and requested that he draft a letter spelling out his various political activities. Tigar read the two-page letter over the telephone the following day, and Brennan responded, "You're my clerk!" But in July 1966, as pressure mounted from Congress, the public, and (perhaps most importantly) his fellow justices, Brennan caved and called Tigar to rescind the offer. Douglas, as usual, provided the unvarnished liberal response in suggesting that Brennan should have instructed their colleagues to "go fuck themselves."

Conservatives have long criticized members of the legal left for understanding the Constitution to overlap perfectly with their conception of a morally just society. There is no figure at whom the right has hurled this accusation with greater force than Justice Brennan. In 1984, Stephen J. Markman and Alfred S. Regnery wrote an article in *National Review* charging that "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." Four years later, Raoul Berger memorably criticized Brennan's "penchant for identifying his personal predilections with constitutional dogma." But as this biography reveals in some of its most insightful passages, Brennan's constitutional interpretations sometimes deviated substantially from his personal views—even in high-profile cases.

Brennan found voting with the Court to limit religion's role in public schools to be an excruciating set of decisions. "In the face of my whole lifelong experience as a Roman Catholic," Brennan noted, "to say that prayer was not an appropriate thing in public schools, that gave me quite a hard time. I struggled." Brennan's morality also clashed with his votes in the line of cases beginning with *Roe* v. *Wade*. "I wouldn't under any circumstances condone an abortion in my private life," Brennan told Wermiel in 1987. "But that has nothing to do with whether or not those who have 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."

Although reporters deeply admired Brennan for his opinion in 1964 that insulated the media from libel lawsuits, the admiration was decidedly not mutual. Brennan's opinion in *New York Times Co.* v. *Sullivan* required public officials to

ANTHONY RUSSO

demonstrate that journalists acted with "actual malice" in order to prevail on a libel claim—an extremely demanding standard—and contained the most celebrated line of his career: "Debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Still, Brennan frequently loathed how the free press used its freedom. Following *The Brethren*'s exposure of the Court's internal dynamics, Brennan—in a fit of pique—exploded, "I will never vote for the First Amendment again!"

Yet perhaps the most distressing chasm between Brennan's public and private selves involved gender. In 1973, he wrote an influential opinion deriding the military's more lenient treatment of women seeking spousal benefits than their male counterparts. "Our nation has had a long and unfortunate history of sex discrimination," he declared, "rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." Such language led Ruth Bader Ginsburg to call Brennan "the Court's clearest, most constant speaker for women's equality."

Brennan's enlightened attitudes did not, regrettably, extend to the hiring of law clerks. For many years, Brennan simply refused to hire women law clerks on the theory that he used salty language and that doing so would be improper in front of a lady. (Pedestal, meet cage.) Even as assessed by the hiring practices of his colleagues, Brennan was painfully slow to internalize his own egalitarian rhetoric. "Between 1973 and 1980, thirty-four women served as Supreme Court clerks," Stern and Wermiel write. "Brennan employed just one of them." Whatever the truth of the feminist axiom that "the personal is political," it would seem that for Brennan, at least, the personal was not the judicial.

The most prevalent misconception that surrounds Brennan, however, is the notion that, even after the Warren Court's heyday, he was able to achieve liberal victories primarily through force of personality. This strand of Brennan nostalgia continues to manifest itself in the calls for President Obama to place someone on the Court who is capable of consistently persuading Justice Anthony Kennedy to side with liberals. The more sophisticated of those who adhere to the notion that Brennan often swayed otherwise conservatively inclined justices to reach liberal results concede that today's Court is quite distinct from the one Brennan served on in the 1970s and 1980s. The current Court, they lament, is composed of far more ideologically rigid conservatives. But Brennan never was the judicial svengali that many admirers made him out to be. The median justice of yesteryear was not more pliant; he was more liberal.

