

THE ENDURING EXAMPLE OF JOHN MARSHALL HARLAN:  
"VIRTUE AS PRACTICE" IN THE SUPREME COURT\*

WILLIAM W. VAN ALSTYNE\*\*

I. IN DISSSENT ON THE WARREN COURT

Twenty years after his last term on the Supreme Court, whatever else complimentary may be written of Justice John Marshall Harlan's sixteen years on the Court (1955-1971), it ought not be said that, in the era of the Warren Court,<sup>1</sup> he was a leading champion of civil liberties and of civil rights. Rather, of Justice John Marshall Harlan it may more appropriately be said that, in the era of the Warren Court, Justice Harlan was more often than not in dissent.<sup>2</sup> Indeed, for those inclined to measure judges by

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\*\* William R. & Thomas S. Perkins Professor of Law, Duke University.

1. The Court whose Chief Justice is remembered by his foremost biographer, Bernard Schwartz, as "Super Chief," and whose leading champion, Justice William Brennan, arriving a year after Harlan and staying on sixteen years afterwards, is now extolled as the "Architect of the Bill of Rights." BERNARD SCHWARTZ, SUPER CHIEF EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY (1983); Laurence H. Tribe, *Architect of the Bill of Rights*, A.B.A. J., Feb. 1991, at 47, 47.

2. See ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND GREAT

the extent of their contribution to "the idea of progress,"<sup>3</sup> insofar as the Warren Court was the embodiment of that idea, then Justice John Marshall Harlan may more suitably be known as the Justice who more often than not threw sand into the churning cogwheels of the Warren Court. It was Justice Brennan, and not Harlan, who helped oil the moving parts. Consider the following brief review of four principal categories of the Warren Court civil rights-civil liberties enterprise.<sup>4</sup>

#### A. Reapportionment Under Supreme Court Directive

In his own assessment of the era of the Warren Court, the Chief Justice personally regarded the reapportionment decisions ("one person, one vote") as the most consequential of all those rendered during his sixteen years on the Supreme Court (1953-1969).<sup>5</sup> Yet, in both of the seminal cases generating all of the subsequent downstream cases on reapportionment, John Marshall Harlan demurred. In each of the two "great" cases that launched the Court's reapportionment career, that is, pursuant to his inability to fathom the majority's treatment of the constitutional clauses that it thought somehow to be relevant and controlling, Justice Harlan was in dissent.<sup>6</sup>

#### B. The Second Reconstruction

Others believe that those cases falling into a second category were far more consequential overall than the reapportionment cases in establishing the principal civil rights pedigree of the Warren Court: cases on race and racially related voting rights. Justice Harlan was not a member of the

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DISSENTERS IN THE SUPREME COURT 41 (1974) (stating that Harlan, even more so than Justice Holmes, genuinely deserved to be called the "Great Dissenter").

3. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 12-13 (1970), in which Bickel suggests that the Warren Court did not remember the past and imagine the future, but rather the Court "imagine[d] the past and remember[ed] the future." *Id.* at 13. In other words, it decided what it wanted to have the Constitution do according to its own vision and then made up its own history to deem it done.

4. Willfully omitted from this initial review of cases are others that will be examined more particularly later on.

5. See SCHWARTZ, *supra* note 1, at 410.

6. See *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting); *Baker v. Carr*, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting); see also *Avery v. Midland County*, 390 U.S. 474, 486 (1968) (Harlan, J., dissenting); *Carrington v. Rash*, 380 U.S. 89, 97 (1965) (Harlan, J., dissenting); *Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting).

Court when the opening case, *Brown v. Board of Education*,<sup>7</sup> was decided in 1954. He was a member in 1966, however, when the Warren Court held Virginia's poll tax to be unconstitutional as a denial of equal protection.<sup>8</sup> But instead of concurring in the majority's holding, Justice Harlan disagreed with it; he thought nothing in the Fourteenth Amendment reached a nonfederal poll tax per se.<sup>9</sup> When, in 1966, the Warren Court also upheld a special section of the 1965 Voting Rights Act disallowing literacy tests in New York, thus enabling Puerto Ricans to vote though unable to speak English, Harlan again demurred.<sup>10</sup> So far as he could determine, there was no constitutional basis for the Act. Also in 1966, when the Warren Court reconstrued, applied, and sustained as constitutional a Reconstruction act to reach racially motivated private conspiracies against persons in travel, Harlan was unable to agree with the majority.<sup>11</sup> And in 1964, he again disassociated himself from the Warren Court; insofar as the majority suggested that ordinary enforcement of state trespass statutes at the instance of private entrepreneurs might violate the Fourteenth Amendment per se, Harlan was respectfully in dissent.<sup>12</sup>

In 1968, moreover, he found no warrant for the Warren Court view that a century-old act of Congress did—or constitutionally could—reach all private racial refusals to enter into property transfers.<sup>13</sup> So, there again, he was unable to help oil the progressive machine. Nor did he agree that a statewide referendum repeal of a state fair housing act, coupled with a state constitutional prohibition on the enactment of legislation affecting private decisions to sell or not sell, was forbidden by the Fourteenth Amendment, as the majority of the Warren Court believed.<sup>14</sup> Nor, in 1961, was it obvious to Justice Harlan how anything adverted to in another Warren Court majority opinion satisfied Fourteenth Amendment state action requirements in respect to a private, commercial

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7. 347 U.S. 483 (1954).

8. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

9. See *id.* at 680 (Harlan, J., dissenting).

10. See *Katzenbach v. Morgan*, 384 U.S. 641, 659 (1966) (Harlan, J., dissenting); see also *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part) (arguing that Congress lacked the power to invalidate age-based voting eligibility requirements); cf. U.S. CONST. amend. XXVI (ratified in 1971) ("The right of citizens of the United States, who are eighteen years or older, to vote shall not be denied or abridged by the United States or any State on account of age.").

11. See *United States v. Guest*, 383 U.S. 745, 762 (1966) (Harlan, J., concurring in part and dissenting in part).

12. See *Bell v. Maryland*, 378 U.S. 226, 311 (1964) (Harlan, J., dissenting).

13. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 (1968) (Harlan, J., dissenting).

14. See *Reitman v. Mulkey*, 387 U.S. 369, 387 (1967) (Harlan, J., dissenting).

restaurant lessee's refusal of service in Wilmington, Delaware.<sup>15</sup> Given the state of the record, as he understood it, the most that Justice Harlan believed to be warranted in this case was to remand the matter for further consideration.<sup>16</sup>

### C. *The Criminal Procedure Revolution*

If a laggard on reapportionment by constitutional fiat (as he was), and if not particularly activist on a number of race-related civil rights decisions during this era (as evidently he wasn't), where else might Justice Harlan have made a great substantive civil rights-civil liberties mark during these heady years? A third category of civil rights-civil liberties advance during the Warren Court years was assuredly that of criminal procedure and the great expansion of rights of the criminally accused. The cases of the time were sufficiently famous that several became eponymous in their own right. Among the most famous were: *Gideon v. Wainwright*,<sup>17</sup> *Mapp v. Ohio*,<sup>18</sup> *Griffin v. Illinois*,<sup>19</sup> *Fay v. Noia*,<sup>20</sup> and *Miranda v.*

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15. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 728 (1961) (Harlan, J., dissenting).

16. *Id.* at 728 (Harlan, J., dissenting). In a classic remark that exhibited the whole distance between his own approach to constitutional adjudication and that of others for whom such matters were mere details at best, Harlan began his expression of reproach in *Burton* in this way:

The Court's opinion, by a process of first indiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer . . . leave[s] completely at sea just what it is in this record that satisfies the requirement of "state action" [without which the majority's result cannot constitutionally be obtained].

*Id.*; see also *Evans v. Newton*, 382 U.S. 296, 322 (1966) (Harlan, J., dissenting) (stating that the opinion of the majority "substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching").

Justice Harlan is sometimes extolled for his important opinion for the Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (confirming and protecting a First Amendment right of political association). One may well agree, as I do, that this is a seminal case and an enduring opinion. Even so, one should also note that in the balance of the Warren Court's cases on this very subject, overall, Justice Harlan was more often than not in dissent. See, e.g., *Dombrowski v. Pfister*, 380 U.S. 479, 498 (1965) (Harlan, J., dissenting); *Henry v. Mississippi*, 379 U.S. 443, 457 (1965) (Harlan, J., dissenting); *Gibson v. Florida Legislative Investig. Comm.*, 372 U.S. 539, 576 (1963) (Harlan, J., dissenting); *Shelton v. Tucker*, 364 U.S. 479, 496 (1960) (Harlan, J., dissenting).

17. 372 U.S. 335 (1963).

18. 367 U.S. 643 (1961).

19. 351 U.S. 12 (1956).

20. 372 U.S. 391 (1963).

*Arizona*.<sup>21</sup> Even now, a leading casebook identifies *Miranda* as “probably the most famous and controversial Warren Court criminal procedure case.”<sup>22</sup> And indeed, who has not heard of “Mirandizing” an arrestee? So, perhaps it will be fruitful to take an additional look here.

But Justice Harlan dissented in *Miranda*,<sup>23</sup> as he dissented also in *Mapp v. Ohio*,<sup>24</sup> as well as in *Fay v. Noia*.<sup>25</sup> And he also dissented in *Griffin v. Illinois*.<sup>26</sup> Even in *Gideon*, in which Harlan concurred, the ease of the Warren Court’s passage—a quick passage so characteristic of the Warren Court’s overall work—was not acceptable to Justice Harlan.<sup>27</sup> For Harlan, the correct doing of constitutional law required a certain turning of squarer corners.<sup>28</sup> In terms of particular outcomes, in any event, judged by these cases, his position cannot qualify him as a major contributing figure to the expansion of criminal procedure rights in the grand era of the Warren Court.

