Our Liberalism

JUSTICE BRENNAN: LIBERAL CHAMPION. By Seth Stern & Stephen Wermiel. Houghton Mifflin Harcourt. 2010. Pp. 688, $35.00.

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Near the start of their vibrant new biography, *Justice Brennan: Liberal Champion*,[1] Seth Stern and Stephen Wermiel provide us with a frame to put around their story. Take it, they suggest, as a tale of surprise: not that Brennan's service on the U.S. Supreme Court should have turned out liberal,[2] but that it should have turned out historically momentous. Not only—so say the authors—did Brennan become arguably ("perhaps") the "most influential justice of the entire twentieth century," he also did surely become (no reservation here) "the most forceful and effective liberal ever to serve on the Court."[3]

These are bold and intriguing claims. To give the first its due, let us, for now, take "influence" to refer to more or less immediately traceable effects on legal outcomes and doctrinal content by work performed in the official capacity of a justice of the Supreme Court of the United States. If we relax the "most influential justice of the entire twentieth century" claim much beyond that rather close restriction, and especially if we allow "influential" to suggest a wide, deep, and enduring impression left by a prominent thinker on intellectual life and civic culture at large, the cases for Holmes and Brandeis might seem hard to beat.

Something similar may hold for the second claim—that of Brennan as the champion *liberal* ever to grace the Court. (Brandeis the people's lawyer? Frankfurter the public intellectual and FDR confidante? Warren the Super

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1. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION (2010). It is a very good book—certainly now, and doubtless destined to remain, the authoritative "life" of Brennan the man and the Justice, luminously, perceptively, and candidly presented. I would guess that most who knew or worked with Brennan, or who have looked hard at his judicial judgments and opinions, or who have thought hard about the life and times of the Warren Court and its proximate successors, will find that the accounts of Stern and Wermiel both chime convincingly with what they think they know already and tell them (most of us, anyway) much that is interesting that they didn't know before.

2. *See* Stephen J. Wermiel, *The Nomination of Justice Brennan: Eisenhower's Mistake? A Look at the Historical Record*, 11 CONST. COMMENT. 515, 536–37 (1995) (confirming reports of Eisenhower's dissatisfaction with Brennan's liberalism as a Justice and showing why the President should have seen it coming).

3. STERN & WERMIEL, *supra* note 1, at xiii.

Chief? Senator Black? Douglas of New Haven and the SEC? Marshall the great cause lawyer?) It must have been with a strict focus on career-as-justice-influencing-doctrine that our authors selected Brennan as beyond argument our history's premier liberal jurist. His liberal testament in his doctrine lies.

Having tabled their claim for Brennan's liberal-champion status, the authors do not have a great deal to say by way of elaboration. Much of what they do offer comes on the heels of their statement of the claim. Brennan, they continue on,

> interpreted the Constitution expansively to broaden rights as well as create new ones for minorities, women, the poor, and the press. His decisions helped open the doors of the country's courthouses to citizens seeking redress from their government and ensured that their votes would count equally on Election Day. Behind the scenes, he quietly helped craft a constitutional right to privacy, including access to abortion, and bolstered the rights of criminal defendants,

to which we may add some adjacent remarks linking Brennan to welfare-state redistributionist policies.[4] "In the process," add the authors, Brennan "came to embody an assertive vision for the courts in which judges aggressively tackled the nation's most complicated and divisive social problems."[5]

Concerning Brennan's liberalism, the mood of the book seems unreservedly celebratory; I pick up no ironic undertow, no minor mode of doubt or second thought to contest with the tonality of the major. *Justice Brennan*—no work of hagiography—is larded with capable, candid, critical reflection on quite a few of Brennan's choices and their consequences. But what is in doubt is never Brennan's liberal cause; it is only, sometimes, his consistency in the cause or his judgments in its service.[6] Liberalism as doctrine, liberalism à la Brennan, comes through unscathed.

But still what is that, exactly? The authors give us a profile in the form of data points: a sympathy for social underdogs and outcasts; a concern for social de-stratification, inclusion, and redress; a faith in rights—as correctives against routinizations of power, as guarantors of robust political contestation, and as shields for individual self-direction in deeply personal matters; and so a corresponding pull to judicial assertiveness. It is left to us, though, to connect the dots as liberalism.

