Justice Brennan, the Constitution, and Modern American Liberalism

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Societies experience periods of relative consensus and periods of disunity. Years of consensus are marked by broad agreement on social, economic, and political means and ends. During these times ideological debates are minimal; political discourse is primarily limited to strategies and narrowly defined subjects. Periods of disunity are characterized by substantial disagreements over political, social, and economic means and ends. These periods are marked by ideological conflicts; political, economic, and social disputes are fundamental.

Compared to the 1950’s, ours is a time of relative disunity. We disagree over fundamental matters such as the class and race divisions in our society, economic policy, and our role in world affairs. Our disunity over basic political, social, and economic structures has spilled over into the legal academy, and has stimulated a fresh and intense interest among legal academics in legal theory. As do their counterparts in other disciplines, these contemporary legal theorists disagree over basic issues.

Justice Brennan’s *Reason, Passion, and “The Progress of the Law”*,2 is related to two current debates on legal theory, which are themselves intertwined. The first concerns the dispute over constitutional meaning and method. The meaning of the Constitution is fiercely contested and includes such fundamental matters as: whether the fourteenth amendment incorporates the Bill of Rights and makes it applicable to the states; whether the free speech clause of the first amendment protects only political speech; whether the Constitution protects individual privacy, and if it does, what interests are protected by this concept; whether church and state can be meaningfully entangled without violating the establishment clause of the first amendment; how much process the Constitution requires each state to afford a defendant in a criminal proceeding; and where the boundaries are
established by such elusive concepts as federalism and separation of powers.

Constitutional commentators also disagree over the proper interpretative theory for construing the Constitution. Their differences are substantial and include: whether the interpreter should construe the Constitution literally and in accord with the intent of the constitutional framers; whether the Constitution should be interpreted to reinforce the democratic process, even though such a meaning is not required by the text and was not intended by the framers; and whether the Constitution should be viewed as a living document which should be interpreted to meet the needs of a given era.3

Brennan's paper is related to a second theoretical dispute involving modern political liberalism and its legal analogue.4 The 1950's witnessed a growing acceptance by intellectuals of modern American liberalism, as it had evolved in the wake of FDR's New Deal and World War II, and its legal theory counterpart. Seymour Lipset captured the scope of political consensus when he wrote in a chapter entitled "The End of Ideology?" that "[t]he democratic class struggle will continue, but it will be a fight without ideologies, without red flags, without May Day parades."5 Lipset continued:

This change in Western political life reflects the fact that the fundamental political problems of the industrial revolution have been solved: the workers have achieved industrial and political citizenship; the conservatives have accepted the welfare state; and the democratic left has recognized that an increase in over-all state power carries with it more dangers to freedom than solutions for economic problems.6

The political consensus identified by Lipset rested on three assumptions. Our economy was considered sufficiently elastic that the distributive justice requirements of the good society could be satisfied without radical or structural changes.7 Our federalism, which divided

4 J. Rawls, A Theory of Justice (1971), is the dominant, recent text on liberalism that is central to the contemporary debate over liberalism. R. Dworkin's two books, Taking Rights Seriously (1977) and Law's Empire (1986), and B. Ackerman's Social Justice in the Liberal State (1980), are some of the major expressions of liberal legal theory.
6 Id. at 442-43.
7 The highly praised legal text by H. Hart and A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law III (tentative ed. 1958), expresses this assumption as the "fallacy of the static pie." Hart and Sacks wrote:
At bottom, [many people] have argued, the social problem is a problem simply of deciding who gets what. This view starts with the obvious fact that there is not enough in the world of all the things that people want to go around among the
power among different layers of government, protected our demo­
cratic processes and freedoms against creeping totalitarianism. The
United States’ military power was judged sufficient to protect it from
external and internal threats.

These assumptions were shaken by our national experiences in
the sixties and early seventies. The collapse and dissipation of the
civil rights movement and the war on poverty ended optimistic hopes
that social, racial, and economic justice were within a generation's
reach. The traumatic experience of our military involvement in Viet­
nam shattered our sense of security, and graphically illustrated the
limits of American military power. The OPEC oil cartel dealt a seri­
ous blow to American illusions of economic independence, and em­
phasized international economic interdependence. The emergence of
détente implied America's formal acceptance of the end of a national
quest for military superiority over the Soviet Union. Further, the en­
largement of national power in Washington sparked sharp criticism of
the national government from the political left and right which in
turn enhanced sensitivities to the risks posed by centralized power to
democratic processes and freedoms.