#### D. *A Downside Sampler of Freedom of Speech, Press, and Religion*

Having briefly canvassed three other famous categories of Warren Court reforms, we shall turn to the last readily identifiable category of fundamental liberty in progressive ferment during the Warren Court era—the great liberties of the First Amendment, especially freedom of speech and of the press. Consider *Barenblatt v. United States*,<sup>29</sup> *Wood*

21. 384 U.S. 436 (1966).

22. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* 307 (6th ed. 1986).

23. *Miranda*, 384 U.S. at 504 (Harlan, J., dissenting).

24. *Mapp*, 367 U.S. at 672 (Harlan, J., dissenting). Harlan accepted the exclusionary rule as constitutionally grounded in Fourth Amendment cases, but distinguished state procedures as governed by the Fourteenth Amendment Due Process Clause instead.

25. *Fay*, 372 U.S. at 448 (Harlan, J., dissenting).

26. *Griffin*, 351 U.S. at 29 (Harlan, J., dissenting); see also *Douglas v. California*, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting) (also involving indigents on appeal).

27. See *Gideon*, 372 U.S. at 349 (Harlan, J., concurring).

28. See, for example, the discussion of the *Burton* case, *supra* note 16. In *Gideon*, Justice Harlan began his concurrence in the following way: “I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded . . . .” *Gideon*, 372 U.S. at 349. See also Harlan’s careful address in due process terms in the indigent access to divorce case, rejecting the larger equal protection rationale, in *Boddie v. Connecticut*, 401 U.S. 371, 382 (1971), and his careful concurrence in the wiretap case overruling *Olmstead v. United States*, 277 U.S. 438 (1928), in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

29. 360 U.S. 109 (1959).

*v. Georgia*,<sup>30</sup> *Time, Inc. v. Hill*,<sup>31</sup> *United States v. Robel*,<sup>32</sup> *Tinker v. Des Moines School District*,<sup>33</sup> and *New York Times Co. v. United States*,<sup>34</sup>—in not one of these cases was Justice Harlan obviously “on the side of” free speech.

In the first major Supreme Court First Amendment case of this series, *Barenblatt v. United States*,<sup>35</sup> in 1958, he joined the majority to be sure; but in that case, the free speech claim actually lost. In each of these other major Warren Court free speech cases, the majority held in favor of the First Amendment claim, but Justice Harlan did not. So, as to these, his views were less “on the side” of free speech than those of the majority. In the last of these cases, the famous Pentagon Papers case, in 1971, Earl Warren was no longer Chief Justice so it was no longer literally the era of the Warren Court. But even as of that late year, beyond the fringe of the Warren Court (and its idea of progress), Justice Harlan was in dissent against the First Amendment claim that had prevailed.<sup>36</sup>

And so, too, things appear to have gone with respect to the neighboring First Amendment clause on the free exercise of religion. In the critical case decided by the Court in 1963 that fundamentally rewrote Free Exercise Clause doctrine,<sup>37</sup> whereas Justice Brennan wrote for a Warren Court majority in holding that the First Amendment required unemployment compensation to be paid from tax-collected funds for persons refusing work that conflicted with their day of religious observance, Harlan filed an emphatic dissent.<sup>38</sup> In his view, it was quite impossible to see how the Free Exercise Clause compelled such a subsidy, despite what the majority said.<sup>39</sup> So, here again, one may say that he was

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30. 370 U.S. 375 (1962).

31. 385 U.S. 374 (1967).

32. 389 U.S. 258 (1967).

33. 393 U.S. 503 (1969).

34. 403 U.S. 713 (1971).

35. 360 U.S. at 109.

36. To be sure, Justice Harlan did not hold that the government was as yet entitled to an injunction to suppress publication of the purloined Pentagon Papers. Rather, his position was, as the court of appeals had held, that the district court had been provided an insufficient opportunity to enable the government to make the extraordinary showing that Harlan agreed the First Amendment required it to make, in order to succeed as it possibly might. See *New York Times*, 403 U.S. at 755-56.

37. See *Sherbert v. Verner*, 374 U.S. 398 (1963).

38. See *id.* at 418 (Harlan, J., dissenting).

39. See *id.* at 423. In a significant number of additional First Amendment religion-specific accommodation cases, as in *Sherbert*, Justice Harlan was more rigorous in facing the difficulties of reconciling the results with Establishment Clause doctrine than was the

far less generous than others on the Court at the time in his construction of the relevant constitutional clause.

Of course this brief review of thirty or so of the most notable decisions from the era of the Warren Court underreports the whole work of that Court during Justice Harlan's tenure. Even so, it is surely sufficient to help remind one concretely of specific positions Justice Harlan held at the time. More than was true of any other Justice of the same period, in virtually all four categories of the Warren Court's expansionary constitutional and statutory decisions, despite what has been left out here, it remains correct that his was the single most frequent voice in dissent. So what shall one say about that?