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4. *See id.* at 317–18 (associating President Lyndon Johnson's "Great Society" with a "liberal consensus" spoken for by the Warren Court). Additional clues to what the authors mean by "liberal" can be mined from scattered other passages. *See, e.g.*, *id.* at 101–02, 128 (coloring Frankfurterian judicial restraint as "conservative" and a more activist judicial posture as "liberal").

5. *Id.* at xiii.

6. As in the matter of the aborted clerkship of Michael Tigar, see *id.* at 264–74, or the obscenity prosecution of Ralph Ginzburg, see *id.* at 249–64, 274–75.

Is there some established theoretical lexicon in which aptly to class as liberal the jurist thus portrayed? One that it will not be is that of our standard general histories of Western political ideas, for if we focus on the term's most steadfast significations in that discourse, we'll have trouble explaining how Brennan—stout defender of the uses of reverse race-based discrimination,[7] of the state's power to impair undoubtedly lawful property holdings for non-urgent reasons,[8] of "welfare" at taxpayer expense[9]—could possibly turn up as hands-down liberal champion. A "classical" liberal—a Milton Friedman[10] or a Friedrich Hayek[11]—he plainly is not, nor yet a pragmatist-liberal like Richard Posner.[12]

But hey, Earth to Frank, our authors are not writing as general historians or general theorists of political ideas. Why not just take them to be talking the talk of recent and contemporary American political polemics, as in "bleeding-heart," "pointy-headed," or "limousine" liberal—all referring to an aggregation of political stances supposedly most at home among so-called elites in blue states, college towns, and upscale suburbs (soft on crime, on cultural deviance, on licentious expression, on indigence; suspicious of the police, property rights, self-reliance, traditional values, and discipline in general)? Why not? Because, in the first place, it is not especially flattering to crown a man champ of *that* crowd. And because, in the second place, such a contemporary political-polemical reading of Stern and Wermiel's "liberal" would not self-evidently take in the book's emphasis on Brennan's judicial activism (the Rehnquist and Roberts Courts as liberal?[13]) or on

7. *See* Metro Broad., Inc. v. Fed. Commc'ns Comm'n, 497 U.S. 547, 552 (1990) (holding that the FCC's policies of awarding preferences to minority owners in comparative licensing proceedings and permitting certain television and radio broadcast stations to be transferred only to minority-controlled firms did not violate equal protection principles); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324–25 (1978) (holding that "Government may take race into account when it acts . . . to remedy disadvantages cast on minorities by past racial prejudice . . . .").

8. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137–38 (1978) (holding that a city may place restrictions on the development of historical landmarks without necessarily effecting a "taking" requiring the payment of "just compensation").

9. *See* Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that welfare recipients must be granted "an opportunity to confront and cross-examine the witnesses relied on by the [State Department of Social Services]" in discontinuing or suspending the recipient's financial aid); Shapiro v. Thompson, 394 U.S. 618, 632–33 (1969) (holding that certain residency requirements precluding people from welfare benefits are unconstitutional).

10. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 5 (1962) (claiming title to "liberalism").

11. *See* F.A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 119–51 (1978) (discussing history and meanings of "liberalism").

12. *See* RICHARD A. POSNER, OVERCOMING LAW 1–19 (1995) (linking liberalism to pragmatism and embracing both).

13. *See* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 917 (2010) (holding that corporate independent expenditures on political broadcasts in candidate elections cannot be limited); Bush v. Gore, 531 U.S. 98, 110 (2000) (reversing the Florida Supreme Court's judgment ordering manual recounts of ballots in the 2000 presidential election).

Brennan's contribution to constitutional super-protection for fundamental personal rights[14] (Brennan and Peckham as co-liberals?[15]).

Brennan unmistakably is liberal and a liberal champion, but the question remains: In exactly whose sense of this somewhat vagrant term is that so? We might look for further clues in either or both of two additional expansions by the authors, toward their book's end, of their characterization of Brennan as "the very embodiment of a liberal justice"[16]—those being Brennan's oratorical invocations of human dignity as a basis of rights[17] and his sponsorship of a "living constitution"[18] (or "moral reading"[19]) approach to constitutional interpretation. And yet the first could leave Brennan paired with Pope John Paul II,[20] while the second could leave him paired with Richard Epstein.[21]

There is only one way I can see to make all this come out right, and it does fit the theme of surprise.

