

# NEW YORK UNIVERSITY LAW REVIEW

---

---

VOLUME 86

JUNE 2011

NUMBER 3

---

---

## *MADISON LECTURE*

### LIVING OUR TRADITIONS

THE HONORABLE ROBERT H. HENRY\*

*In the annual James Madison Lecture, Robert Henry, former Chief Judge of the United States Court of Appeals for the Tenth Circuit, explores Justice John Marshall Harlan II's notable dissent in Poe v. Ullman. President Henry carefully examines Justice Harlan's method of constitutional interpretation. Refusing to adopt a "literalistic" reading of the Constitution and instead looking to the "history and purposes" of a particular constitutional provision, Justice Harlan's approach serves as a source of both flexibility and restraint. Of particular importance is Justice Harlan's recognition of the role that "living" traditions play in supplying meaning to the concept of due process of law. What emerges from this probing review of Justice Harlan's Poe dissent is a moderate and thoughtful response to originalism.*

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.

—THE FEDERALIST NO. 37 (James Madison)<sup>1</sup>

---

\* Copyright © 2011 by Robert H. Henry, President and CEO, Oklahoma City University. Formerly, Chief Judge, United States Court of Appeals for the Tenth Circuit. An earlier version of this text was delivered as the James Madison Lecture at the New York University School of Law on October 12, 2010. I would like to thank Daniel Correa and Laana Layman for research assistance; also, for their comments and criticism, I thank Professors Art LeFrancois, Andy Spiropoulos, and Michael Gibson of the Oklahoma City University School of Law. For subsequent comments and encouragement, I would also like to thank friends and family: F.A.O. "Fritz" Schwartz, Michael Gardener, and Rachel Henry—all of New York City.

<sup>1</sup> THE FEDERALIST NO. 37, at 229 (James Madison) (Edward Mead Earle ed., 1937).

## INTRODUCTION

It is an honor to be here at NYU today. The honor is special for a number of reasons. First, my daughter, Rachel, graduated from the Tisch School of the Arts this year. She received a wonderful education and is now pursuing a career in the arts. Which is to say, she's waitressing. But I guess with her father, grandfather, and great-grandfather all working in the legal profession, she likely thought applicable the infamous passage from Justice Holmes's opinion in *Buck v. Bell*: "Three generations of imbeciles are enough."<sup>2</sup>

Second, I came to NYU when I was first appointed to the bench for "baby judges' school." Since then, I've spent some time in Cambridge at "baby presidents' school." While here at baby judges' school, I began an acquaintance with Burt Neuborne, Sam Estreicher, and a person who has become my wonderful friend, colleague, and fellow International Judicial Relations Committee member, Judge John Walker. I also had the occasion to hear the finest luncheon biographical speech I have ever heard, presented by Norman Dorsen about his judicial mentor, John Marshall Harlan II—more on that in a minute.

Finally, my dear friend and mentor, the late Bernard Schwartz, was a law professor here for a number of years. I cannot tell you how inspiring it was to have him in Oklahoma with me at the end of his career—a time when his energy and productivity continued unabated. Continuing his Balzacian output of books and articles, he drew me into his orbit, which tragically ended in an automobile accident five years, five books, and forty law review articles after he came to Tulsa. I was honored to speak at both of his memorial services, one in Tulsa and the other here at NYU.

The Madison Lecture is a wonderful tradition. It has brought some of the nation's finest judges (as a college president, I can say this with all modesty) to one of the nation's finest law schools. In 2002, Professor Dorsen edited a volume of the Madison Lectures, published under the title *The Unpredictable Constitution*.<sup>3</sup> It is an interesting title with many possible meanings. Like the Constitution, it's susceptible of divergent interpretations. But I don't think "unpredictable" is merely referring to the character of the great jurists who have delivered the Lectures.

---

<sup>2</sup> 274 U.S. 200, 207 (1927).

<sup>3</sup> THE UNPREDICTABLE CONSTITUTION (Norman Dorsen ed., 2002).

## I DADDY'S GHOST

In a book published in 1990, Bernard Schwartz bemoaned: Like Hamlet's father, "original intention" is a ghost that refuses to remain in repose. The notion that constitutional construction should be based solely upon the intention of the framers has, despite its utter fatuousness, never been laid to rest. For it is one of those delusively simple concepts that promises a facile solution to the most difficult of our legal problems—purporting, in the process, to eliminate the uncertainty that too frequently prevails in constitutional law and to curb the excesses of judicial activism.<sup>4</sup>

Today I want to talk about originalism, but through a somewhat narrow lens. For I want to return to that subject of Professor Dorsen's magnificent luncheon speech, which inspired me to learn more about Justice John Marshall Harlan II. Justice Harlan had a particularly interesting, and I think principled, response to originalism (at least with respect to the Fourteenth Amendment's Due Process Clause, though a case may be made that he was not an originalist in other contexts as well).<sup>5</sup> In a remarkable dissent in the case of *Poe v.*

<sup>4</sup> BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK* 7 (1990).

<sup>5</sup> For Fourteenth Amendment due process decisions, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 2 & 185 n.3, 3 & 186 n.10 (1980), which advocates an interpretivist approach whereby Justices repair to express or implicit purposes in the language of the Constitution when deciding Fourteenth Amendment due process cases. But an interpretive stance informed by "living traditions" need not be restricted to the jurisprudence of due process. Justice Harlan's dissent in *United States v. White*, 401 U.S. 745, 768 (1971), a Fourth Amendment warrant case, is illustrative. The legal predicate of the central problem in *White* was this: Supreme Court case law had determined that no warrant was required where informants revealed the contents of prior conversations to the government. *Id.* at 749 (plurality opinion) (citing *Hoffa v. United States*, 385 U.S. 293 (1966)). The idea was that citizens assume the risk that the persons with whom they speak might reveal those conversations to the government. *Id.* (citing *Hoffa*, 385 U.S. at 302). The legal question in *White* was whether it made a difference if the informant was simultaneously transmitting the conversation to unseen government agents. *Id.* at 746–47. The plurality determined that it did not, and no warrant was required. *Id.* at 752–54.