## II. "VIRTUE AS PRACTICE"

In his far ranging essay *After Virtue*,<sup>40</sup> Alasdair MacIntyre investigates a view of virtue as "the notion of goods internal to a practice."<sup>41</sup> It is a view one might also identify as easily, and perhaps better, as the idea of virtue as the quality of professional commitment in a particular sense. The "goods" internal to a practice, as MacIntyre helpfully recalls in his provocative essay, are not worldly goods, at least not in the usual sense, but something else. In the course of explaining the idea, MacIntyre offers the following explanation and comparison:

Consider the example of a highly intelligent seven-year-old child whom I wish to teach to play chess, although the child has no particular desire to learn the game. The child does however have a very strong desire for candy and little chance of obtaining it. I therefore tell the child that if the child will play chess with me once a week I will give the child 50¢ worth of candy; moreover I tell the child that I will always play in such a way that it will be difficult, but not impossible, for the child to win and that, if the child wins, the child will receive an extra 50¢ worth of candy. Thus motivated the child plays and plays to win. Notice however

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prevailing Supreme Court majority at the time. See, e.g., *Walz v. Tax Comm. of New York*, 397 U.S. 664, 696-97 (1970) (Opinion of Harlan, J.). Harlan's view in this case was that property tax exemption of religiously held property is consistent with the Establishment Clause only on the assumption that other kinds of nonprofit ideological groups are treated the same way. See also *Welsh v. United States*, 398 U.S. 333, 357-58 (1970) (Harlan, J., concurring), where Harlan stated that exemption from military training and combatant service provided by Congress for religious conscientious objectors is valid only if all other conscientious objectors are treated as similarly exempt.

40. ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

41. *Id.* at 175.

that, so long as it is the candy alone which provides the child with a good reason for playing chess, the child has no reason not to cheat and every reason to cheat, provided he or she can do so successfully. But, so we may hope, there will come a time when the child will find in those goods specific to chess, in the achievement of a certain highly particular kind of analytical skill, strategic imagination and competitive intensity, a new set of reasons, reasons now not just for winning on a particular occasion, but for trying to excel in whatever way the game of chess demands. Now if the child cheats, he or she will be defeating not me, but himself or herself.<sup>42</sup>

"But, so we may hope, there will come a time when the child will find in those goods specific to chess, . . . a new set of reasons"<sup>43</sup> sufficient in themselves to abstain from "cheating," even when (and one wants to emphasize this particularly) he or she can do so successfully,<sup>44</sup> or even when doing so successfully generates external goods lying outside the immediate practice itself.<sup>45</sup> Importantly, MacIntyre adds an observation to this suggestion of virtue as a certain kind of practice. He declares that "[t]hose who lack the relevant experience are incompetent thereby as judges of internal goods."<sup>46</sup> One must have an experience in working within, I suppose he means, to know virtue as practice. Justice John Marshall Harlan assuredly did reflect that experience, and it is by the character of his practice that so many—by no means persons of the same view on the outcome of particular cases in which he wrote—came to believe strongly in the integrity of his work.

This imagery of "virtue as practice" is not captured in case outcomes, as in merely asking who won. Nor, for that matter, is it caught in supposing that virtue in practice is captured in one's resolve as a judge to fulfill the familiar maxim, *justitia fiat, coelum ruat*. To "let justice be done though the heavens fall" (which is how this familiar maxim roughly translates), is not virtue as practice, but rather simply a commitment to do what the maxim declares—to do whatever it is that one thinks to be

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42. *Id.* at 175-76.

43. *Id.*

44. For example, even when no one will know (indeed, so far as outsiders can see, all the proper rules of chess are at all times being strictly met).

45. Whether the "external goods" be those secured to the chess player as a chess player (as to be world renown) or to the chess player in some other way (as a great champion of others, for example, as to have all the "candy" that comes consequential to winning put into a trust account for the benefit of others and not for himself or herself—that is, impersonal external goods).

46. MACINTYRE, *supra* note 40, at 176.



“justice.” It is, moreover, a thoroughly apocalyptic vision of a judge’s role, a vision John Marshall Harlan eschewed. It implicitly maintains that justice (or rather that which one deems to be justice) always comes first, thus everything else comes second—including such lesser matters as truth. This, however, plainly was not Justice Harlan’s view in his practice of constitutional law during his sixteen years on the Supreme Court of the United States.<sup>47</sup> The truth, rather, mattered much to Harlan, or so at least I believe it did, as do others who have likewise studied his work.<sup>48</sup>

The truth was for John Marshall Harlan not a subordinate clause to the judge’s oath; it was not a merely quondam thing to be given its due only if congenial to “justice,” but not otherwise. Neither was the truth to be captured in merely ingenious or merely plausible—but fictive—readings of constitutional clauses or articles.<sup>49</sup> The truth, indeed, has nothing to do

47. For an elaboration on this paragraph, see William Van Alstyne, *Notes on a Bicentennial Constitution, Part II: Antinomial Choices and the Role of the Supreme Court*, 72 IOWA L. REV. 1281 (1987).

