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IN A COURT BADLY DIVIDED between the rival judicial philosophies of Justices Black and Frankfurter, Associate Justice William J. Brennan, Jr. has over the past five years quietly developed his own judicial style and body of ideas. He has neither accepted the competing dogmatisms of his two senior colleagues nor espoused an overarching principle of his own. The common thread of his opinions is Brennan's firm insistence on judging each case on its particular merits. It is possible to see emerging from the record of these five years a pattern of thought. Among its several major features: a belief in positive government, including an active role for the Supreme Court; a conviction that the civil liberties of the individual are indispensable to the security of the nation; an almost old-fashioned concern for business competition (witnessed by his opinions in the *du Pont* and *Parke, Davis* cases), and an alert awareness of the irrepressible tendency of federal and local police to cut through procedural safeguards in their zeal for success. But it is a mistake on the basis of this pattern of decisions to assign Brennan casually to a "liberal bloc" along with Justices Black and Douglas and Chief Justice Warren. While he more often than not arrives at their conclusion, he only infrequently gets there by their lines of reasoning. This essay attempts a partial exploration of these intellectual differences.

The distinguishing quality of Brennan's pattern of thought is what may be called massive common sense. His approach to every case is practical, specific, factual. Unlike Black or Frankfurter, he rarely lays down sweeping *dicta*. He gives the impression of reasoning inductively from the facts before him rather than deductively from his own set of first principles. This, in turn, accounts for the characteristic tone of his opinions. While some of his colleagues give the impression of writing for posterity rather than any present audience, Brennan invariably addresses himself to his brethren on the Court and his professional colleagues in the law. He is conciliatory and moderate. His is the negotiator's

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manner; one catches in his opinions the overtones of the conference room mediator and the earnest debater, seeking to persuade rather than overpower. Those overtones are missing in the opinions of several of his colleagues. Brennan is neither prophet nor professor nor publicist. His tone is that of the practical man who, even when most deeply convinced of the rightness of his own position, does not wholly forget that one or another of his colleagues who differs with him today may join with him in making a different majority tomorrow. This is not to suggest that there is anything weakly placating or self-deprecatory in Brennan's work; he has at his command a resource of lucid, sturdy prose. But he foregoes the witticism, the epigram, the twisting personal thrust, if, indeed, these literary devices occur to him; and although he occasionally rises to indignation, it is an impersonal kind of indignation, and his language is characteristically calm and good-humored. One does not turn to Brennan's opinions to enjoy their high style, discursive erudition, or the working out of an iron logic, but one does find in them a body of reasonable argument reflecting a patient open-mindedness and a decent, humane spirit.

There is never anything doctrinaire or arbitrary in Brennan's approach. One of his favorite quotations is an admonition which Chief Justice Taft made to his colleagues not to be that "blind" Court that does not see what "all others can see and understand." Citing this remark in his dissent in *Uphaus v. Wyman*,[1] Brennan added: "The problem of protecting the citizen's constitutional rights from legislative investigation and exposure is a practical one, and we must take a practical, realistic approach to it.[2]

The *Uphaus* case concerned an investigation by the New Hampshire state attorney general into the adult education conferences held by an elderly pacifist at his summer camp: The Court in a 5-to-4 decision by Justice Clark upheld this sweeping inquiry into "subversive activities." Brennan condemned the investigation because it was not connected with "a discernible legislative purpose" but was conducted for "the impermissible one of exposure for exposure's sake."[3]

> . . . Any line other than a universal subordination of free expression and association to the asserted interests of the State in investigation and exposure will be difficult of definition; but this Court has rightly turned its back on the alternative of universal subordination of protected interests, and we must define rights in this area the best we can. The problem is one in its nature calling for traditional case-by-case development of principles in the various permutations of circumstances where the conflict may appear,

he continued.[4]

[1] 360 U.S. 72 (1959).
[2] *Id.* at 98.
[3] *Id.* at 82.
[4] *Id.* at 85.