These experiences fundamentally altered our collective outlook. Optimism about our elastic economy was replaced by doubt and no­
tions of the zero-sum and the lean years. The idea of the American
Century faded into fears that American power was waning. Hope for
social, economic, and racial justice turned into pessimism, sparked by
assertions that inequalities and unfairness were inevitable, and weak
assurances that a "safety net" existed for the poorest.

The disintegration of national optimism and a sense of security
prompted formidable challenges to basic tenets of modern political

people who want them. The gist of the social situation is then seen, baldly, as no
more than a continuing struggle among conflicting claimants to get what they can.
In this view, the whole apparatus of social order, law included, becomes little more
than a substitute or a mask for force, providing a cover of legitimacy for the deci­
sions that have to be made among the various contestants.

These materials proceed upon the conviction that this is a fallacy—"the fal­
lacy of the static pie."

The fact—the entirely objective fact—seems to be that the pie—that is, the
total of actually and potentially available satisfactions of human wants—is not
static but dynamic. How to make the pie larger, not how to divide the existing pie,
is the crux of the long-range and primarily significant problem.

Id. at 111.

8 Wechsler, The Political Safeguards of Federalism: The Role of the States in the Compo­
sition and Selection of the National Government, 54 Colum. L. Rev. 543, 543 (1954).
10 See L. Thurow, The Zero-Sum Society (1980); R. Barnet, The Lean Years: Politics in
the Age of Society (1980).
liberalism. The power of the modern state was criticized as threatening to economic efficiency, democratic processes, and individual freedoms. Emphasis on individual rights was attacked as misplaced because it undercut community values and cohesiveness, or denigrated because it inadequately protected the individual from intrusive state regulation. The concept of human dignity was assailed as deficient unless it was accompanied by a fair measure of distributive justice. Although the intellectual roots for the current critique of modern liberalism may be found in every decade of the century, the post-sixties challenges posed by communitarians and libertarians have force and intensity absent for some time.

Brennan's *Reason, Passion and “The Progress of the Law”* is related to these two intellectual landscapes. On the one hand, his paper is obviously written with the contemporary constitutional debate in mind even though he does not mention it. He boldly presents a sweeping vision of the role of “reason” and “passion” in constitutional interpretation, and relates his vision to what he considers one of the most serious social and political problems in modern America—the intrusiveness of the expanding state into the lives of its citizens, and the paramount importance of structuring that relationship so as to foster individual dignity. On the other hand, although Brennan may have written his paper without having the current dialogue over modern liberalism in mind, at least two of its dominant themes are controversial predicaments of modern political and legal liberalism. Defining these predicaments not only helps place Brennan's views on constitutional law in a broader context, but also illuminates and explains the problematic aspects of Brennan's eloquently stated and forcefully presented constitutional arguments.

I. A SUMMARY OF BRENNAN’S VIEWS

Brennan's thesis is that the internal dialogue of “reason” and “passion” within a judge is vital to the judicial process. He asserts that the judicial process goes haywire, as it did during the *Lochner* era when judges denied that they made value choices in deciding a case. Judges and the judicial process are strengthened and invigorated when judges permit their intuition and passion to guide them in discharging their responsibility.

In explicating his thesis, Brennan attacks the conception of adjudication that portrays the judge as “no more than a legal pharmacist,
dispensing the correct rule prescribed for the legal problem presented."\(^\text{14}\) According to this view, which he labels formalism, "judges decided cases in mechanical, 'scientific' fashion"\(^\text{15}\) by applying precedent, "and where precedent supplied no obvious answer, they simply 'discovered' the appropriate rule, dormant and imbedded in the ineluctable logic of the law."\(^\text{16}\)

Brennan begins his argument with an historical analysis. He argues that a "myth," which he states might be called the "judge-as-oracle" myth,\(^\text{17}\) arose in the nineteenth century as a response to the judicial branch's birth "in the trenches of partisan politics."\(^\text{18}\) He claims that this myth was "at first entirely healthy"\(^\text{19}\) as a counterbalance "to the spectre of politicization that hung over the Court in its early years."\(^\text{20}\) But he argues that the long term effect was to distance the judge from the qualities other than reason that Brennan considers essential "to a healthy and vital rationality."\(^\text{21}\)