Writing at a time when the Warren Court's doctrinal legacies still strongly guided the discourse and debates of the Supreme Court, political theorist and public intellectual Alan Ryan detected in the Court's body of work the stamp of the philosopher John Rawls. Rawls's ideas "have crept into the law of the land," Ryan wrote.[22]

> Liberal-minded lawyers keep pushing the envelope of the Constitution, trying to expand Americans' civil liberties, but they don't at the same time encourage the courts to favor the rights of property developers. One reason is that they have been taught [by Rawls] that liberal ideals of justice do embrace civil rights and economic equality but do not embrace laissez-faire and the unfettered rights of property.[23]

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14. *See* STERN & WERMIEL, *supra* note 1, at xiii (discussing Brennan's role in crafting a constitutional right to privacy).

15. *See* Lochner v. New York, 198 U.S. 45, 64 (1905) (holding that a New York law limiting the amount of hours a baker could work was an infringement on the right and liberty to contract, and therefore was unconstitutional).

16. STERN & WERMIEL, *supra* note 1, at 546.

17. *Id.* at 542.

18. *Id.* at 546.

19. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 5 (1996) (calling Brennan a notably "liberal and explicit practitioner[] of the moral reading of the Constitution").

20. *See* Ioannes Paulus PP. II, *Evangelium Vitae* (Mar. 25, 1995), http://www.vatican.va/edocs/ENG0141/_INDEX.HTM (pronouncing the Catholic Church's position on the value of human life).

21. *Compare* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN v (1985) ("I argue that . . . clauses in the Constitution render constitutionally . . . suspect many . . . institutions of the twentieth century.") *with id.* at 3 ("This book is an extended essay about the proper relationship between the individual and the state.").

22. Alan Ryan, *How Liberalism, Politics Come to Terms*, WASH. TIMES, May 16, 1993, at B8.

23. *Id.*

Ryan thus identified Brennan and his judicial pals as "liberal" in a sense akin to what Rawlsian political philosophy has in mind. So, I now suggest, do Stern and Wermiel. Rawls's ideas, it seems—not just Rawls's, of course, but those of broadly allied theorists such as Joshua Cohen, Ronald Dworkin, Jürgen Habermas, Thomas Nagel, and T.M. Scanlon, to name just a few contemporary liberals whose programmatic views largely converge with Rawls's (even as these theorists may differ among themselves over aspects of the philosophical underpinnings)—are what our authors mean by "liberal," in effect if not by intention.

Academics will easily identify the group of philosophers I mean. They compose a contemporary group of liberals of a distinctively egalitarian type, all of whom would confess to inspiration, somewhere along the line (and by inspiration I do not mean detailed guidance) from the political–philosophical ideas of Immanuel Kant (along with, no doubt, those of John Locke, John Stuart Mill, and others). To their common philosophy, I suggest—to their "overlapping consensus"—the liberal profile by which our authors award the prize to Brennan's adjudicative works rather strikingly conforms.

Take it by steps. Start with the question of a fundamental-liberty right to physician-assisted suicide. Our group of philosophers finds that choice covered by a constitutionally protected right of people to decide for themselves matters "'central to personal dignity and autonomy.'"[24] So, surely, would Justice Brennan have found, given the chance.[25] What would distinguish the Justice and the philosophers as *liberal* in this instance might be their alliance with what has been called a "voluntarist" account of human dignity, as grounded in (roughly) the capacity of a being of the human kind for ethical and moral self-direction. The contrast would be with a "creationist" account (as we may call it) that grounds human dignity in a "'particular spiritual and bodily structure,'" or, in other words, in humanity's "place within a divinely established natural order."[26] It does not take much work to see how the two views might easily clash at the point of sorting out

24. *See* Ronald Dworkin, *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. OF BOOKS, Mar. 27, 1997, at 41, 41 (quoting from the plurality opinion in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)) (introducing and then reprinting an amicus brief on behalf of six philosophers, supporting a fundamental constitutional right to physician-assisted suicide)).