It is an article of faith for many on the left that Brennan's maneuverings chiefly explain the judicial victories that liberals won during Chief Justice Warren Burger's tenure. But the evidence to support such claims is seldom overwhelming. Consider Brennan's role in *Regents of the University of California* v. *Bakke*, a case that many observers in 1978 thought spelled doom for affirmative action. As it turned out, the Court divided evenly, with four justices (led by Justice Stevens) finding that affirmative action violated a federal statute and another four justices (led by Brennan) deeming affirmative action constitutional. Writing only for himself, Justice Lewis Powell issued the controlling opinion, putting him in the position of, as he termed it, "a chief with no Indians." Although Powell found that the U. C. Davis School of Medicine's usage of a quota violated the Equal Protection Clause, he refused to find that universities could never consider an applicant's race. Powell then held up Harvard's undergraduate admissions program as a constitutionally permissible model for universities seeking a racially diverse student body.

Bernard Schwartz, who has explored *Bakke* in great detail, has contended that "if not for Brennan . . . it is probable that the Burger Court would have ruled all racial preferences unconstitutional." The main evidence for this claim arises from the discussion of the case in conference. After Powell articulated his view and expressed his intention to affirm the lower court's holding, Brennan suggested that Powell affirm the invalidation of the Davis program, but also that he reverse the California Supreme Court's broader holding that admissions programs were categorically prohibited from considering race. Powell then agreed that his opinion should be styled a partial affirmance and a partial reversal.

Brennan's suggestion may well have been helpful for highlighting *Bakke*'s divided bottom line to the media. But it is simply inaccurate to view Brennan as affirmative action's savior. Even before the Court met to discuss the case's merits, Powell had circulated a draft opinion to his colleagues that contained every essential argument in his final opinion, including the decisive approval of Harvard's program. "The attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education," Powell wrote in language that appeared in both the draft and final opinions. As Powell's biographer John Jeffries has emphasized, he agreed to Brennan's suggestion because it best advanced his constitutional conception, not because Brennan somehow manipulated him.

Indeed, the legendary charmer sometimes seemed to repel the very colleagues he needed most. Powell, the embodiment of the Southern gentleman as lawyer, regarded Brennan's prose in dissent as exceedingly caustic, and also found him to be something less than an honest broker. When a Brennan dissent ridiculed the Court's opinion as "transparently fallacious," Powell jotted atop the draft he received, "This is garbage!" Similarly, Brennan's dissent in a habeas corpus case calling Justice Sandra Day O'Connor's opinion for the Court "a conspicuous exercise in judicial activism" prompted

I Desired You, I Didn't

I desired you, I didn't. I desired what's coming
of the past. The roads will open for us. Life
will take us to its nature. We'll forget
our shadows under the ancient pine tree, and leave
them there seated in shadows. A new day will rise
over our roads. We have two separate shadows
that don't embrace or return the swallows'
greetings. I said: Think of the shadow if you want
to remember. She said: Be strong and realistic, forget
my shadow. On two roads life will take us
to its new nature. The dove won't herald
peace or safety. We won't be as we wished
to be. Whenever longing sleeps, tomorrow
awakens. We'll be cured of our small resurrection
when the shadows sit on the fence, when
the moon is not a fever. When the shadows
sit on the fence.

MAHMOUD DARWISH

—Translated by Fady Joudah

Powell to scribble: "Who's calling who what!?"

O'Connor had not been a justice for a full year when Brennan filed his notoriously harsh dissent, merely one of several perplexing ways in which Brennan went about welcoming his new colleague to the Court. The relationship never fully thawed, leading some commentators to suggest that, but for Brennan's presence, O'Connor might well have amassed a more liberal record during her first decade on the Court. Whatever the accuracy of such speculation, O'Connor instructed her law clerks during the 1980s to examine the opinions that emerged from Brennan's chambers with particular scrutiny. Powell suggested this practice to O'Connor because he found that Brennan opinions often contained language that initially seemed innocuous, but was inserted with an eye toward resolving future cases in a liberal direction.

What accounts, then, for the notion that Brennan was a singularly persuasive justice? After stripping away the ethnic caricature, three reasons remain. First, Brennan forged a legitimately close working relationship with Chief Justice Warren. When the Court was in session, the two men had a standing meeting on Thursdays at 4 p.m. to discuss business. Although associate justices are typically assigned relatively unimportant opinions early in their tenures, Warren assigned Brennan to write many of the Court's landmark decisions. "In the entire history of the Court," Warren wrote with evident pride in a tribute to Brennan in 1966, "it would be difficult to name another Justice who wrote more important opinions in his first ten years than has he." By the time Warren departed in 1969, Brennan had attained some seniority and was well positioned to maintain the central place that Warren had conferred upon him. In 1975, Brennan became the senior associate justice (with all of the attendant opinion-assigning power), a position that he would occupy for fifteen years.