The phrases "case-by-case development" and "various permutations of circumstances" are characteristic and suggestive terms in a Brennan opinion. Further, in the same dissent, he observed:

> One may accept the Court's truism that preservation of the State's existence is undoubtedly a proper purpose for legislation. But, in descending from this peak of abstraction to the facts of this case, one must ask the question: What relation did this investigation of individual conduct have to legislative ends here?[5]

Brennan, embedding his opinion in a matrix of fact, cited at length the factual, voluminous report issued by the state attorney general, which Clark had scarcely mentioned. Brennan concluded:

> The investigation, as revealed by the report, was overwhelmingly and predominantly a roving, self-contained investigation of individual and group behavior, and behavior in a constitutionally protected area. Its whole approach was to name names, disclose information about those named, and observe that 'facts are facts.' ... The report discloses an investigation in which the processes of lawmaking and law-evaluating were submerged entirely in exposure of individual behavior.[6]

Brennan's dissent in *Flemming v. Nestor*[7] affords a second illustration of his characteristic approach. One of the questions in this case was whether a 1954 amendment to the Social Security Act depriving aliens of their old-age benefits if deported for past membership in the Communist Party constituted an *ex post facto* punishment of the alien. Associate Justice Harlan, speaking for the Court in a 5-to-4 decision, held that the provision (Section 202[n]) was not a punishment. Brennan commented in his dissent: "The Court seems to acknowledge that the statute bears harshly upon the individual disqualified, but states that this is permissible when a statute is enacted as a regulation of the activity. But surely the harshness of the consequences is itself a relevant consideration to the inquiry into the congressional purpose." He went on to argue that the statute itself clearly showed that the intent of Congress was to punish particular persons—deported aliens who had at any time been Communist Party members—and not to regulate an activity or status such as all beneficiaries who lived abroad. In a footnote, Brennan added:

> The Court, recognizing that *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall 333 [two precedents from the Reconstruction period], strongly favor the conclusion that 202(n) was enacted with punitive intent, rejects the force of those precedents as drawing "heavily on the Court's first-hand acquaintance with the events and the mood of the then recent Civil War, and 'the fierce

[5] *Id.* at 99-100.
[6] *Id.* at 100-101.
[7] 363 U.S. 603 (1960).

> passions which that struggle aroused.' " This seems to me to say that the provision of 202(n) which cuts off benefits from aliens deported for past Communist Party membership was not enacted in a similar atmosphere. Our judicial detachment from the realities of the national scene should not carry us so far. Our memory of the emotional climate stirred by the question of communism in the early 1950's cannot be so short.[8]

It is instructive to consider four citizenship cases in which Brennan took stands that differed from those of Warren, Black, and Douglas. In two of these, he wrote the majority opinions which ruled against the claimed right of the individual petitioners, while in the other two—a pair of 5-to-4 decisions—he provided the "swing vote," siding first with one faction in the Court and then with the other.

In *Tak Shan Fong v. U.S.*,[9] Brennan delivered the opinion of the Court in a 6-to-3 decision to which Black, Douglas, and Warren dissented. Tak Shan Fong, a native and citizen of China, had been lawfully in the United States for a short period in 1951 on a seaman's 29-day pass and had re-entered, unlawfully, on January 27, 1952, and remained through his induction into the Army on May 4, 1953. When he was honorably discharged after two years of service, he petitioned for naturalization as a U.S. citizen in accordance with a law passed during the Korean War. Aliens who had served at least 90 days in the armed services could be naturalized if " (1) . . . lawfully admitted to the United States for permanent residence, or (2) . . . lawfully admitted to the United States, and . . . physically present within the United States for a single period of at least one year at the time of entering the Armed Forces. . . ."

Tak Shan Fong contended he was eligible under the law because he had been resident in this country for more than a year before induction and he had at one time (in 1951) been lawfully admitted. The Government countered that the lawful admission had to be the one that commenced the year of residence; any previous admission was irrelevant. Brennan upheld the Government's contention.

> We must [he wrote] be receptive to the purpose implicit in legislation of this sort, to express the gratitude of the country toward aliens who render service in its armed forces in its defense. But that does not warrant our rationalizing to an ambiguity where fairly considered none exists, or extending the generosity of the legislation past the limits to which Congress was willing to go. The service petitioner has rendered this country might inspire legislative relief in his behalf; but here we take the statute as it stands.[10]

[8] *Id.* at 637.
[9] 359 U.S. 102 (1959).
[10] *Id.* at 107.