25. Brennan's tenure as Justice ended prior to the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997). The evidence, however, is clear from dissenting opinions in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 301–30 (1990) (Brennan, J., dissenting), and *Michael H. v. Gerald D.*, 491 U.S. 110, 136–57 (1989) (Brennan, J., dissenting). Brennan's *Cruzan* dissent refers repeatedly to Nancy Cruzan's claim to dignity. *See Cruzan*, 497 U.S. at 301, 302, 311 (arguing for Cruzan's right to choose to die with dignity, and citing language from the supreme courts of several states that expresses a similar concern for human dignity in a near-death medical care context).

26. Michael Rosen, Dignity 73–74 (unpublished manuscript) (on file with author) (quoting from Pope John Paul II, Encyclical, *Veritatis Splendor*, 23 ORIGINS 297, 312 (1993)).

the claims and obligations of individuals and the state in the context of assistance of suicide.

But of course liberalism in *that* sense could take in many philosophers who are decidedly *not* liberal in other respects obviously intended by Stern and Wermiel in their designation of Brennan as liberal champion. (Among the signers of the "Philosophers' Brief" we find Robert Nozick.)[27] And that takes us to a next step, for which the recent, sharply divisive *Citizens United*[28] can stand as icon. Kathleen Sullivan explains how the Court's decision there may be viewed as a triumph for a "libertarian" view of freedom of speech (serving as a negative check on state manipulation of the market in ideas), over an "egalitarian" view of this freedom (serving as a guarantor of political equality).[29] We know that Brennan-as-liberal would have stood with the speech-egalitarians.[30] But of course both the libertarian and egalitarian views are liberal in a broader and entirely familiar sense of the term. Both demand robust justification for any legislative restriction on political and much other speech. Only the egalitarian side, however, upholds promotion of equality of access to political debate as a proper regulatory aim.[31] In doing so, that side corresponds quite nicely with our contemporary strand of egalitarian-liberal political philosophy.[32]

Without running out the string, I suggest that the contemporary egalitarian/Kantian liberalism of Rawls et al. will, at just about every point in the profile, jibe neatly and suggestively with the authors' designation of Brennan (but presumably not Roberts, Rehnquist, Friedman, Hayek, Posner, Epstein, Peckham, or Nozick) as "liberal." And perhaps, there too, lies a surprise. Surprise, I mean, that 21st century journalistic authors, in a book so decidedly nonacademic and vernacular as *Justice Brennan*, should so unselfconsciously—one is tempted to say, so casually—have taken on board such a historically recent philosophical turn on the term "liberal" as the one

27. *See* Dworkin, *supra* note 24; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

28. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

29. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144–45 (2010).

30. *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 675 (1990) (Brennan, J., concurring) ("[T]he state surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message."); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (confirming "the legitimacy of Congress' [sic] concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace").

31. *See* Sullivan, *supra* note 29, at 154–55 (stating that egalitarians believe "political equality is advanced by governmental regulation limiting corporate incentives to decrease the diversification of electoral debate").

32. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 359–63 (1993) (discussing how the fair value of political liberties is essential for a just political process, and how this might require restricting certain forms of speech in order to foster others); Ronald Dworkin, *The Curse of American Politics*, N.Y. REV. BOOKS, Oct. 17, 1996, at 19, 19 (criticizing disparate campaign financing for its negative impact on political equality).

represented by Rawls, Dworkin, Habermas et al. Those philosophers' ideas, it seems, have crept not just into the law of the land,[33] but into the most thoughtful talking heads of our civic culture—at least to the point of defining what "liberalism" is, if not, alas, to the point of cementing it as our civic religion.

We could try one further spin on the theme of surprise, by way of redeeming our authors' claim for Brennan's influence.[34] Once, while rejoining to Alan Ryan, I was wild enough to suggest a possible both-ways creep of ideas. The Warren Court reached its apogee in years during which John Rawls was bringing *A Theory of Justice* toward publication. Might it possibly be that the Warren Court's example crept into the heads of observant political philosophers?[35]

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33. *See supra* note 22 and accompanying text.

34. *See supra* note 3 and accompanying text.

35. *See* Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law* (stating that Justices on the Warren Court, such as Brennan, "produced the basic doctrinal ingredients for a liberalized American constitutional law well before they or their law clerks could have heard of Rawls"), *in* THE CAMBRIDGE COMPANION TO RAWLS 394, 408 (Samuel Freeman ed., 2003).