Brennan explains that during the early years of the republic, there was an intense debate over the power that federal judges exercised, and a deep suspicion about who should be a judge. The judiciary quickly understood that it had to "tether its decisions to constitutional principles and not party affiliation,"\(^\text{22}\) or at least struggle to imbue the popular and legal culture with that notion. Brennan claims that several factors combined over many decades to strengthen this myth of judge-as-oracle. The "great opinions of the Marshall Court,"\(^\text{23}\) the publication of Supreme Court decisions by William Cranch, and "[t]he rise of the legal treatise, with its strangely disembodied character,"\(^\text{24}\) along with other factors all contributed to the idea of judges as legal robots crunching out the inevitable decision that was buried in the mysterious legal texts and traditions that only the legally trained could fathom.

Brennan argues that although the development of this judge-as-oracle myth was understandable, it embodied a grave threat to the legitimacy of the federal judiciary than did the judiciary's politicaliza-

\(^\text{14}^\) Brennan, supra note 2, at 4.
\(^\text{15}^\) Id.
\(^\text{16}^\) Id.
\(^\text{17}^\) Id. at 5.
\(^\text{18}^\) Id. at 7.
\(^\text{19}^\) Id.
\(^\text{20}^\) Id.
\(^\text{21}^\) Id. at 9.
\(^\text{22}^\) Id. at 7.
\(^\text{23}^\) Id.
\(^\text{24}^\) Id. at 8.
tion which promoted the myth in the first place.25 He contends that judges eventually persuaded themselves that formalism was not a myth but a realistic description of how they actually decided cases. Brennan asserts that this approach deprived the judiciary of the "nourishment" it would otherwise have obtained from other qualities that were vital to the judicial process. He refers to these other qualities as "passion," which he in turn defines as a "range of emotional and intuitive responses to a given set of facts or arguments . . . which often speed into our consciousness far ahead of the lumbering syllogisms of reason."26

Brennan illustrates his point that formalism posed more of a threat to the judiciary’s legitimacy than politicalization by discussing the Supreme Court’s decision in *Lochner v. New York.*28 In *Lochner,* the Court invalidated a New York statute that limited the number of hours per week bakery employees could work, because it constituted a deprivation of liberty without due process of law guaranteed by the fourteenth amendment. Brennan argues that “[f]he problem with the decision was not that it lacked rationality.”29 He concedes that the opinion was logical given the majority’s underlying premise. The problem, he contends, lay with the majority’s underlying premise. Brennan asserts that the *Lochner* majority used as a primary premise a concept of "‘negative liberty,’"30 which Brennan defines "as freedom from restraint,"31 and which otherwise might be understood as laissez-faire. Brennan concludes that this premise “was rooted in ‘a philosophy that had served its day,’ but was ill-suited for modern problems.”32

Brennan argues that the *Lochner* majority’s absorption of formalism as a way of thinking caused it to select negative liberty as the starting point to decide the constitutionality of the New York statute. By aspiring to the perfection of pure reason, and faithful adherence to precedent as the majority perceived it, the *Lochner* majority had cut themselves off from “sources of inspiration that would have enriched their rational debate.”33 Brennan asserts that if the *Lochner* justices had approached the facts in the case not only with a sense of “reason”

25 Id. at 9.
26 Id.
27 Id.
28 198 U.S. 45 (1905).
29 Brennan, supra note 2, at 10.
30 Id.
31 Id.
32 Id. (quoting B. Cardozo, The Nature of the Judicial Process 78 (1921)).
33 Id. at 11.
but “passion,” they would have “easily arrived at”34 the concept of positive liberty—the freedom that results when the state uses its power to adjust relations to promote equality in contract. Brennan is confident that if the majority had employed his concept of positive liberty, it would have focused on “the plight of an employee whose only ‘choice’ is between working the hours the employer demands or not working at all.”35 Brennan is convinced that such a choice would have struck the *Lochner* majority as it “strikes us, intuitively, as no choice at all,”36 thus persuading it to overthrow the restraints of formalism and to sustain the New York statute.

Brennan clearly believes that formalism led to *Lochner* and the era it symbolizes, which is widely considered by students of American constitutional law as one of the low points in constitutional jurisprudence. The result was that the Court eventually found itself in the middle of a political storm as it invalidated several state and federal statutes it considered violative of laissez-faire values. This history constitutes Brennan’s evidence for the claim that the cure of formalism gave rise to a more treacherous disease than that which it was meant to treat.