In *Costello v. U.S.*,[11] Brennan wrote the majority opinion in a 6-to-2 decision stripping the well-known gambler of his citizenship on the grounds that he had obtained it fraudulently in 1925 when he stated his "occupation" as real estate while, in fact, it was bootlegging. Justice Douglas, with whom Justice Black concurred, wrote in his dissent:

> I do not think 'bootlegging' *per se* would have been a ground for denying naturalization to an alien in the 1920's. If it were, it would be an act of hypocrisy unparalleled in American life. For the 'bootlegger' in those days came into being because of the demand of the great bulk of people in our communities—including lawyers, prosecutors, and judges—for his products. However that may be, the forms of naturalization in use at the time did not ask for disclosure of all business activities of an applicant or of all sources of income. If that had been asked and if only one source of income were disclosed, then there would be a concealment relevant to our present problem. . . . Petitioner . . . actually engaged in real estate transactions. The fact that this real estate business was secondary in petitioner's regime did not make it any the less his 'occupation.'. . . The form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government.[12]

The inference is unavoidable that Douglas and Black do not believe in denationalization under any circumstances, and certainly not where it is used, as in this instance, primarily as a device to combat organized crime. This basic hostility to denationalization led them into the expansive but anachronistic generalities about the hypycrisy shown toward bootleggers and into the specious interpretation of the term "occupation." Brennan quite easily demonstrated that if Costello had avowed his real occupation in 1925, the judges of the period would certainly have denied him citizenship. As for the relative importance of "real estate" versus bootlegging in Costello's scheme of things, Brennan in his opinion exhaustively reviewed the facts of Costello's activities. He concluded:

> These proofs raise no troubling doubt in our minds. They do not support an inference that his occupation was real estate. They show only that the petitioner invested his illicit earnings in real estate transactions. . . . No one in the petitioner's situation could have reasonably thought that the questions could be answered truthfully as they were. It would have been a palpable absurdity for him to think that his occupation was real estate; he actually had no legal occupation. On this record, his only regular and continuing concern was his bootlegging. . . .[13]

If Brennan's common sense approach served him well in *Fong* and *Costello,*

[11] 365 U.S. 265 (1961).
[12] *Id.* at 288-289.
[13] *Id.* at 276-277.

it proved a less dependable guide in two more fundamental cases in the citizenship field. *Perez v. Brownell*,[14] and *Trop v. Dulles*,[15] announced the same day, March 31, 1958, involved the power of Congress to take away citizenship. These cases tested the constitutionality of the Nationality Act of 1940, which provided for several instances in which a citizen could by his behavior lose his citizenship. Perez had lost his citizenship because, while resident in Mexico, he had voted in a Mexican election. Trop had lost his citizenship because he deserted military service during wartime, was found guilty by a court martial, and given a dishonorable discharge. Perez's loss of citizenship was affirmed by the Court, while Trop had his citizenship restored to him. The result of these two contradictory decisions was to leave the constitutional issue still in doubt. Since Brennan was the only justice to change sides in these two 5-to-4 decisions, he bears the responsibility for the confusion that persists.

Justice Frankfurter wrote the majority opinion in *Perez*. He held that providing for the denationalization of American citizens for various kinds of behavior was well within Congress's power. This position was in accord with Frankfurter's well-known theory of judicial self-restraint and judicial deference to legislative authority. Justices Burton, Clark, and Harlan supported his view. They also joined him when he reiterated it in his dissent in *Trop*. The Frankfurter view would have been a majority in both cases if Justice Whittaker had supported it as he usually does. In these cases, however, Whittaker joined with Warren, Black, and Douglas who, predictably enough, argued that American citizenship was an inherent right which could be voluntarily renounced but which Congress had no power to take away.[16] This equal division among his colleagues meant that the decision in each case fell to Brennan.