Justice Harlan, dissenting, *id.* at 768, relied on his concurrence in *Katz v. United States*, 389 U.S. 347, 360 (1967), in which he argued that the Fourth Amendment regulates governmental investigative conduct (typically by requiring a warrant) where that conduct (1) invades a person's actual expectation of privacy, so long as (2) that expectation is "one that society is prepared to recognize as 'reasonable.'" *Id.* at 361. The legitimate expectation of privacy test must account for life as we think it ought to be lived. And so, for Harlan, whether we are talking about what risks we should be held to assume or what expectations are legitimate, we need to determine the desirability of those risks and expectations: "[I]t is the task of the law to form and project, as well as mirror and reflect . . ." *White*, 401 U.S. at 786 (Harlan, J., dissenting). Justice Harlan would have required a warrant in all cases jeopardizing an individual's "sense of security" when that sense of security outweighed "the utility of the conduct as a technique of law enforcement." *Id.* at 786–87. Thus, Harlan

*Ullman*,<sup>6</sup> the good Justice took a strong stand for the idea that the Constitution must be interpreted in light of history and tradition, and famously noted “[t]hat tradition is a living thing.”<sup>7</sup> Harlan’s view has received much praise, but also some criticism.<sup>8</sup> It is still quoted, still influential, and an important law review article written in 2004 correctly concluded, “American law has not yet plumbed Justice Harlan’s meaning in proclaiming that our ‘tradition is a living thing.’”<sup>9</sup>

I find it interesting that the popular justification for originalism today is not that our framers were divinely inspired, or omniscient, or even exceptionally wise. I think I can make something of a case for all three of those traits. But originalism is popular today not for the merits of our framers but for the malice of their judicial successors,<sup>10</sup> least-dangerous-branch occupiers though they may be.<sup>11</sup> Originalism is touted as the only preventive for judicial activism (or perhaps for its

---

was not concerned with an originalist view of what the framers thought about warrants. His view in *White* was not unconstrained by Fourth Amendment principle, but in both *Katz* and *White*, he favored what we might call an expanded view of warrants. And yet, the Fourth Amendment, particularly given its historical context, is difficult to read on originalist accounts as little else than a safeguard *against* warrants. For a discussion about the history of the Warrant Clause, the debate between a per se warrant requirement in all search and seizure cases, and the current reasonableness standard for warrantless searches, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994), and Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994). Perhaps it makes sense to turn an amendment on its head when factual realities (the means of eavesdropping) and legal realities (warrants as privacy safeguards rather than threats) change.

<sup>6</sup> 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

<sup>7</sup> *Id.* at 542.

<sup>8</sup> See, e.g., SCHWARTZ, *supra* note 4, at 67–72 (supporting Harlan’s approach to substantive due process); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 72–82 (1991) (supporting Harlan’s *Poe* dissent, but criticizing substantive due process as applied in *Roe v. Wade*, 410 U.S. 113 (1973)); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 231–35 (1990) (criticizing Justice Harlan’s approach as judicial Darwinism).

<sup>9</sup> Bruce Ledewitz, *Justice Harlan’s Law and Democracy*, 20 J.L. & POL. 373, 460 (2004) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

<sup>10</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2–4 (1971) (arguing that courts violate “Madisonian” democracy and thereby usurp power when unconstrained by neutral principles derived from Constitution itself, employing instead values of particular judges); see also Edwin Meese III, *A Return to Constitutional Interpretation from Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 929–33 (1996) (arguing that role of Supreme Court is to support original understanding of Constitution, not to legislate from bench); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56, 864 (1989) (arguing that originalism avoids evils of judicial preference and ability of judiciary to impose illegitimately “current societal values” onto constitutional text).

<sup>11</sup> See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale Univ. Press 1986) (1962) (arguing that Supreme Court is least dangerous branch of government whose power of judicial review secures our rights, liberties, and values).

clever conspiratorial companion, legislative history).<sup>12</sup> Of course, it isn't—as Judge Posner has written and demonstrated, originalism is a “clever disguise.”<sup>13</sup> Originalism's disciples sometimes claim that it also corrects the so-called “counter-majoritarian difficulty.”<sup>14</sup> (“Why do unelected judges get to decide what the majority will do?” “They don't! Long-deceased white males who thought they were establishing a republican form of government do.”)

Today I want to remind you about *Poe* and Justice Harlan's famous phrase. I want to talk about what I think he meant, and see if we can plumb his meaning a bit. I think there are some considerable restraints in his plan (e.g., reasoned judgment, faithfulness to precedent, attention to tradition, legal professionalism, and judicial restraint),<sup>15</sup> that it better explicates a republican form of government than does originalism, and that it adequately handles the counter-majoritarian difficulty. My plan is first to give just a bit of biography about Justice Harlan, which will help explain why he is so influential in interpretive debates. Next, I will discuss *Poe* as an example of Harlan's method. Finally, I will talk about Harlan's famed “living traditions” and his interpretive restraint. Whether these living traditions will give Hamlet's father's ghost some repose or not, I cannot tell.

## II

### JUSTICE JOHN MARSHALL HARLAN II<sup>16</sup>

Justice John Marshall Harlan II was born in Chicago in 1899 and died in Washington, D.C. in 1971.<sup>17</sup> He was an Associate Justice from

---

<sup>12</sup> See, e.g., BORK, *supra* note 8, at 9 (arguing that courts abandoning original intent introduce into Constitution elitist principles that otherwise could not be achieved democratically); cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 35–38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

<sup>13</sup> Robert Henry, *The Players and the Play*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 13, 39–40 (Bernard Schwartz ed., 1998) (citing RICHARD A. POSNER, OVERCOMING LAW 237–55 (1995)).

<sup>14</sup> BICKEL, *supra* note 11, at 16–18 (describing “counter-majoritarian difficulty”); see, e.g., BORK, *supra* note 8, at 143–60 (arguing that originalism avoids counter-majoritarian problem).

<sup>15</sup> These “restraints,” along with judicial review itself, may be among our living traditions.

<sup>16</sup> This Part of the Lecture was largely adapted from my previous essay, Robert Henry, *The Players and the Play*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 13, 17–18 (Bernard Schwartz ed., 1998), by permission of Oxford University Press.

<sup>17</sup> TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 9, 333–35 (1992).