48. See, e.g., sources cited *supra* note \*.

49. In this conference, Professor Ackerman contrasts what he calls “independent constitutionalism” with what he calls “common law constitutionalism.” Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991). He attributes the latter as more of a piece with Harlan, but faults Harlan on that account, commending “independent constitutionalism” as the better vision—less staid, more dynamic, more liberal, and more liberating as surely it is. In defense of “independent constitutionalism,” moreover, Professor Ackerman observes how it can serve both to (a) expand processes of democratic majoritarianism, and (b) expand entrenched rights against majorities, at one and the same time. See *id.* at 11-25. As always, when Professor Ackerman writes on this theme as he has so impressively, he does an excellent job in making his point. Choosing examples from the Warren Court, he shows how “independent constitutionalism” was pro-democratic in several respects, such as in the invalidation of the Virginia poll tax, and he is likewise able to draw on a number of other Warren Court decisions expanding the field of entrenched rights. See *id.* at 11-20. So, all is well . . . except perhaps for a niggling matter or two.

An *alternative* (to Ackerman) in the manner of either expanding democratic processes beyond those already provided for by the Constitution, or expanding the list of rights and/or liberties beyond those provided for by the Constitution, is found in the Constitution itself. Come to think of it, this alternative (rather than “independent constitutionalism”) is all that the Constitution provides and has had a fair bit of use. For example, the proposal and ratification of the Fifteenth Amendment, and so, too, the proposal and ratification of the Nineteenth Amendment, and so, too, the Twenty-third, the Twenty-fourth, and the Twenty-sixth Amendments as well—each and all expanded the participating body politic. And each is quite express and quite concrete. Come to think of it, this is also how several important entrenched personal rights became established: by amending the Constitution. Come to look at it close up in contrast, Professor Ackerman’s agenda of “independent constitutionalism” is but a felicitous restatement of a most familiar Ackerman theme: the encouragement of judicial flexibility in lieu of amendments (of participation and of protection) by decisional fiat—without proposal or ratification pursuant to Article V.

with facile things. It likewise has less affinity for those who, remembering the future, can at once so easily therefore also "imagine" the past.<sup>50</sup> For the quality of the example Harlan provided of virtue as practice in this regard, I do not know of a judge whom it is more of a privilege to pay an admiring tribute to than to John Marshall Harlan.

But however one might try, having said just this much, one cannot in a short paper—probably not even in an endless paper—convince anyone that Justice Harlan actually warrants this special praise. And I certainly do not mean to suggest that the fact that Harlan was in dissent in a large number of leading decisions of the Warren Court somehow per se establishes his virtue—as though by innuendo against the Warren Court one thereby means to praise Harlan. I mean no such thing at all. Moreover, laying aside any claim of that sort, I have no means finally to persuade anyone of Harlan's good example of virtue as practice. Rather, if it comes, it comes simply as a conclusion one will reach; if at all, I suppose, ultimately only by way of one's own abiding impression of Justice Harlan, after doing the best one can in devoting quite a long time in trying to take the measure of the same things he and others worked on, and in coming to that task without illusion or predisposition, so far as one can manage to do. Here, I can but suggest a few particular examples that seem to me most helpful in taking the measure of John Marshall Harlan during his years on the Supreme Court, as a judge who represented virtue as practice. So, all too briefly, let us give it a try. We do so in a brief review of but four cases in which Justice Harlan wrote several of his most interesting opinions, each selected for review in order to make a particular point, to be fitted within an overall assessment at the end.<sup>51</sup>

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To call this judicial technique "*independent* constitutionalism," however, is at least appropriate, albeit perhaps more so than Professor Ackerman intends. It envisions a Supreme Court busily making constitutional changes quite "independent" of the Constitution and quite as it thinks best. It will operate (as it sometimes already has operated) much in the manner of Hans Christian Andersen and *The Emperor's New Clothes*. Within the new parable "the Constitution" is the Emperor. The Court then tells us from time to time, just how perfect the Emperor looks (he merely looks a bit naked, as it were, to us). But I surely agree that Justice Harlan can be faulted (if fault it be) for not giving himself as readily as others to this often personally self-gratifying and sometimes even highly rewarding, and thoroughly constructive community fraud. Perhaps, moreover, even as Professor Ackerman implies, some who served with Harlan thought this entirely appropriate, and accordingly declared "Behold!" Justice Harlan did not usually exclaim "Behold." Rather, in his quiet, professional manner, he was more likely to say: "Behold what?"

50. See *supra* note 3.

51. The examples are taken from cases involving particular parts of the Bill of Rights, rather than other areas of constitutional review, simply in keeping with the focus of this panel on that portion of Harlan's work.

