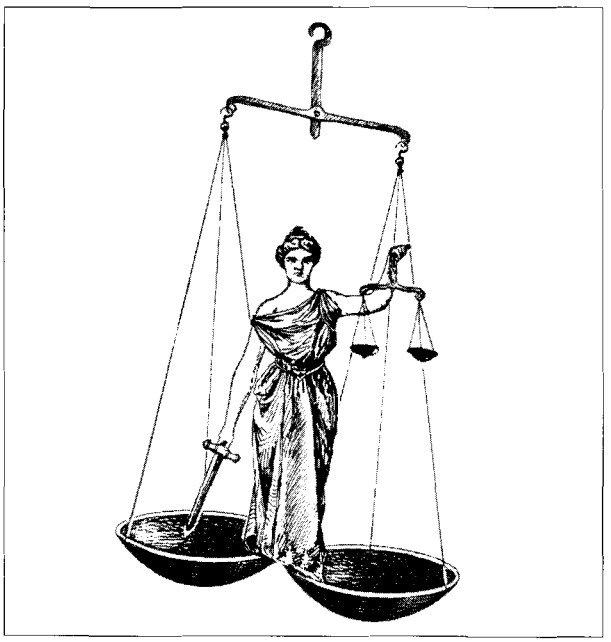
Five Votes

by Gregory J. Sullivan

"Much law, but little justice."
—Thomas Fuller



Igor Kopelnitsky

A Justice for All: William J. Brennan, Jr., and the Decisions That Transformed America
by Kim Isaac Eisler
New York: Simon & Schuster;
303 pp., $22.00

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"With five votes around here you can do anything," Justice William Brennan told his law clerks, thus summarizing the quintessence of Brennanism. That constitutional law is not something derived from the text, structure, and history of the various provisions of the Constitution but rather a creation of the arbitrary personal views of the Justices—this, for the past 30 years or so, has been the crux of Brennan's radical egalitarianism. Kim Isaac Eisler's biographical portrait, *A Justice for All*, though a very mediocre study of Brennan's political—it can hardly be called jurisprudential—thought, provides a good opportunity to examine the decisions that, as Eisler's subtitle states, transformed America.

Brennan had a conventional legal career following his graduation from Harvard Law School and prior to his appointment to New Jersey's state trial bench and subsequent elevation to the New Jersey Supreme Court (which was not then but has since become an appalling Brennanite tribunal). When Brennan arrived on the U.S. Supreme Court in 1956, he fell into the middle of the struggle between the conservative Felix Frankfurter and the liberal Hugo Black. Eisler's misunderstanding of Frankfurter is appalling. At one point he obtusely says: "Frankfurter in no way connected the role of being a 'justice' with the concept of 'justice.'" But Frankfurter understood his role perfectly. "I do not conceive that it is my function to decide cases on my notion of justice. If it were, I wouldn't be as confident as some others are that I knew exactly what justice required in a particular case." This is a concise statement of the doctrine of judicial restraint, whereby the jurist subordinates his personal sense of justice to the law of the Constitution. This view was soon to be overrun by the egregious activism of the Warren Court.

Black rather easily won the battle for Brennan's soul, but Brennan moved far beyond Black's simpleminded and selective constitutional literalism. Black, for all his flaws, attempted to root his views in the Constitution; Brennan, by contrast, virtually ceased bothering with the Constitution in any meaningful way. Moreover, Brennan moved quickly into the position of intellectual architect of the Warren Court's revolution, for Justice William Douglas was too contentious and Warren himself was not by any means a legal scholar—he was, to use the accurate if uncharitable phrase of Judge Learned Hand, a "big dumb Swede." Eisler concentrates on a handful of opinions that Brennan either wrote or helped to shape, and they provide outstanding instances of unfettered judicial power in crucial areas of the law.

Reapportionment. In *Baker* v. *Carr* (1962), Brennan created a new political order with this watershed apportionment

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decision. Theretofore, state legislative apportionment had been treated by the Court as a nonjusticiable political question. Brennan, however, brought it into the adjudicatory ambit by removing it from the Guaranty Clause and declaring it an equal-protection issue, thereby assuring the ultimate outcome in a subsequent case: one man, one vote. In a penetrating dissent, Frankfurter denounced this remarkable arrogation of power: "There is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate." He added: "The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality . . . that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment . . . is, to put it bluntly, not true." This type of rigorous textual and historical argument mattered little to a Court on the long march to electoral utopia.

Substantive Due Process. In *Griswold* v. *Connecticut* (1965), the Court struck down a Connecticut statute that criminalized the sale of contraceptives and their use by married couples; in order to reach this conclusion, it created a "right to privacy" from the "penumbras" and "emanations" of the Bill of Rights. The author of this sloppy nonsense was Douglas, but Eisler makes it clear that it was Brennan who masterminded the radical core of the opinion: "Brennan's arguments persuaded Douglas to change his rationale. As a result, the Court stated for the first time that the American citizen had a 'right to privacy.' And it was that Brennan-formulated principle which would ultimately flower into an even more controversial and contentious issue—a woman's right to an abortion." Indeed, in *Roe* v. *Wade* (1973), Justice Blackmun initially drafted a narrow opinion on the subject of abortion; it was Brennan who pushed for and secured the most sweeping abortion law in the Western world. Moreover, Brennan had set the tenor for *Roe* with his opinion in *Eisenstadt* v. *Baird* (1972). This case proved to be an important link between *Griswold* and *Roe*, inasmuch as it involved the extension of the right of contraception to the population generally, regardless of marital status. Brennan recklessly noted that "if the right of privacy means anything, it is that right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The framework, then, was set; abortion simply had to be placed within it by the case that rivals *Dred Scott* in infamy.