Offering a sweeping interpretation of American constitutional law during the republic’s first one hundred and fifty years, Brennan seeks to illustrate how “the progress of the law depends on a dialogue between heart and head,”37 by focusing on the due process clause. Brennan claims that the due process clause, “[p]erhaps more than any other provision of the Constitution . . . requires reliance on both reason and passion for its interpretation.”38

Brennan roots his construction of the due process clause in the framers’ theory of government, which he states “represented a sharp break with the past and its assumptions of a natural social hierarchy.”39 The framers understood “government as a contract ‘formed by the individuals of the society with each other, instead of a mutual arrangement between rulers and ruled.’ ”40 “Under such a theory of government,”41 Brennan argued, “due process required fidelity to . . . the essential dignity and worth of each individual.”42

34 Id.
35 Id.
36 Id.
37 Id. at 12.
38 Id. at 13.
39 Id. at 15.
41 Id.
42 Id.
Since those who ruled possessed no inherent superiority over those they ruled, the requirements of due process now applied to all officials, commanding them to treat citizens not as subjects but as fellow human beings. In short, due process requires that the rulers and the ruled acknowledge their common humanity, and that official judgment always remain human judgment.

Brennan contends that if the purposes of the due process clause are to be achieved, judges responsible for interpreting and applying it must be "sensitive to the balance of reason and passion that mark a given age, and the ways in which that balance leaves its mark on the everyday exchanges between government and citizen." We must, he insists, "draw on our own experience as inhabitants of that age, and our own sense of the uneven fabric of social life." Failure to adhere to this admonition will constitute a serious loss to individual dignity since "the greatest threat to due process principles is formal reason severed from the insights of passion."

Brennan believes that we must quickly use the due process clause to protect individual dignity, because government power has increased to a point where government officials now "'make decisions that affect us from before the cradle to beyond the grave.'" Now more than ever procedural protections are required to guard individual dignity threatened by the bureaucratic state.

Brennan concludes his paper with an illustration of how due process jurisprudence takes account of concepts as abstract as reason and passion. His focus is on Goldberg v. Kelly which he describes as "the opening shot in a modern 'due process revolution.'" In Goldberg, the Court concluded that the state was required by the due process clause to hold a hearing to determine eligibility, before terminating a welfare recipient's benefits. Brennan argues that the pretermination hearing resulted from "injecting passion into a system whose abstract rationality had led it astray." Inserting passion into the adjudicatory process prompted the Justices to focus on a recipient's "intricate texture of daily life" and to appreciate "the drastic..."

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43 Id. (emphasis in original).
44 Id. at 16.
45 Id.
46 Id. at 17.
47 Id. at 17-18 (quoting J. Mashaw, Due Process in the Administrative State 12 (1985)) (emphasis in original).
49 Brennan, supra note 2, at 19 (quoting J. Mashaw, supra note 47, at 33).
50 Id. at 20.
51 Id. at 22.
consequences of terminating a recipient's only means of subsis­
tence." Brennan concluded that “[a] government insensitive to such
a reality cannot be said to treat individuals with the respect that due
process demands—not because its officials do not reason, but because
they cannot understand.”

Brennan concedes that the Goldberg decision "may have
spawned unforeseen consequences" by contributing "in some ways
to the formality of the welfare system." But he believes that it did
more good than harm by opening "a dialogue that continues to this
day about the responsibilities of the bureaucratic state to its citi­
zens." This dialogue will not produce static due process principles,
for "[e]ach age must seek its own way to the unstable balance of those
qualities that make us human." Brennan claims that this inquiry
into understanding "the pulse of life beneath the official version of
events" will only be meaningful if we "do not take refuge in the
illusion of rational certainty" or insist on allowing our passion to
influence our judgment.

II. BRENNAN AND CONSTITUTIONAL LAW

The constitutional debates over meaning and method are related.
The interpreter's approach to the Constitution may determine its
meaning, and the meaning desired by the interpreter may influence
the interpreter's choice of interpretive theory. But as closely tied as
these two debates are, they are fundamentally different.