## III. VIRTUE APPLIED

## A. Cohen v. California

Decided in 1971, the *Cohen*<sup>52</sup> case belies the expectation one might otherwise have were one's impression based only on the frequency of Harlan's dissents in the general run of decisions of the Warren Court, that he must have taken a narrow measure of constitutional review. To the contrary, as illustrated by *Cohen*, Justice Harlan's understanding of principles of generous construction of constitutional clauses was fully equal to Justice Marshall's own approach in matters of constitutional adjudication<sup>53</sup>—in this instance, an understanding applied to the Free Speech Clause of the First Amendment. In *Cohen*, moreover, Harlan's opinion drew insights from the very fact of Cohen's rude language,<sup>54</sup> rather than distancing himself from it as the dissent chose to do.<sup>55</sup> Cohen's "immature antic"<sup>56</sup> (as the dissent described it) actually went to the most divisive political issue of the time, namely, the war in Vietnam and the military draft that sustained it. In the critical passages of his opinion for the Court, understanding the setting exactly, Justice Harlan picked up the point and wrote:

[I]mportant to our conclusion<sup>[57]</sup> is the constitutional backdrop against which our decision must be made. The constitutional

52. 403 U.S. 15 (1971).

53. Specifically, clauses in the Constitution carry a presumption of general utility and of more permanent principle than do statutes or rules of common law. The latter provide mutable, provisional "answers" to some perceived problem addressed by legislative resolution which may or may not prove serviceable but in any event are alterable by the same politics that generated them. They may, but need not, convey any large principle or philosophy. Constitutional provisions, however, presumptively address matters at a more enduring level of principle and concern, and should be treated accordingly—with that perspective in full view. See *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 627-50 (1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819).

54. The rude language was this: Fuck the draft. It was lettered onto the jacket Paul Cohen wore when arrested in the corridor of the Los Angeles courthouse for breach of the peace. *Cohen*, 403 U.S. at 16.

55. Justices Blackmun and Black, and Chief Justice Burger, dissented in *Cohen*. They did so in a cursory dissent by Blackmun characterizing Cohen's expression as an "absurd and immature antic . . . mainly conduct and little speech," in their view a vulgarity easily outweighed by considerations of public decorum and public peace. *Cohen*, 403 U.S. at 27 (Blackmun, J., dissenting).

56. *Id.*

57. The "conclusion" was that the conviction for breach of the peace, as affirmed in the state court of appeals, must be reversed. *Id.* at 24.

right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion . . . .

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. . . .

. . . .  
 . . . [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message to be communicated. . . .

. . . [W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.<sup>58</sup>

I do not think *Cohen* needs a great deal of comment, even two decades removed from its inscription. The appreciation of First Amendment core principles is represented as straightforwardly in Harlan's opinion in *Cohen* as in the best opinions decades earlier by Holmes and Brandeis. And Harlan was surely insightful in seeing "not a sign of weakness but of strength"<sup>59</sup> in the verbal cacophony of which he wrote. Harlan's modest reminder of the "emotive" force of protected speech, too, is much more than an afterthought. Just two summers ago, eighteen years after *Cohen*, the point was brought back when flag-burning Gregory Johnson prevailed in the Supreme Court partly on the strength of what Harlan wrote in *Cohen*.<sup>60</sup> In Tiananmen Square, in this same summer two years ago, in contrast with *Cohen*, there was assuredly no quarter given for immature antics or emotive expressions of political dissent. Far from it. There was instead the ultimate "decorum" of death. By any fair measure, *Cohen* was not simply a small matter about a vulgar antic as Justice Blackmun suggested in dissent. It was, rather, a case about political freedom, as Harlan understood.

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58. *Id.* at 24-26.

59. *Id.* at 25.

60. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *United States v. Eichman*, 110 S. Ct. 2404 (1990) (a reprise of the *Johnson* case).

B. *Poe v. Ullman and Griswold v. Connecticut*

The related prior point meant to be illustrated here is that Harlan's *Poe*<sup>61</sup> and *Griswold*<sup>62</sup> opinions (a) provide a further report of a principle of generous construction, but (b) at the same time also display an understanding that all constitutions, including our own, are necessarily ethnocentric, much as Holmes had understood as well.<sup>63</sup> And Harlan carefully indicates an intention to abide by that remembrance in the useful

61. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

62. 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

63. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

I think the word "liberty," in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, *unless* it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

*Id.* (emphasis added). The "unless" clause in Holmes's opinion furnishes the occasion for the judicial checking function according to the Constitution. The reference is not a universal one, moreover, but midrange and culturally specific (thus the "ethnocentric" boundary reference in administering substantive due process review). "Marriage," as a special estate of privacy, may well meet this test against certain intrusions, but even then the term itself carries a boundary as it were—i.e., "marriage" as traditionally understood. For Holmes, no doubt polygamous marriage, even assuming it had or now has a rock solid foundation in some other culture, as it may well have, would not be understood as such in this one. Accordingly, the idea of raising an "equal protection" entitlement for plural, as for monogamous, "marriage" would not work; not because eminently reasonable persons cannot be found to find solace and nurture equally in polygamous relationships as in monogamous relationships, but because it cannot be found equally entrenched in protection ascribable to any existing real clause, whether of substantive due process or otherwise, in the Constitution as is.