1955 to 1971.<sup>18</sup> The fact that he was the second indicates that there was a first, and certainly, there was. That was his grandfather, the first Justice Harlan.<sup>19</sup> His grandfather also advocated a moderate version of substantive due process.<sup>20</sup> The first Justice Harlan is most famous for his dissents,<sup>21</sup> particularly in *Plessy v. Ferguson*<sup>22</sup> and *Lochner v. New York*,<sup>23</sup> which acknowledged deferential review to state purposes but not complete abdication by the courts of their task. The father of Justice Harlan II, John Maynard Harlan, was a lawyer and a Chicago alderman, who raised him as a “patrician.”<sup>24</sup> Justice Harlan attended Princeton University, where he was chairman of the student newspaper and was selected as a Rhodes Scholar.<sup>25</sup> He was also selected for Balliol College, one of Oxford’s most demanding and intellectual colleges,<sup>26</sup> whose men possessed the “tranquil consciousness of effortless superiority.”<sup>27</sup> There was a poem about its master, Benjamin Jowett, the great Plato scholar:

First come I. My name is J[o]w[e]tt.  
 There’s no knowledge but I know it  
 I am Master of this College.  
 What I don’t know isn’t knowledge.<sup>28</sup>

After completing his British education in law and jurisprudence, Harlan enrolled in New York Law School, completing a two-year program in one year.<sup>29</sup> A prominent New York City law firm retained him, and he eventually became the leader of the firm’s litigation

<sup>18</sup> *Id.* at viii.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> See TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 163–64 (1995) (describing first Justice Harlan as writing and joining substantive due process opinions).

<sup>21</sup> LOREN P. BETH, *JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE* 156 (1992) (describing Justice Harlan’s dissents as his “most memorable opinions” and noting that “when history has judged him to be right he was usually dissenting”).

<sup>22</sup> 163 U.S. 537, 552 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also BETH, *supra* note 21, at 156 (describing Justice Harlan’s dissent in *Plessy* as one of his most memorable opinions).

<sup>23</sup> 198 U.S. 45, 65–74 (1905) (Harlan, J., dissenting), *abrogated by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

<sup>24</sup> YARBROUGH, *supra* note 17, at 5, 138.

<sup>25</sup> *Id.* at 11, 13.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> PETER BARBERIS, *LIBERAL LION: JO GRIMOND: A POLITICAL LIFE* 19 (2004) (quoting H.H. Asquith’s famous saying about Balliol men) (internal quotation marks omitted).

<sup>28</sup> This poem—attributed to H.C. Beeching—was originally printed in 1881 as part of a collection of verses written by undergraduates at Balliol College and appeared under the title, “A Masque of B[a]ll[i]o[l].” ANTHONY POWELL, *UNDER REVIEW: FURTHER WRITINGS ON WRITERS, 1946–1990*, at 236 (1991).

<sup>29</sup> YARBROUGH, *supra* note 17, at 13, 15.

team.<sup>30</sup> He briefly served on the Court of Appeals for the Second Circuit, having been appointed by President Eisenhower, who later appointed him to succeed Justice Robert H. Jackson on the Supreme Court in 1954.<sup>31</sup>

Harlan has been called the “paradigm of the true conservative judge.”<sup>32</sup> Anthony Lewis observed:

Conservative judges . . . should respect a precedent once established, even though they opposed that result during the process of decision. For such a true conservative as Justice John Marshall Harlan, that consideration was certainly a factor; he might warn in dissent against what he foresaw as the baleful effects of a decision, but he would hesitate thereafter to subject it to constant relitigation. He valued stability over perfection.<sup>33</sup>

In fact, stability might have described Justice Harlan himself. As Judge Henry Friendly noted, “[T]here has never been a Justice of the Supreme Court who has so consistently maintained a high quality of performance or, despite differences in views, has enjoyed such nearly uniform respect from his colleagues, the inferior bench, the bar, and the academy.”<sup>34</sup>

Justice Harlan’s paradigmatic conservatism was clearly demonstrated by the two judicial values he most often advocated: federalism and proceduralism. He valued the “experimental social laboratories” represented by the state governments.<sup>35</sup> His belief in federalism as a “bulwark of freedom” was so strong that he saw federalism as equivalent to the Bill of Rights and the Fourteenth Amendment as a guarantee of personal liberty.<sup>36</sup>

With respect to proceduralism, Justice Harlan took a narrow view of both due process and judicial power. He dissented in *Reynolds v. Sims*, the Warren Court’s landmark reapportionment decision, writing that he rejected the view that “every major social ill in this country can find its cure in some constitutional ‘principle,’ and that this Court

<sup>30</sup> *Id.* at 13, 15, 41–42.

<sup>31</sup> *Id.* at 82, 87.

<sup>32</sup> BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 375 (1993).

<sup>33</sup> Anthony Lewis, *Foreword to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T*, at viii (Vincent Blasi ed., 1983).

<sup>34</sup> Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 384 (1971).

<sup>35</sup> Norman Dorsen, *John Marshall Harlan, Civil Liberties, and the Warren Court*, 36 N.Y.L. SCH. L. REV. 81, 84 (1991) (quoting *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J., dissenting)).

<sup>36</sup> *Id.* at 83–84 (quoting John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 943 (1963)). Federalism may be both a bulwark and a barrier. Perhaps certain limitations that Harlan liked, especially federalism, made possible his careful use of substantive due process.

should ‘take the lead’ in promoting reform when other branches of government fail to act.”<sup>37</sup> Elaborating, he wrote: “The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.”<sup>38</sup>

Justice Black, who both tangled and tangoed with Justice Harlan, once observed that Justice Harlan proves that there “is such a thing as a good Republican.”<sup>39</sup> Coming from the populist prophet, it was high praise. Harlan was truly a lawyer’s lawyer and a “judge’s judge.”<sup>40</sup>

Today, Justice Harlan is remembered for his marvelously crafted opinions, his consistent and principled judicial conservatism, and his patrician traditionalism that was, at the same time, remarkably sensitive to other views.<sup>41</sup> Upon learning that he had terminal cancer, he delayed the announcement of his own resignation to avoid interfering with the accolades accompanying the retirement of his seriously ill confrere, Justice Black<sup>42</sup> (who proved there can be such a thing as a good Democrat).