Affirmative Action. In *Board of Regents of the University of California* v. *Bakke* (1977), Justice Lewis Powell wrote an opinion that would have eliminated race as a factor in university admissions. Brennan, however, ever the adroit behind-the-scenes politician, convinced Powell to reconsider. Professor Bernard Schwartz concisely comments on the outcome: "If not for Brennan, indeed, it is probable that the Burger Court would have ruled all racial preferences unconstitutional. He saw the opportunity to change the Powell unqualified vote against the Davis [the medical school that had refused Bakke admission] special admissions program to one that reversed the lower court's refusal to allow race to be considered." Brennan, in his separate opinion in *Bakke*, wrote: "Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice." Of course affirmative action—which invariably translates into quotas—demeans and insults the group it purports to help. After all, if you can make it on your own, then why do you need help? In *Johnson* v. *Transportation Agency, Santa Clara County* (1987), Brennan again demonstrated his zeal for divisive affirmative-action plans, even at the expense of coherent statutory construction. *Johnson* involved a county program that favored women in promotions because of their sex; there was no evidence of past discrimination. This

plan was upheld by Brennan in direct contradiction of the explicit language of Title VII, the antidiscrimination provision of the Civil Rights Act of 1964. As Justice Scalia noted in his astute dissent: "In fact, the only losers in the process are the Johnsons of the country [Johnson was the man who, though more qualified, was passed over in favor of a woman], for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent."

Crime and Punishment. Brennan was an enthusiastic participant in the revolution in criminal procedure that is typified by *Miranda* v. *Arizona* (1966), where the Warren Court's obsession with and invocation of the "human dignity" of the criminal class (somehow the dignity of crime victims failed to have an impact on the Court's thinking) led it, in case after case, to place the most preposterous restrictions on police and prosecutors. The result was predictable: time and again the jailhouse door was thrown open to release criminals on trivial technicalities. Additionally, Brennan worked relentlessly to have the death penalty declared unconstitutional, notwithstanding the fact that the Constitution itself explicitly presumes its validity. The basis for Brennan's concern was again human dignity, but the human dignity of the convicted—not the victim whose human dignity is vindicated by the penalty of death. This point goes to the central problem with Brennan's approach; as Robert Bork has noted, even "if there were a human dignity clause in the Constitution of the sort Justice Brennan would import, it would not necessarily give the results he wants. A Justice of different temperament could as easily dwell upon the human dignity of the murderer's victim as upon the dignity of the murderer. . . . What concepts such as 'dignity' and 'privacy' mean in application depends entirely upon the sentiments of each judge."

Sex and Law. This ongoing phase of the revolution involves the eradication of any and all sexual distinctions—no matter how reasonable—in the law. This ideological assault gained considerable momentum in *Frontiero* v. *Richardson* (1973). In this case (a discussion of which Eisler omits), Brennan struck down federal statutes that distributed military benefits on the basis of sex. In language that perfectly captures the reductive and feverish quality of the feminist legal mind, he wrote: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." This part of the revolution is ongoing because Justice Ginsburg participated in this case on behalf of the American Civil Liberties Union. In other words, the sort of abrasive, stupid language that appeared in *Frontiero* will doubtless be seen with increasing—and depressing—regularity in the opinions of the Court.

"This isn't bad constitutional law," Edwin Meese once commented. "It isn't constitutional law at all." The cases discussed above, furthermore, are only a mere sampling, highlights from the revolution. Alas, Eisler's book is silent on the intellectual sources of this revolution. Brennan, for example, was very close to Judge David Bazelon, who can only be described as a kind of extreme version of Brennan. Who influenced whom? What books shaped Brennan's thinking? (Eisler does mention Brennan reading St. Thomas Aquinas; one finds it, to say the least, difficult to describe Brennan's work as Thomistic.) This information would have been helpful in a biography, particularly when the subject has made his name by thinking and writing about the law.

As to the question of Brennan's judicial legacy, it can only be described as pernicious. The decisions he wrote or significantly influenced have fundamentally changed the way we live. Indeed, it is certainly not going too far to say that they are one of the main reasons that we have become a culture obsessed with rights. And Brennan, more than any other Justice, is responsible for transforming the Supreme Court from a constitutional arbiter into a lawless "bevy of Platonic Guardians" (again, Learned Hand's phrase) and for transmogrifying the Constitution from a document of ordered liberty into an instrument for continuous egalitarian revolution. What is especially distressing is how firmly Brennan's influence has been entrenched in both the judiciary and the legal academy. Aside from the occasional dissent by Justices Rehnquist, Scalia, or Thomas, or a law-review article by, say, Lino Graglia, very little is written in opposition to what is now an oppressive constitutional orthodoxy. ☆

Reflections on Presidential Sex Preferences

by Katherine McAlpine

Though some wish they could put Hillary
in a pillory,
one shudders and cowers
to think we could have wound up with Gennifer Flowers.