Chief Justice Warren, in the writer's view, had much the stronger argument and he was at his magisterial best in his *Perez* dissent:

> What is this Government, whose power is here being asserted? And what is the source of that power? The answers are the foundation of our Republic. To secure the inalienable rights of the individual, 'Governments are instituted among Men, deriving their just powers from the consent of the governed.' I do not believe the passage of time has lessened the truth of this proposition. It is basic to our form of government. This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.... Citizenship *is* man's basic right for it is nothing less than the right to have rights.[17]

[14] 356 U.S. 44 (1958).
[15] 356 U.S. 86 (1958).
[16] Whittaker based his agreement with them on more limited grounds.
[17] 356 U.S. at 64.

Warren cited the first sentence of section one of the fourteenth amendment as the provision of the Constitution which "crystallized" this basic right of citizenship.

Brennan, however, is more impressed by the claims of history than by the claims of abstract logic. History shows there has been a continuing problem in this field arising from Americans, citizens by birth, who have lived for long periods in other countries, often doing military service and voting in these countries, and from naturalized citizens who sometimes returned to their countries of origin; in many instances, these individuals have claimed American citizenship only when a war crisis arose or they got in trouble with the government of their country of residence. Frankfurter noted that "no one seems to have questioned the necessity of having the State Department, in its conduct of the foreign relations of the Nation, pass on the validity of claims to American citizenship and to such of its incidents as the right to diplomatic protection. However, it was recognized in the Executive Branch that the Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves." [18] The Naturalization Act of 1906, the first law in this field, had been upheld by the courts. The common sense of mankind, the practical wisdom of those who have dealt with this kind of problem for generations, Frankfurter implicitly argued, indicated the necessity for congressional legislation. He found the constitutional sanction for such action in the government's general powers to conduct foreign policy under the "necessary and proper clause." And he carried Justice Brennan with him in his argument.

Brennan seems to have recoiled from applying the very same doctrine in *Trop*. Here the individual had deserted from military duty during World War II for less than a day. He had already been punished by a military prison sentence of three years and a dishonorable discharge. Was not the loss of his citizenship, in addition, an extremely harsh punishment out of all proportion to his offense? But having sustained the power of Congress to denationalize an American citizen for the comparatively trivial offense of voting in a foreign election, how could he justify denying to Congress the power to inflict the same penalty for the grave crime of desertion from military duty in time of war? Nevertheless that is what he did. Brennan, to his credit, candidly acknowledged his self-created dilemma. In his concurring opinion, he wrote:

> It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war. The loss of citizenship

[18] *Id.* at 49.

> may have as ominous significance for the individual in the one case as in the other. Why then does not the Constitution prevent the expatriation of the voter as well as the deserter?[19]

It cannot be said that Brennan ever worked his way satisfactorily out of this dilemma. In a long concurring opinion, he tried to develop the argument that there had to exist a "relevant connection" between the particular legislative enactment and the power granted to Congress by the Constitution. Voting in a foreign election, he contended, was one of the "evils which might obstruct or embarrass our diplomatic interests." Congress, might well believe that under these circumstances, there was no "acceptable alternative" to expatriation as a means of avoiding a possible embarrassment in our relations with a foreign country. This argument was dubious on the face of it; in the specific case of Perez, it had no validity since his voting in the Mexican election had caused no problem in the relations of the United States and Mexico. Nevertheless, Brennan wrote: "Where Congress has determined that considerations of the highest national importance indicate a course of action for which an adequate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress's power to choose." [20]

He then reversed the argument and said that while Congress clearly had the power to wage war, "it is difficult, indeed, to see how expatriation of the deserter helps wage war. . . ." No more difficult, one would have thought, in one instance than in the other. While admitting that there was "a certain rough justice" in the notion of expatriating a wartime deserter and that "Congress's belief that expatriation of the deserter might find some—though necessarily slender—support in reason," Brennan concluded Congress did not have the authority to be so severe. There was not, he said, "the requisite rational relation between this statute and the war power." [21]

One can only infer that Brennan's open-mindedness and instinct for history prompted him to accept the rationale of Frankfurter's opinion in *Perez,* but that his equally strong sense of what is equitable in ordinary human terms made him seek some escape from that rationale in *Trop.*

In his first five years on the Court, Brennan has maintained an independent position not only because temperament and experience incline him toward a tentative, fact-oriented approach to issues but also because he has refrained from committing himself on the two basic theoretical questions that have divided the Court during the past twenty years. The first question concerns the scope of the fourteenth amendment. Its first section forbids the states from