Though Justice Harlan represents the best of the judicial “conservative” tradition, he did concur in some of the “liberal” activism of the Warren Court.<sup>43</sup> And he dissented from illiberalisms as well. It was in his dissent in *Poe v. Ullman* where he noted that Fourteenth Amendment due process is informed by history and tradition and that “tradition is a living thing.”<sup>44</sup> Harlan’s language describing his method of construing his holy writ is perhaps the most eloquent defense of nonliteralism ever written by a conservative:

[T]he basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text [of the Constitution] which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.<sup>45</sup>

---

<sup>37</sup> 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

<sup>38</sup> *Id.* at 624–25. For an elaboration on Harlan’s view that courts should avoid political entanglements, see Dorsen, *supra* note 35, at 85.

<sup>39</sup> ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 588 (2d ed. 1997) (internal quotation marks omitted).

<sup>40</sup> YARBROUGH, *supra* note 17, at 337.

<sup>41</sup> See *id.* at 337–44 (providing overview of Justice Harlan’s multiple influences and multidimensional jurisprudence).

<sup>42</sup> *Id.* at 333.

<sup>43</sup> See Dorsen, *supra* note 35, at 93–97 (cataloguing cases where Justice Harlan concurred with or wrote liberal Warren Court opinions).

<sup>44</sup> 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

<sup>45</sup> *Id.* at 540.



He could be read in *Poe* to suggest a constitutional right of privacy<sup>46</sup> several years before the majority reached the same conclusion.<sup>47</sup>

Perhaps his former clerk, Norman Dorsen, presented the best summary of his character:

It fell to John Marshall Harlan, by nature a patrician traditionalist, to serve on a Supreme Court which, for most of his years, was rapidly revising and liberalizing constitutional law. In these circumstances, it is not surprising that Harlan would protest the direction of the Court and the speed with which it was traveling. He did this in a remarkably forceful and principled manner, thereby providing balance to the institution and the law it generated. Despite his role, Harlan joined civil liberties rulings on the Court during his tenure to the degree that his overall jurisprudence can fairly be characterized as [moderate,] conservative primarily in the sense that it evinced caution, a fear of centralized authority, and a respect for process.<sup>48</sup>

In noting the departures of Justices Harlan and Black, one cannot help but wonder what effects their continued presence on the Court would have had. The once great “liberal,” Black, and the “paradigmatic conservative,” Harlan, might even have changed ideological positions on the most controversial case of modern times, *Roe v. Wade*.<sup>49</sup> Black, dissenting in *Griswold v. Connecticut*, could not see a constitutional right to privacy in a penumbra of substantive due process or anywhere else.<sup>50</sup> Harlan, joining *Griswold*<sup>51</sup> and echoing his instructive concurrence in *United States v. Katz*,<sup>52</sup> might very well have gone the other way, adopting the *Roe* balance.<sup>53</sup> Interestingly,

---

<sup>46</sup> See *id.* at 550 (“I think the sweep of the Court’s decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.”).

<sup>47</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that zone of privacy exists, within penumbras of constitutional guarantees, that precludes states from prohibiting married couples from using contraceptives).

<sup>48</sup> Dorsen, *supra* note 35, at 107.

<sup>49</sup> 410 U.S. 113 (1973).

<sup>50</sup> 381 U.S. at 507–11 (Black, J., dissenting).

<sup>51</sup> *Id.* at 499 (Harlan, J., concurring).

<sup>52</sup> 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (arguing in favor of reasonable expectation of privacy test to limit government’s ability to intrude upon individual’s privacy right without warrant); see also *Griswold*, 381 U.S. at 500–01 (Harlan, J., concurring) (arguing that critical inquiry in case challenging state statute that prohibited use of contraceptives by married couples lies in Due Process Clause and “basic values that underlie our society”).

<sup>53</sup> But Harlan apparently believed laws forbidding adultery and homosexuality were constitutionally allowable. See *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting) (“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 . . .”). And, he cautioned that “in abstraction,” laws regulating sexual morality would “require us to hesitate long before con-

the Justices who replaced Black and Harlan voted contrary to their predecessors' probable votes: In *Roe*, Lewis Powell voted with the majority<sup>54</sup> and William Rehnquist dissented.<sup>55</sup>

### III

#### *POE V. ULLMAN*

In *Poe*, a married couple, a married woman, and a physician challenged a Connecticut statute enacted in 1879 that forbade the use of contraceptives or even medical assistance in the use of contraceptives, even within a marriage.<sup>56</sup> The plaintiffs argued that for the situation each woman confronted, the best medical treatment would be advice in preventing conception.<sup>57</sup> But since the prosecutors claimed that giving such advice constituted an offense under Connecticut law, the physician, the married woman, and the couple sought a declaratory judgment that Connecticut law deprived them of life and liberty without due process of law.<sup>58</sup> The Connecticut Supreme Court had sustained demurrers in the case, in effect upholding the statute, while noting that the law had been used to prosecute only three persons since its enactment.<sup>59</sup>

At the Justices' conference on *Poe*, Justice Harlan let it be known where he stood on this debate. In a highly emotional statement, unusual for the refined patrician, he declared that the Court had "no business dismissing these cases"<sup>60</sup> and argued: "I think the statute is egregiously unconstitutional on its face. . . . The Due Process Clause has substantive content for me. The right to be let alone is embodied in due process. Despite the broad powers to legislate in the area of health, there are limits."<sup>61</sup> Referencing Justice Brandeis's famous phrase, he concluded his statement by asserting, "This is more

---

cluding that the Constitution precluded Connecticut from choosing as it has among these various views." *Id.* at 547. His *Poe* discussion would have required resolving the above consideration along with perhaps one more, whether abortion laws result in "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection." *Id.* at 553.

<sup>54</sup> 410 U.S. at 113.

<sup>55</sup> *Id.* at 171 (Rehnquist, J., dissenting).

<sup>56</sup> 367 U.S. at 498-501; see also Ledewitz, *supra* note 9, at 376 (explaining facts of *Poe*).

<sup>57</sup> 367 U.S. at 499-500.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 500-02; see also YARBROUGH, *supra* note 17, at 310 (explaining facts and procedural history of *Poe*).

<sup>60</sup> YARBROUGH, *supra* note 17, at 311 (internal quotation marks omitted).