For reasons I speculate about later, Brennan's paper conflates
these two distinct debates. He portrays his disagreement with the
Lochner majority as addressing interpretive method, when he actually
disagrees with their understanding of constitutional meaning. He
characterizes his concept of passion as if it were an interpretive meth-
ology, when it is substantive. He claims that the Supreme Court's
legitimacy is most threatened by the meaning it ascribes to the Constitu-
tion, but he employs arguments that indicate his belief that the
Court's legitimacy is dependent on both meaning and method.

52 Id. at 20.
53 Id. at 22.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
A. "Reason" Is Not Method

Breiman imbues his concept of reason with two distinct meanings. First, he uses it to describe how the legal and popular cultures conceived of the judicial decisionmaking process. These cultures conceived of the reasoning process as a method employed by a judge to apply determinate law to determinate facts to reach a decision that was objectively correct. In this sense, formalism and the judicial use of reasoning are a misleading image of the judicial process. Judges fostered this image over decades to shield the federal judiciary from the charges of politicalization that threatened the courts during the early years following the organization of our republic.

But Brennan uses the word "reason" in a distinctly second but far more important sense. He argues that formalism and the concept of reason eventually became more than merely misleading advertising intended to calm the fears about the abuse of judicial process: it became an accurate description of it. Brennan's use of reason in this sense is most evident in his discussion of Lochner. He claims that if the Lochner judges had not become formalist in fact, they would have decided the case differently, because their intuitive responses—their passion—would have put them in touch with what he labels positive liberty. Brennan believes that if the Lochner majority had used positive liberty as the basis from which to decide the case, it would have reasoned its way to a result upholding a statute designed to overcome the inequality in bargaining power between workers and employers.

Brennan portrays his criticism of the Lochner majority as a disagreement over method. He cannot believe that judges influenced by passion could reach the result of the Lochner majority. He believes that a judge who accepted a dialogue between his intuition and rationality as a basis for deciding a case would uphold the New York law limiting the number of hours bakery employees could be required to work.

Brennan may be correct, but he need not be. The Lochner majority's decision might well have reflected its intuition and the common values of the time. The Lochner majority may have been influenced by laissez-faire values and viewed government interference in the market place as presumptively dangerous. It may have believed that laissez-faire values should prevail even when the choice confronting workers was to work on the employers' terms or not to work at all. The fact that the majority opinion was written in accord with what Brennan considers to be the requirements of formalism, may only have been to assure that the decision conformed to what the majority considered to be the accepted and expected forms of judicial
opinion writing. In short, Brennan’s disbelief may not be well-founded; the *Lochner* majority may have been in touch with “passion” and strong community sentiment, but its passion may have been for values different from his.

**B. “Passion” Is Meaning**

Brennan defines passion as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason.” He considers passion to be “nourishment essential to a healthy and vital rationality” and believes that it is “not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared.” Brennan distinguishes passion from “impassioned judgment,” which he describes as judgment which has surrendered to the “tug of such sentiments.”

Brennan portrays his concept of passion, similar to his view of reason, as if it were an interpretive methodology that was value-free, leading a judge to the correct primary premise from which to reason. He argues that if the *Lochner* majority had permitted itself to be guided by its passion, it would have sustained the New York statute protecting bakers. Brennan also contends that passion caused the *Goldberg* majority to perceive that a pretermination hearing was necessary for welfare recipients who were totally dependent on their public benefits.

Although Brennan does not define passion as normative, that is the meaning he gives it. In *Lochner*, he does not entertain the possibility that a judge’s intuitive response could cause him to oppose state intervention in the marketplace, even at the cost of the bakers’ health, because of classic libertarian fears of state power. In *Goldberg*, he rejects the possibility that a judge’s intuition might influence him to oppose the imposition of a prior hearing out of fear that it will contribute “to the formality of the welfare system,” which tends “to banish passion from government altogether, and to establish a state where only reason will reign.” If Brennan’s concept of passion was merely methodological, a judge in *Lochner* or *Goldberg* should have been able to follow his passion to a decision not countenanced by

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60 Id. at 9.
61 Id.
62 Id. at 10.
63 Id. at 11.
64 Id.
65 Id. at 22.
66 Id. at 18.
Brennan, without being vulnerable to Brennan's criticism that he had severed his internal decisionmaking process from his intuition and passion. Brennan's refusal to permit this possibility establishes the substantive nature of his concept of passion.