Brennan also demonstrated an extremely elastic conception of how an opinion might be written. This flexibility enabled him to be unusually responsive to his colleagues' preferences both in drafting opinions and in considering requests for changes once a draft had been circulated. Brennan often had firm ideas regarding the Court's appropriate destination, but he was far from fastidious about the route that it traveled to arrive there. Lucas A. Powe Jr. has commented upon Brennan's characteristic "willingness to say virtually anything (or nothing) if a key member of his majority requested it, so long as the opinion reached the right outcome." Acquiescing and persuading are not the same things.

Finally, from early on in his Court tenure, Brennan shrewdly cultivated his historical reputation. In addition to maintaining friendly relations with reporters and writers, Brennan had his law clerks write histories of each Court term. Given the vantage point of law clerks, these term histories predictably cast their boss in the starring role in the Court's annual drama. Brennan then doled out access to these documents at various times over the years. Consequently, Brennan may have been portrayed as more pivotal than he actually was. Justice Harry Blackmun, one of Brennan's frequent allies throughout the years, appears to have thought that this was the case regarding his opinion for the Court in *Roe* v. *Wade*. As Linda Greenhouse has written, "On a copy of an article in *Washingtonian* magazine suggesting that 'the real story of *Roe* v. *Wade*' was that William Brennan was the unseen hand behind the opinion, Blackmun affixed a Post-it note: 'This is hogwash.'"

The many misapprehensions that enshroud Brennan should not prevent us from remembering his core constitutional vision with genuine admiration. Joining the Court on the heels of its decision in *Brown* v. *Board of Education*, Brennan was a crucial part of a coalition that extended *Brown*'s fundamental principle over the ensuing three decades. That principle insisted that the judiciary plays a vital role in ensuring that the American experiment in democracy functions in a manner that does not appear incompatible with modern constitutional understandings. The key arenas in which Brennan helped to clarify the nation's constitutional commitments—racial equality, gender equality, criminal procedure, political reapportionment, freedom of speech, freedom of press, freedom of religion—all shared this same animating theme.

Brennan, in other words, was a leading advocate of living constitutionalism. Not long after Attorney General Edwin Meese made a plea for originalism in the mid-1980s, Brennan delivered a widely covered speech at Georgetown University dismissing the concept as "little more than arrogance cloaked as humility." Brennan did not suggest that the original understanding played no role in constitutional interpretation; he contended instead that its role is necessarily a limited one. "We current Justices read the Constitution in the only way that we can: as twentieth-century Americans," Brennan stated. Rather than allowing originalism's quixotic enterprise to displace all other considerations, he suggested that judges must grapple with a more fundamental question. "The ultimate question must be: what do the words of the text mean in our time?" he said. "For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Although many commentators portrayed his speech as a direct response to Meese, this biography notes that Brennan had previously delivered a strikingly similar talk on numerous occasions before Meese ever entered the debate. In fact, Brennan's robust defense of law's evolution stretches back to a much earlier speech that he delivered also at Georgetown, this one in 1957. Just months after joining the Court, Brennan embraced the notion—first articulated by Roger J. Traynor—that "courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."

Today, mainstream legal liberals would blanch in the face of such language. (Judicial creativity is out; judicial modesty is in.) More alarmingly, though, they may also distance themselves from the justice who has been most prominently associated with living constitutionalism. Indeed, for all the talk about Brennan's "influential" career, it is now somewhat difficult to imagine judicial nominees citing Brennan as an intellectual influence during their confirmation hearings.

The disembodied quality of Brennan's legacy is regrettable because he, along with his allies, brought about some of the nation's most treasured decisions in constitutional law. In so doing, he helped to broaden the prevailing conception of the judiciary's ability to address inequalities that resist political remedy. It is Brennan's implicit resolution of the fundamental paradox of constitutional law—that decisions contravening majority preference can nevertheless be democratizing—that demands our continued appreciation. In a time when many suggest that judicial interpretation can do little to improve society, recovering this lesson is a matter of considerable urgency. ◆