Compare with this discussion, Justice Harlan's similarly constrained observations in *Poe*:

The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. . . .

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

*Poe*, 367 U.S. at 552-53.

opinions he wrote.<sup>64</sup> The authenticity of adjudication in respect to cases such as *Poe* and *Griswold* was thus expressly checked—by Harlan—in taking due care in crafting his opinions neither to neglect the informing strength of the institution and tradition he drew upon (“marriage”) nor to exaggerate it, thus leaving the law freer beyond the identifiable zone. So, it seems to me that Harlan was persuasive in his opinion but persuasive partly because he was also careful, however, *not* to embrace anything beyond that which he could show strong support for by a rigorous test. If that is so, as I think it is, then Harlan would most likely have voted with the majority in *Bowers v. Hardwick*,<sup>65</sup> and it seems to me a virtual certainty that he would have been amazed at, and would have rejected, Justice Brennan’s “equal protection” argument in *Eisenstadt v. Baird*.<sup>66</sup>

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64. See the excerpt from Harlan’s opinion *supra* note 63. By much the same test, moreover, “marriage” itself is understood in a particular way within this opinion: monogamous (not polygamous), and heterosexual (not homosexual). Expectations that Harlan would find satisfactory substantive due process or equal protection leverage to judicially remake the constitutionally protected array of “personal intimacy” choices of the less culture-bounded range that authors such as David Richards or Kenneth Karst would encourage of the Court, would surely be altogether misplaced. See generally Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980) (advocating a presumptive freedom of intimate association encompassing all close and familiar personal relationships comparable, in some significant way, to a marriage or family relationship); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986) (criticizing the Court’s failure to extend the constitutional right of privacy to consensual homosexual relationships).

65. 478 U.S. 186 (1986).

66. 405 U.S. 438 (1972). In *Eisenstadt*, the Court held a criminal prohibition on the distribution of contraceptives to an unmarried person to be a denial of equal protection of such a person vis-a-vis a married person. Justice Brennan’s odd efforts here begin in the following way: “If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.” *Id.* at 453. Really? Nothing in Harlan’s opinion in *Poe* or in *Griswold* provides any foundations for such a claim as Justice Brennan asserted here. Indeed, the opposite would be true. If it is the case that the state may not forbid persons from having sexual intercourse even within marriage, does it follow that it would be “equally impermissible” to disallow fornication—sexual intercourse without marriage? If so, why is that? But unless it would be equally impermissible, why, then, would a ban on contraceptive access for an unmarried person stand or fall according to the constitutionality of such a restriction as applied in respect to married persons, acting within marriage? If the restriction on distributing contraceptive devices is a restriction against distribution to those whose most standard use of such devices would be to commit a crime (fornication), the restriction would *prima facie* seem to pass every reasonable test of constitutional scrutiny, whatever the rights of married persons acting within marriage may be. Perhaps such a statute might still fail on some other account, but one is not likely to find anything in *Eisenstadt v. Baird* to discover why that is so. The Court’s opinion is, in any case, utterly “unHarlanlike,” but then Justice Harlan was no longer on the Court. It is just another

Assuming it to be so, moreover, there is no reason to believe that Justice Harlan would have acted from any animus for the value of such rights as were sought to be claimed in either *Bowers* or *Eisenstadt*. Rather, he would have acted simply from his informed inability to reinvent the clauses relied upon by Brennan in each of these cases.

### C. Roth v. United States and Alberts v. California

These two cases were treated as of a single piece by the Supreme Court, but they were distinct for Harlan. In *Roth*, involving an act of Congress, the First Amendment was directly and fully at stake.<sup>67</sup> In *Alberts*, a state statute was all that was involved, to be assessed under the Fourteenth Amendment.<sup>68</sup> Harlan emphasized the lesser consequences of state laws on freezing the national status quo of attitudes toward acceptable obscenity and on flexibility, change, and variation, than when acts of Congress presume to lay down the heavy regime of a single flat, national, criminal law—a law pre-empting what may well be the more permissive attitude in some locales and pre-empting, too, for all practical purposes, whatever additional protections state supreme court Justices might find (as currently in Oregon) in state constitutional free speech provisions. In *Roth*, moreover, Harlan rightly noted that the federal interest was marginal to begin with; he properly pointed out that “Congress has no substantive power over sexual morality.”<sup>69</sup> The thematic point meant to be added here is to note the continuing awareness of federalism interests characteristic of Harlan’s more subtle approach—less procrustean dogma, more care, more nuance, more attention to differences in text, in specific history, and in effect. Again, the point is not meant to be ponderous, but in his taking care not to hold (rather cavalierly, as Brennan did?) that “obscenity” is somehow just a category excluded from all conventional free speech protection, there is in Harlan a seriousness of thought and an awareness that notices relationships among parts of the Constitution as well.