C. Legitimacy, Method, and Meaning

Alexander Bickel, Robert Bork, and other conservative scholars are largely responsible for allowing the anti-majoritarian critique of the Supreme Court to become a central axis of contemporary constitutional law commentary. Indeed, for some it is the only axis for any defensible "grand theory" of constitutional law. According to this perspective, the Supreme Court should declare majoritarian preferences unconstitutional primarily when they conflict with the plain meaning of the Constitution and the framers' intent.

Brennan does not endorse this conservative critique of the Supreme Court. Nor does he embrace the limitations this critique places on constitutional interpretations. Yet Brennan is alert to the conservative assessment of the Supreme Court, and he is worried about the capacity of the Court to maintain itself as a respected and influential co-equal branch of government.

Brennan's paper reveals his alertness to the conservative critique in two ways. First, as already discussed, Brennan conflates the method and meaning debate in constitutional law. The reason may be that he believes he can make more persuasive arguments on behalf of his interpretive methodology than on behalf of the constitutional results he desires. He hopes to persuade us that his method is value-free, even though it leads only to results he supports.

Second, Brennan argues that the Lochner era teaches that the main threat to the Court's power was and is substantive results that the other co-equal branches of government and the public will not honor. He believes that the Justices increase the risk that the Court's decisions will be unacceptable when they isolate themselves from their passion in deciding cases. He insists that a judge's personal views cannot be kept out of the decisionmaking process, and that it is a serious mistake to pretend that they can be. He asserts that decisions do not and should not solely reflect the text of the Constitution or the

67 See, e.g., A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).
69 See, e.g., J. Ely, Democracy and Distrust (1979) (the term "grand theory" is drawn from The Return of Grand Theory in the Human Sciences 1 (Q. Skinner ed. 1985)).
intent of the framers; they do and should reflect the vision of the judge.

Despite the force of his presentation, Brennan appears to lack some confidence in his claim that the Court’s legitimacy rests primarily on the acceptability of its substantive results. Brennan argues that the decision in *Goldberg* and the result he wishes the Court had reached in *Lochner* were not only correct, but also reflect the original intent of the framers. He explains that the framers intended the Constitution to constitute a covenant among the citizens, not between the rulers and the ruled. He asserts that this means that the framers intended that the government must always respect the individuality and dignity of its citizens. Brennan uses this premise to claim that the imposition of the pretermination hearing in *Goldberg* was simply a fulfillment of the framers’ intent, as would have been a decision to sustain the New York statute in *Lochner*.

Brennan attempts to tilt in two directions at once. When discussing interpretive approaches to the Constitution, he emphasizes the realist perception that a judge’s personal views play a significant role in construing the Constitution and deciding cases. But when he discusses constitutional meaning, he develops an elaborate argument, grounding his interpretation in the framers’ intent.

Identifying these two contrary leanings is easier than reconciling them. Nevertheless, an explanation emerges from Brennan’s piece. Brennan recognizes that the Court’s legitimacy depends on public acceptance of its decisions, and that acceptance depends in large part on the acceptability of the substantive result. But he believes that acceptance partially requires that a decision not be viewed solely as the result of a justice’s personal preference. Judges should ground their decisions in the constitutional text, the framers’ intent, and constitutional history.

Brennan’s ambivalence is understandable. The interplay between outcome and methodology, and their relationship to the Court’s legitimacy—its capacity to maintain its status as a third co-equal branch of government—is subtle and complex. Outcomes must be acceptable, and part of what makes them acceptable is the acceptability of the methodology employed by the interpreter. Methodology alone may steer the Court in disastrous directions, as it did the *Lochner* Court, but outcomes unsupported by an acceptable methodology may make the Court’s decision suspect. Thus, Brennan has a strong view of what the proper outcome should be in *Lochner* and *Goldberg*, and at the same time feels compelled to tie the outcome—no matter how loosely—to the intent of the framers.
III. BRENNAN AND MODERN LIBERALISM

Brennan adheres to major tenets of modern liberalism in his paper. He emphasizes the importance of individual dignity, the significant role of the modern state in creating and maintaining the good society, and the importance of shaping the relationship between the modern welfare state and the individual so that the state’s powers are not imprudently diminished, and individual dignity is preserved. By so doing, however, Brennan encounters two important dilemmas of modern liberalism, partially accounting for his effort to camouflage his preferred constitutional interpretations as interpretive methodology.