[19] 356 U.S. at 105.
[20] *Id.* at 106-107.
[21] *Id.* at 114.

abridging "the privileges or immunities of citizens of the United States." Are these privileges and immunities protected against state action the same rights which the first ten amendments protect against federal action? Did the fourteenth amendment "incorporate" and make applicable to the state all of the Bill of Rights? Many but not all of the framers of the amendment thought it did, but, beginning with the *Slaughterhouse* cases, a majority of the Supreme Court has consistently ruled that it did not. In his dissent in *Adamson v. California* in 1947, Justice Black, together with three of his colleagues, revived the "incorporation theory" of the fourteenth amendment. Since that time, Black has held tenaciously to that view. Justice Frankfurter has argued just as tenaciously that the opposite interpretation is correct and that the fourteenth amendment should not be viewed as "an instrument of general censorship by this Court of state action."[22]

On this question, Brennan has adopted a moderate position. He has not accepted Black's "incorporation theory." But he has laid heavy stress on the "due process" provision of the fourteenth amendment and by giving a more expansive definition than Frankfurter of what guarantees from the Bill of Rights should be "absorbed" into the amendment, he has frequently, though not always, arrived at the same conclusions in specific cases as have Black and Douglas.[23]

The second basic theoretical question on which Brennan has taken a middle ground position is: how absolute and binding on the federal government are the commandments of the Bill of Rights? Black, Douglas, and, usually, Chief Justice Warren take the position that the language of the Bill of Rights is rigid and leaves no room for interpretation. When, for example, the first amendment states: "Congress shall make no law . . . abridging the freedom of speech," this means that no restraint can be put on free speech. Frankfurter and his colleagues who have made a majority of the Court during the post-war period argue that this prohibitory language must be understood in its social setting; where society has competing interests, it is the duty of the Court to weigh those interests and strike a balance. In making its determination, the Court should again exercise self-restraint and defer to the greatest extent possible to the political judgment of Congress and the President.

The whole thrust of Brennan's thought is libertarian and he looks with favor on the positive exercise of the Court's powers of judicial review, but he has, characteristically, refrained from taking an all-or-nothing stance on this issue. He has not insisted that the language of the first amendment imposes

[22] Lerner v. Casey, 357 U.S. 468 (1958), *rehearing denied*, 358 U.S. 858 (1958) (concurring opinion); Beilan v. Board of Public Education, 357 U.S. 399 (1958), *rehearing denied*, 358 U.S. 858 (1958) (concurring opinion).

[23] For a full account of Brennan's thinking on this problem, see Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).

absolute prohibitions. He has often refrained from associating himself with the sweeping if exhilarating language used by Black and Douglas in their dissents and concurrences. For example, in the 1958 case of *Speiser v. Randall*[24] involving a California statute requiring taxpayers to file a loyalty oath as a condition for obtaining a tax exemption, Brennan delivered an opinion on behalf of the 8-to-1 majority forbidding the state to put the burden of proof as to loyalty on the taxpayers, but he did not join Black and Douglas in their denunciation of the whole idea of loyalty oaths. Brennan usually participates in the effort to balance society's conflicting interests but, as in *Uphaus v. Wyman* discussed *supra*, he insists that the claims advanced in behalf of interests alleged to be superior to those of free speech and other individual liberties must be real claims, and the interests must be weighty and substantial. Brennan is a judge who reads the transcripts of state and congressional investigating committees and the enactments of legislatures with a shrewd and worldly eye. He recognizes investigations that simply expose for exposure's sake for the punitive enterprises they are. He refuses to grant them the same weight he would an investigation with a genuine legislative purpose. Thus in *Barenblatt v. U.S.*,[25] where the Court upheld by 5-to-4 the defendant's conviction for contempt, Brennan dissented because he believed this particular inquiry of the House Un-American Activities Committee was only exposure for exposure's sake, and not, as did Black, Warren, and Douglas, because he believed the interrogation of Barenblatt violated his right to freedom of speech under the first amendment.