<sup>61</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 379 (1983) (internal quotation marks omitted).

offensive to the right to be let alone than anything possibly could be.”<sup>62</sup> Justice Harlan expressed his “fear that the Court ha[d] indulged in a bit of sleight of hand to be rid of [the] case.”<sup>63</sup>

Justice Frankfurter wrote the plurality opinion for the Court (joined by Chief Justice Warren, and Justices Clark and Whittaker), dismissing the case.<sup>64</sup> Frankfurter argued that the case was not justiciable because the appellants “do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices.”<sup>65</sup> Justice Brennan concurred in the judgment of dismissal, noting that the threat of prosecution against the individuals was not “definite and concrete.”<sup>66</sup>

Justices Black, Douglas, Harlan, and Stewart all dissented, agreeing, for differing or unstated reasons, that the issues should be decided—that the case was justiciable.<sup>67</sup> But the most important dissent was the somewhat uncharacteristic one of Justice Harlan. Apologizing both for the unusual length of his dissent (he might have apologized for the unusual length of some of his sentences, too), as well as the necessity to discuss constitutional issues not mentioned in the plurality opinion, his passion continued for thirty-three pages.<sup>68</sup>

Here is how Professor Schwartz described it:

In his *Poe* dissent, Justice Harlan indicated why the right to be let alone was guaranteed even though it was not mentioned in the constitutional text. First of all, said Harlan, the Court must approach “the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government.” For Harlan, “[I]t is not the particular enumeration of rights . . . which spells out the reach of” constitutional protection. On the contrary, the “character of Constitutional provisions . . . must be discerned from a particular provision’s larger

<sup>62</sup> *Id.* (internal quotation marks omitted).

<sup>63</sup> 367 U.S. at 533 (Harlan, J., dissenting).

<sup>64</sup> *Id.* at 498 (plurality opinion).

<sup>65</sup> *Id.* at 501.

<sup>66</sup> *Id.* at 509 (Brennan, J., concurring).

<sup>67</sup> *See id.* (Black, J., dissenting) (dissenting on ground that Court ought to reach and decide merits of case); *id.* at 509–10 (Douglas, J., dissenting) (arguing that case is justiciable); *id.* at 522–23 (Harlan, J., dissenting) (“In my view the course which the Court has taken does violence to established concepts of ‘justiciability,’ and unjustifiably leaves these appellants under the threat of unconstitutional prosecution.”); *id.* at 555 (Stewart, J., dissenting) (agreeing with dissents of Douglas and Harlan).

<sup>68</sup> *Id.* at 522–55 (Harlan, J., dissenting).

context. And . . . this context is one not of words, but of history and purposes.”<sup>69</sup>

Nothing radical so far; the Constitution’s not a tax statute.

Harlan continued:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes . . . that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.<sup>70</sup>

Justice Harlan saw due process as “a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions.”<sup>71</sup>

Justice Harlan articulated the idea that living traditions supply the content to the all-important constitutional concept of due process of law. Noting that due process represented a balance between individual liberty and the demands of organized society, he wrote:

The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.<sup>72</sup>

#### IV

#### BALANCE, HISTORY AND TRADITION, LIVING THINGS, AND JUDGMENT AND RESTRAINT

Let’s examine Justice Harlan’s passage carefully. It seems that four matters need to be discussed. First, the Due Process Clause represents a balance—a rational continuum. It regards history, both traditions we follow and those from which we have broken. Second, that tradition is living—evolving. And, third, in trying to determine the

---

<sup>69</sup> SCHWARTZ, *supra* note 4, at 67 (quoting *Poe*, 367 U.S. at 541–43 (Harlan, J., dissenting)).

<sup>70</sup> 367 U.S. at 543 (Harlan, J., dissenting).

<sup>71</sup> *Id.* at 542.

<sup>72</sup> *Id.*

scope of the continuum, we should utilize judgment (hopefully a judicial quality) and restraint. But, fourth, decisions contrary to that living tradition will not survive long. What does all of this tell us about the good Justice?

### A. *Not an Originalist*

Well, first, and fortunately for today's presentation, the mentioning of traditions and utilizing them in the balancing required to create a rational continuum of due process tells us that Justice Harlan is not an originalist. This fact has been important for several reasons. First of all, Justice Harlan's reputation, as indicated at the outset of this lecture, is sterling. His tenure was marked by great and widespread respect for his persona and his opinions. His work is influential and remains prominent in many areas of law. When a great Justice takes sides in a debate, it does lend credibility to the cause. And when a "conservative" Justice takes a "liberal" position, it allows for what some call "[c]ross-[q]uotesmanship."<sup>73</sup>

Professor Schwartz strongly supported both the idea of nontextual rights and a Constitution that, in his words, "states, not rules for the passing hour, but principles for an ever-expanding future."<sup>74</sup> Although Justice Harlan perhaps would not go that far, it was significant to Professor Schwartz that Harlan—"the very model of the true conservative judge"—was not one who looked at narrow literal meanings but examined rationality, history, purposes, and tradition.<sup>75</sup>

Whereas Professor Schwartz was likely to see the Ninth Amendment's unenumerated rights, rather than the idea of due process, as support for his flexible Constitution, he welcomed Justice Harlan's membership in the non-originalist camp. He said:

That Justice Harlan relied upon due process rather than the Ninth Amendment did not detract from his full acceptance of the concept of nonenumerated rights. As Harlan saw it, due process "is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." Except for its terminology, the Harlan approach is essentially similar to the approach that relies on the Ninth Amendment. If the right is a basic right "which [is] *fundamental*; which belong[s] . . . to the citizens of all free governments," it is one

---

<sup>73</sup> JAMES C. HUMES, *SPEAK LIKE CHURCHILL, STAND LIKE LINCOLN: 21 POWERFUL SECRETS OF HISTORY'S GREATEST SPEAKERS* 47 (2002).

<sup>74</sup> SCHWARTZ, *supra* note 4, at 10.

<sup>75</sup> *Id.* at 67.

retained by the people under the Ninth Amendment or, in Harlan's view, included in the "liberty" protected by due process.<sup>76</sup>

Now, the idea that the literal text of the Constitution needs some content supplied to it, and further that this content might come from history and tradition, has been articulated by a good number of other famous judges, "conservative" and "liberal" alike. Chief Justice Marshall famously wrote the first principles of constitutional interpretation, noting:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . [W]e must never forget, that it is *a constitution* we are expounding.<sup>77</sup>

Justice Holmes wrote that the Constitution must be flexible in the joints,<sup>78</sup> and Justice Felix Frankfurter wrote, "[j]udicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future."<sup>79</sup>

Additionally, Justice Frankfurter wrote, quoting Justice Cardozo: These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal

<sup>76</sup> *Id.* at 68 (quoting *Poe*, 367 U.S. at 541 (Harlan, J., dissenting)).