Central to Brennan’s views is the importance he places on “the essential dignity and worth of each individual.” He easily persuades the reader that his support for what has come to be called the rights-model approach to constitutional interpretation is obviously a direct consequence of this position. Although he does not refer to modern political philosophers, he would seem to agree with John Rawls that “[e]ach person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override . . . . [T]he rights secured by justice are not subject to political bargaining or to the calculus of social interests.”

Nevertheless, Brennan does not explain what he means by the essential dignity and worth of each individual. We know from his analysis of Lochner (as well as all his other writings) that he is not a libertarian (or a devotee of law and economics) wedded to a market economy and a strict regime of private property rights. But Brennan does not state that individual dignity and self-worth require the state to assure to each individual minimal necessities such as food, clothing, housing, and medical care, or a fair measure of distributive justice.

Brennan’s failure to explain a vital concept such as individual dignity is endemic to modern liberalism, which is torn between two conflicting and pivotal values, liberty and equality. The liberty value, as Robert Nozick has argued, leads to a minimal state that is “scrupulously . . . neutral between its citizens.” The equality value supports an activist state using its powers to promote the equality of opportunity and distributive justice. The tension between these two values is a source of dispute among political theorists, and limits the ability of

70 Brennan, supra note 2, at 15.
constitutional jurists, like Brennan, to fashion a conception of an individual's constitutional right that is broadly accepted.

Brennan grapples with a second problem of modern liberalism. Modern liberalism conceives of the state as a positive and creative force using its vast powers to nurture the good society. It also places great emphasis on the individual as an entity the state must respect. As the modern liberal state seeks to create the good society and becomes more entangled with the lives of its citizens, the relationship between the state and its citizens must be structured so that the state can fulfill its responsibilities without threatening individual dignity.

Brennan's paper echoes this dilemma. He emphasizes the fact that the state has not only become bigger, but more intrusive in the lives of each citizen. As he explains:

In the two hundred years since our Constitution was framed, government has vastly increased in the size and scope of its activities. As one observer puts it, in contemporary society "[i]t is not only trite, it is no longer sufficient to say that we have a cradle-to-grave administrative, welfare state. Administrators make decisions that affect us from before the cradle to beyond the grave." 73

Brennan accepts this development not only as a matter of constitutional law, but also as an inevitable consequence of the modern welfare state he supports.

Brennan argues, however, that the state must respect individual dignity as it discharges its responsibilities. The state's bureaucracy must possess sufficient discretion to allow it to be compassionate to individuals, but not so much discretion to permit it to be arbitrary. Apart from claiming that procedural due process may provide a basis for reconciling these opposing pulls, Brennan does not make any progress in resolving this predicament.

Brennan's dilemmas are fundamental to his philosophical and constitutional outlook. His inability to dissipate them limits the influence of his thought. Yet his weaknesses are no more (or less) than those of modern liberalism which he ardently supports. And while we may be tempted to fault Brennan and modern liberalism for not resolving these theoretical difficulties, it may be a serious error to expect modern liberalism to resolve these predicaments for they embody important and complex values that all significant western political theories find difficult to accommodate.

Justice Brennan’s thought is worthy of our attention for at least two reasons. Brennan’s influence on American life during the thirty-two years he has been on the Court has been substantial. Indeed, it would be difficult to exaggerate the impact he has had on our nation as an intellect, a welder of majorities for seminal opinions which he has crafted, and a passionate dissenter protesting the dilution or destruction of values he labored so hard to protect.

But Brennan is not only powerful; he is wise and humane. Isaiah Berlin once observed that at any given moment a society holds dear a plurality of conflicting values that may be impossible to reconcile: “The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realization of some of which must inevitably involve the sacrifice of others.” For all the fierceness with which he advocates his views, Brennan is aware that his vision is only one of many. Yet he resists the paralysis of relativism, and accepts “[t]he necessity of choosing between absolute claims... [as] an inescapable characteristic of the human condition.”

For more than three decades Brennan has been a model of courage, force, and eloquence in making his judgments and in helping us make our societal ones. As a judge, he has struggled to be sensitive to the poor, needy, and vulnerable. As a constitutional jurist, he has tried to remain loyal to the traditions of his Court while seeking to accommodate his constitutional interpretations with his larger social and political vision. His *Reason, Passion, and “The Progress of the Law”* expresses his moral and intellectual struggles as a judge and constitutional jurist, and constitutes one of his many valuable contributions that help to illuminate our choices and to shape our decisions.

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75 Id. at 169.