Brennan has stated the following abstract view of the first amendment vs. "competing interests" problem:

> There is some plausibility in the argument that executives, legislatures and courts will not suppress these basic liberties unless they have decided in good faith that the suppression is needed to save government. But these arguments, I think, challenge the basic assumption of the First Amendment. That basic assumption is that our government should not, even for the best of motives, suppress criticism of the way public affairs are conducted. The further basic assumption is that the nation's security lies in the undiluted right of individuals to exercise their First Amendment freedoms. The area of superior interests where the freedoms may not encroach has indeed been marked out as very narrow in Supreme Court decisions.[26]

One area that Brennan obviously had in mind was the Court's upholding of the Smith Act in the case of the Communist Party leaders. An area he may not have had in mind was that of the "obscenity cases." In recent years, Brennan

[24] 357 U.S. 513 (1958).
[25] 360 U.S. 109 (1959).
[26] West, *Mr. Justice Brennan—The First Four Years*, N.J.B.J. 519 (Fall 1960).

has been the author of the Court's principal opinions in cases concerning obscene literature (*Roth v. U.S.*,[27] *Alberts v. California*,[28] and *Smith v. California*[29]). Brennan excluded obscene works from the protection of the first amendment on the ground that the constitutional purpose for safeguarding speech and press was to assure "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion —have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[30]

This is a reasonable distinction that reasonable men might make. It is open, as all such distinctions are, to the attack promptly leveled against it by Justice Black in his concurring opinion in *Smith*. ("What is the standard by which one can determine when abridgement of speech and press goes 'too far' and when it is slight enough to be constitutionally allowable? Is this momentous decision to be left to a majority of this Court on a cast-by-cast basis?")[31] Moreover, Brennan made the mistake of entangling himself in an opposition metaphor: "The door barring federal and state intrusion into this area (freedom of speech and press) cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." [32] One does not ordinarily open doors to prevent encroachments —one closes them. This door metaphor goes naturally only with Black's absolutist argument. Brennan forgot the old debater's rule never to argue your case in terms of your opponent's metaphor.

But these obscenity cases are a small matter. Notwithstanding Black's strictures, Brennan's opinions were well-grounded in history since, for nearly two hundred years, American and English judges and juries have been trying to stem the flow of obscenity without their efforts curbing in any way the free expression of ideas about social and political change.

Interestingly enough, on another peripheral first amendment issue, Brennan, by balancing competing interests and arguing back from social effects rather than forward from first principles, arrived at a more libertarian position than Black. This was on the matter of the "blue laws" requiring businesses to close on Sunday. Where Black joined in an opinion written by

[27] 354 U.S. 476 (1957).
[28] 354 U.S. 476 (1957).
[29] 361 U.S. 147 (1959).
[30] Roth v. U.S., 354 U.S. 476, 484 (1957).
[31] 361 U.S. at 157.
[32] Roth v. U.S., *supra* note 30, at 488.

Chief Justice Warren upholding these laws, Brennan (dissenting in *Braunfeld v. Brown*[33]) examined the hardship worked on Orthodox Jewish businessmen who, for religious reasons, close their businesses on Saturday.

> The laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. . . . What then is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? . . . It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.[34]

Brennan has demonstrated it is possible to achieve libertarian results by weighing conflicting interests rather than by erecting absolute prohibitions. He has placed his main reliance upon the lessons of history, practical experience, the common sense derived from common experience. This is an appealing attitude for a man to have whose task is to interpret the present-day meaning of the oldest written Constitution in the world still in use. Moreover, it places Brennan in our nation's central tradition because we Americans are a covenanted people, the people of the Mayflower Compact and the Constitution, always harking back to first principles, but we are also a people of pragmatic temper, a people of Yankee inventors, western pioneers, and enterprising immigrants.

Given Brennan's libertarian temper but open-minded, undogmatic position on the theoretical issues, he could conceivably serve as a bridging influence within the Court between the absolutist defenders of liberty and the sometimes unrestrained advocates of self-restraint. Although that has not proved true in these first five years, his common sense approach may provide Mr. Justice Brennan with increasing opportunities over the long reach of his future career to play a unique and useful role in reconciling the divergent intellectual viewpoints for which his colleagues now contend.

[33] 366 U.S. 599 (1961).
[34] *Id.* at 609.