<sup>77</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

<sup>78</sup> Dissenting in *Lochner v. New York*, 198 U.S. 45 (1905), Justice Holmes wrote: I think that 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 the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

*Id.* at 76 (Holmes, J., dissenting). Holmes is clearly protean on constitutional jurisprudence. He would tell Harold Laski in a letter "that a law was constitutional unless it made him want to 'puke.'" POSNER, *supra* note 13, at 192 (quoting 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, at 888 (Mark DeWolfe Howe ed. 1953)). Yet Judge Posner exposes him for the pragmatist that he was:

Holmes's influential conception of free speech as an open marketplace of ideas owes more to Mill and Darwin than to the values that all reasonable Americans could or can be brought to agree on. The great judges have enriched political thought and practice precisely by bringing controversial values, whether of an egalitarian, populist, or libertarian cast, into the formation of public policy. Marshall, Holmes, Brandeis, and Black, to name only a few of the most important American judges, are major figures in the history of American political liberalism because they used their judicial office to stamp the law with a personal vision.

*Id.* at 197.

<sup>79</sup> *Graves v. New York*, 306 U.S. 466, 491 (1939) (Frankfurter, J., concurring).

immunities which, as Mr. Justice Cardozo twice wrote for the Court, are “so rooted in the traditions and conscience of our people as to be ranked as fundamental,” . . . or are “implicit in the concept of ordered liberty.”<sup>80</sup>

Also, Justice Frankfurter wrote that provisions “like ‘due process of law’ or ‘the equal protection of the laws[ ]’ . . . do not carry contemporaneous fixity. By their very nature they imply a process of unfolding content.”<sup>81</sup>

### B. *Living Traditions?*

Besides consulting tradition and history, Justice Harlan termed the tradition side of the equation “living.” What does that mean? Justice Rehnquist said: “At first blush it seems certain that a *living* Constitution is better than what must be its counterpart, a *dead* Constitution. It would seem that only a necrophile could disagree.”<sup>82</sup> Well, courageously opposing necrophilia, as I often have, I have to join Harlan in supporting living traditions that animate our consequently living Constitution. That is, I think by “living,” Justice Harlan means evolving. Judge Bork, who is considerably more into constitutional necrophilia, agrees with my analysis, terming Justice Harlan’s view “a jurisprudential version of Darwinism.”<sup>83</sup> Bork’s point is a bit more complicated, but we will come back to it in a moment.<sup>84</sup>

Until recently, I don’t think Harlan’s view was that controversial. As one scholar wrote, “Nowadays, liberal and conservative fundamental rights theorists alike, from Laurence Tribe to Charles Fried, celebrate [the idea of living traditions] . . . .”<sup>85</sup> Indeed, Charles Fried, who clerked for Justice Harlan,<sup>86</sup> wrote a book about his tenure in a Republican administration Department of Justice, where he said that he signed on to battling *Roe v. Wade*, but not to an originalist agenda.<sup>87</sup> Fried, in fact, wrote the memos behind *Poe* and may have

<sup>80</sup> *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) respectively).

<sup>81</sup> *FHA v. Darlington, Inc.*, 358 U.S. 84, 92 (1958) (Frankfurter, J., dissenting).

<sup>82</sup> William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976); see also SCHWARTZ, *supra* note 4, at 264 (mentioning Justice Rehnquist’s statements regarding “living Constitution”).

<sup>83</sup> BORK, *supra* note 8, at 232.

<sup>84</sup> See *infra* notes 120–32 and accompanying text.

<sup>85</sup> James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 60 (1995).

<sup>86</sup> YARBROUGH, *supra* note 17, at 310.

<sup>87</sup> FRIED, *supra* note 8, at 72.

helped Justice Harlan crystallize his formulation.<sup>88</sup> Justice Harlan's formulation continues to be cited and to influence jurists.<sup>89</sup>

Again, Professor Schwartz wrote,

Most of us today have no doubt about the proper answer. A basic document, drawn up in an age of knee-breeches and three-cornered hats, can serve the needs of an entirely different day only because our judges have recognized the truth of Marshall's celebrated reminder that it is a *constitution* they are expounding—an instrument that could hardly have been intended to endure through the ages if its provisions were fixed as irrevocably as the laws of the Medes and Persians. The constantly evolving nature of constitutional doctrine has alone enabled our system to make the transition from the eighteenth to the twentieth century.

The outstanding feature of the Constitution is thus its plastic nature. Its key provisions are malleable and must be construed to meet the changing needs of different periods.<sup>90</sup>

What are some of these living traditions? Harlan's remarkable dissent requires considerable quoting here. We can start with the tradition of substantive due process. As Harlan notes,

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's "*per legem terrae*" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."<sup>91</sup>

So, our tradition includes Magna Carta, but not just as written, for that phrase, "*per legem terrae*"—the "law of the land"—had considerable substantive flesh on its bones by the time our country was founded.<sup>92</sup> Harlan argued that rights older than the Fourteenth Amendment were fundamental and belong to the citizens of all free

---

<sup>88</sup> See YARBROUGH, *supra* note 17, at 310–11 (describing memorandum written by Fried and Justice Harlan's agreement with it).

<sup>89</sup> See Ledewitz, *supra* note 9, at 375 ("Given his position as 'The Great Dissenter' on the Warren Court, Justice Harlan has emerged . . . as surprisingly influential . . ." (quoting YARBROUGH, *supra* note 17)).

<sup>90</sup> SCHWARTZ, *supra* note 4, at 264–65.

<sup>91</sup> *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 523, 532 (1884)).

<sup>92</sup> See Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 192 (explaining that organic documents of United States incorporate understanding that our rights are "preconstitutional and prepolitical").



governments, and it is for the purpose of securing these rights that men enter into society.<sup>93</sup> (Sounds like Jefferson, doesn't it?) He pointed out that the Court had "[a]gain and again . . . resisted the notion that the Fourteenth Amendment is no more than a shorthand reference" to the first eight amendments in the Bill of Rights.<sup>94</sup>

He argued that the character of constitutional provisions "must be discerned from a particular provision's larger context," and that that context was "one not of words, but of history and purposes," and thus "cannot be found in or limited by the precise terms of the specific guarantees . . . ."<sup>95</sup> The rational continuum he saw, "broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."<sup>96</sup> (I suspect he meant improperly purposed restraints.)