### D. Sherbert v. Verner

Rejecting the free exercise claim, and thus dissenting in this case, Harlan came directly to terms with a related clause the majority did not

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reason he is much missed.

67. See *Roth v. United States*, 354 U.S. 476, 479 (1957) (consolidation of *Roth* and *Alberts*, sustaining an anti-obscenity act of Congress and an anti-obscenity act of the California legislature, respectively).

68. See *id.* at 479-80.

69. *Id.* at 504 (Harlan, J., concurring in part and dissenting in part).

appear to address or even to take care to consider in the course of its decision favoring the original plaintiff in this case.<sup>70</sup> Justice Harlan confronted the implicit Establishment Clause tension that the majority, in its haste to favor the “deserving” unemployment compensation claimant, rather blithely brushed over. I have discussed the case in a footnote above, in relation to two other Establishment Clause-Free Exercise Clause cases in which Harlan’s position also set him apart.<sup>71</sup> In each of these, as in each case we have already examined, he is more attentive to distinctions, more aware of other principles, other clauses, other cases which, for him, always needed to be accounted for and given their due. The problem for Harlan in *Sherbert* itself can be quickly stated, although I do so here in a rather simplified way.

*Sherbert* was not a case in which a harsh conflict existed between a state law and claims of religious conscience—i.e., a case involving a statute either requiring a religious person to do something or to forbear from something contrary to the dictates of their faith. Rather, *Sherbert* was a case where insofar as a person might quit a job from the need to stay home with a young child or even to attend a dying relative, the unemployment compensation statute of the state provided no benefits, nor did it so provide for persons quitting a job for religious reasons. In *Sherbert* Justice Brennan, writing for the majority, nonetheless produced a result requiring just such payments from the state fund.<sup>72</sup> By focusing on the hardship to Ms. Sherbert in the nonavailability of unemployment compensation to her upon leaving work when her employer shifted to a six-day schedule, one day of which (Saturday) her religion told her to keep holy, the Court described the arrangement as “penalizing” the free exercise of religion itself.<sup>73</sup> For Justice Harlan, however, this way of dealing with the case (and its startling neglect to reconcile the Court’s own Establishment Clause cases) would not do. We capture here but a portion of his able dissent, but it is useful even so:

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70. See *Sherbert v. Verner*, 374 U.S. 398, 421 (1963) (Harlan, J., dissenting).

71. See *supra* note 39.

72. See *Sherbert*, 374 U.S. at 410; see also *Frazee v. Illinois Dep’t of Employment Sec.*, 489 U.S. 829 (1989) (extending *Sherbert* to encompass a claimant who is not a member of an established religious sect, but still holds religious beliefs that prohibit him from working on Sunday); *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (invalidating a state statute that denied benefits to a claimant who was discharged for refusal to work on her Sabbath); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981) (applying and extending *Sherbert* to a statute that disqualified a claimant who quit his job for religious reasons).

73. See *Sherbert*, 374 U.S. at 406.



Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future. . . .

. . . .  
The South Carolina Supreme Court has uniformly applied [its] law in conformity with its clearly expressed purpose. It has consistently held that one is not "available for work" if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling. . . .<sup>74</sup>

In the present case all that the state court has done is to apply these accepted principles. . . .

. . . What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.<sup>75</sup>

One of those "two respects," of course, is how to make sense of this version of the Free Exercise Clause insofar as it does more than exempt a person from conforming to a law valid as applied to others (the usual manner in which free exercise claims may be entitled to some recognition arise, but not at all a question presented by *Sherbert*), but appears also to *mandate payment of financial assistance specially targeted to persons identified by religiously motivated action*. Our purpose is satisfactorily served here merely to have noted the question Justice Harlan raised, a question raising serious Establishment Clause issues frankly not met in the majority opinion at all.<sup>76</sup> And so, just how does one count Justice Harlan in this case? As a dissent "against" a claim of civil liberty? As a judge, rather, voting "for" the Constitution?

#### IV. CONCLUSION

Justice Harlan was a judge who tried remarkably successfully always to answer for the full integrity of his work on the Supreme Court. His seriousness of purpose, his conscientiousness, his understanding, his openness, his courtesy, his skill, his learning, all seem so apparent as one turns pages, reads, and reflects. Whether one finds in any of this "virtue

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74. For example, the case of a claimant leaving a job to attend a sick or dying relative and unable to return to work, or a claimant who must care for young children and who, on that account, leaves a job and is similarly not available to resume work or take another job.

75. *Sherbert*, 374 U.S. at 418-20 (Harlan, J., dissenting).

76. *See* *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

as practice," as MacIntyre meant to describe it, perhaps one cannot finally say. But I believe there was virtue of a rare sort in Justice Harlan. It was well reflected in his years on the Supreme Court. This law school honors itself in honoring John Marshall Harlan. He is very greatly missed.