Additionally, he cited cases involving the education of children where the court had used "the right of the individual to . . . establish a home and bring up children,"<sup>97</sup> and the principle that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."<sup>98</sup> (He noted, however, that Fourteenth Amendment incorporation of the First Amendment would probably have guided these decisions at the time he was writing.)<sup>99</sup> Harlan was again the purposivist: "For it is the purposes of those guarantees and not their text, the reasons for their statement by the framers and not the statement itself . . . which have led to their present status in the compendious notion of 'liberty' embraced in the Fourteenth Amendment."<sup>100</sup>

### *C. Decisions Based on Our History and Tradition Must Be Restrained*

This somewhat bracing language does not sound very restrained. So, he reins it in a bit:

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise

<sup>93</sup> *Poe*, 367 U.S. at 541 (Harlan, J., dissenting).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 542–43.

<sup>96</sup> *Id.* at 543.

<sup>97</sup> *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (internal quotation marks omitted)).

<sup>98</sup> *Id.* at 543–44 (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (internal quotation marks omitted)).

<sup>99</sup> *Id.* at 544.

<sup>100</sup> *Id.*

limited and sharply restrained judgment, yet there is no “mechanical yard-stick,” no “mechanical answer.” The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take “its place in relation to what went before and further [cut] a channel for what is to come.”<sup>101</sup>

He continues:

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.<sup>102</sup>

Having stated the premises upon which his quest was based, Harlan turned to the particular constitutional claim in the case and pointed out the lines of battle. On the one hand, the appellants argued that the State, “without any rational, justifying purpose” deprived them of “a substantial measure of liberty in carrying on the most intimate of all personal relationships . . . .”<sup>103</sup> As Harlan wrote,

The State, on the other hand, assert[ed] that it [was] acting to protect the moral welfare of its citizenry, both directly, in that it consider[ed] the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize “the disastrous consequence of dissolute action,” that is fornication and adultery.<sup>104</sup>

Harlan argued that “throughout the English-speaking world,” there was a tradition, and evidently one very much alive, of privacy in the home, and very specifically a tradition guarded in the Third and Fourth Amendments.<sup>105</sup> But he goes beyond that to invoke Brandeis’s famous phrase from his *Olmstead* dissent about the right to be let alone:

The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain,

---

<sup>101</sup> *Id.* (quoting *Irvine v. California*, 347 U.S. 128, 147 (1954)).

<sup>102</sup> *Id.* at 544–45 (quoting *Rochin v. California*, 342 U.S. 165, 170–71 (1952) (internal quotation marks omitted)).

<sup>103</sup> *Id.* at 545.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 548–49.

pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>106</sup>

Quoting *Weems v. United States*,<sup>107</sup> Harlan argues, “A principle to be vital must be capable of wider application than the mischief which gave it birth.”<sup>108</sup> After continuing to discuss privacy and family, and the private realm of family life, he invokes divine literary reference (he’s really getting wound up after previously referencing the secular state). He perorates, “We would indeed be straining at a gnat and swallowing a camel<sup>109</sup> were we to show concern for the niceties of property law involved in our recent decision, under the Fourth Amendment, in *Chapman v. United States*<sup>110</sup> . . . and yet fail at least to see any substantial claim here.”<sup>111</sup>

One last bit of restraint remains to be played, and I hesitate to mention it because some of you are almost ready to vault over the rostrum at me now. But here goes:

[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut’s moral policy, has seen fit to effectuate that policy by the means presented here.<sup>112</sup>

---

<sup>106</sup> *Id.* at 550 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (internal quotation marks omitted).

<sup>107</sup> 217 U.S. 349, 373 (1910). The Court in *Weems* found that a Philippine law inflicted cruel and unusual punishment. *Id.* at 363–65. The law prohibited falsification of a public document by a public official, making it punishable by fine, twelve to twenty years of hard labor, and subsequent deprivation of political rights. *Id.* The Court held, “we cannot think that [the Cruel and Unusual Punishment Clause] was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history.” *Id.* at 373.

<sup>108</sup> *Poe*, 367 U.S. at 551 (Harlan, J., dissenting) (quoting *Weems*, 217 U.S. at 373) (internal quotation marks omitted).

<sup>109</sup> Straining at a gnat and swallowing a camel is the literary reference. *Matthew* 23:24. I mention this only because I just saw a recent survey that said that eighty percent of young people believe that Sodom married Gomorrah.

<sup>110</sup> 365 U.S. 610 (1961) (holding warrantless search of house based upon suspicion that contraband was inside violated Fourth Amendment, and that landlord could not consent to search of tenant’s home).

<sup>111</sup> *Poe*, 367 U.S. at 552 (Harlan, J., dissenting).

<sup>112</sup> *Id.* at 554–55.

Yup. There it is. Foreign law.

Having gone this far, Justice Harlan concludes:

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Mr. Justice Jackson that "There are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality" of the individual. . . . In this instance these limits are, in my view, reached and passed.<sup>113</sup>

*D. Decisions That Depart from Living Traditions Will Not Long Survive*

Time does not allow detailed discussion of one final—and perhaps even the most interesting—point. And that is Harlan's final first aid in the hand of restraint: for he argues that a court decision that departs from living traditions will not long survive. But for now let me just give it voice. Professor Bruce Ledewitz wrote:

Justice Harlan's view was that a decision that "radically departs from" tradition "could not long survive." But how, exactly, was that to happen? What agency could account for such a consequence? What phenomenon was Justice Harlan expecting to come into play? Why could a decision departing from our nation's "balance" of tradition not survive?

The *Poe* language is suggestive but not clear. . . . I believe that Justice Harlan was referring to the power of public opinion—in a broad and organic sense—in a democratic society. The *Poe* dissent does not dismiss the views of the people after a judicial decision is reached. The "tradition" is not a passive and static resource for a judge to rummage through in order to reach a decision, but an ongoing force in public affairs capable of controlling constitutional interpretation in the long run.<sup>114</sup>

According to Ledewitz, Harlan is pointing out that although tradition may be a source of judicial decision making, "living tradition continues to determine constitutional law after judicial decisions are made."<sup>115</sup> This is sort of Mr. Dooley's famous point, that he did not

---

<sup>113</sup> *Id.* at 555 (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (agreeing with majority that forced sterilization statute for habitual criminals is unconstitutional)).

<sup>114</sup> Ledewitz, *supra* note 9, at 387 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

<sup>115</sup> *Id.* at 411.

know whether the Constitution followed the flag or not, but he did know that the Supreme Court follows the election returns.<sup>116</sup>

But, it is more than that. Ledewitz cites my favorite framer, Benjamin Franklin, and his reported comment upon being accosted when emerging from the final Constitutional Convention. A woman allegedly asked him what form of government he had created, a republic or a monarchy.<sup>117</sup> Franklin's wise reply was, "A republic . . . if you can keep it."<sup>118</sup> In concluding his fascinating article, Professor Ledewitz states:

American law is plagued by doubts about the proper relationship of law to democracy. To paraphrase Robert Dahl, we lawyers both cannot deny and cannot accept that law is essentially political. Justice John Harlan was aware of this tension and considered it a central problem of American law that judges decide fundamental issues of governance without elections and without close democratic oversight. Justice Harlan resolved this problem for himself first by reference to certain lawyerly virtues: reasoned judgment, faithfulness to precedent, attention to tradition, and judicial restraint. Yet, he knew that these qualities were not guarantees of the proper use of judicial power in a democratic society.

This is the framework of Justice Harlan's celebrated dissent in *Poe v. Ullman*. . . . In the living tradition quotation, Justice Harlan wrestles with the power of the judge and the authority of democratic consensus. In a short few sentences, Justice Harlan reorients our view of American law. In just a few words, Justice Harlan places democratic consensus at the center of legal activity.

American law has not yet plumbed Justice Harlan's meaning in proclaiming that our "tradition is a living thing." His meaning goes beyond our current, tired debates about the proper sources of judicial constitutional decision. Justice Harlan is pointing to something outside law and judges. Something else—something vital, alive, and popular—controls. Given America's currently inflated view of law, this is a message we very much need to hear.<sup>119</sup>

## V

### ANSWERING HARLAN'S CRITICS

Harlan's approach, of course, has its critics, including Robert Bork. Judge Bork takes aim at Justice Harlan, but because of the

---

<sup>116</sup> Finley P. Dunne, *Mr. Dooley Reviews the Supreme Court's Decision*, SUNDAY CHAT, June 9, 1901, at 6.

<sup>117</sup> Ledewitz, *supra* note 9, at 412.

<sup>118</sup> *Id.* (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, at 85 (Max Farrand ed., Yale Univ. Press rev. ed. 1937)).

<sup>119</sup> *Id.* at 460–61 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

latter's credibility, he aims a little more moderately than usual. Stating that "many people find [Justice Harlan's method] attractive," as it both avoids the "obvious intellectual disingenuousness of some methods and, on the other [hand], the necessity of allowing a bad law to stand," Judge Bork remains unconvinced that rights that are not explicit in the Constitution should receive constitutional protection.<sup>120</sup>

Bork writes that Harlan "employed the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment since it was abundantly clear that nothing else in the Constitution could conceivably apply to the statute, and the [D]ue [P]rocess [C]lause has become the usual resort when no actual provision is available."<sup>121</sup> Noting that Harlan agreed with precedent that the Due Process Clause did not just protect procedural rights and that due process's substantive content did not come from incorporating just the Bill of Rights, Bork argues that Harlan arrogates too much power to judges:

He assumed that judges possess a legitimate method of deciding when the substance of a state law, even when applied fairly, *improperly* deprives people of life, liberty, and property. Such a method is also required to justify an undefined residue of judicial power outside the provisions of the Bill of Rights.<sup>122</sup>

Also, Bork dismisses Harlan's idea that there has been, or should be, judicial involvement in the balance our nation strikes between liberty and the demands of organized society.<sup>123</sup> (Might as well, as Bernard Schwartz would suggest, bring back "cropping of ears, selling into servitude, branding, and whipping as punishments for crime."<sup>124</sup>) And, as to the idea that a decision departing from living traditions could not long survive, Bork interjects: "This is pure early Alexander Bickel. The primary safeguard against judicial willfulness seems to be a theory of the survival of the fittest decisions, a jurisprudential version of Darwinism."<sup>125</sup>

Bork suggests that the state interests offered to justify the Connecticut law (essentially that contraception is immoral) would be difficult for the Court to overcome, as "much law is based on moral precepts."<sup>126</sup> Bork notes that Harlan predicted some of what Douglas would write in *Griswold*, about the importance of privacy in our Constitution, but he is still not persuaded that any other privacy is

---

<sup>120</sup> BORK, *supra* note 8, at 231, 234.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 231–32.

<sup>123</sup> *Id.* at 232.

<sup>124</sup> SCHWARTZ, *supra* note 4, at 15.

<sup>125</sup> BORK, *supra* note 8, at 232.

<sup>126</sup> *Id.* at 232–33.

guaranteed except that explicit in the Third and Fourth Amendments.<sup>127</sup> As to Harlan's statement that marital intimacy was part of an institution that must always be allowed and always be protected, Bork notes that the state had never really enforced the law.<sup>128</sup> He seems unconcerned that the state was arguing that it had a right to enforce it in the very case at bar. Bork cites Harlan's conclusion that no other state or nation had imposed such a law, but he does not raise the foreign law bugaboo.<sup>129</sup> And, Bork admits that it was a "lunatic law," but rests his prescription for judicial inaction on the conclusion that "the Constitution has nothing whatever to do with issues of sexual morality."<sup>130</sup>

Professor Ledewitz makes the obvious rejoinder:

By entitling his book *The Tempting of America*, Judge Bork seemed to be acknowledging that the problem was not just that the Justices were usurping inappropriate political power, but that the American people might well have decided that this is a good, or at least occasionally necessary, thing. Justice Harlan, on the other hand, might regard this "temptation" as a deeply democratic decision about the role of the Supreme Court in the American system of government.<sup>131</sup>

Or, Harlan might just say that Bork loses and tradition lives. But the best answer to Bork comes from a federal judge: Richard Posner describes the fallacies of Borkian originalism. Judge Posner not only shows the fallacies of originalism, he underscores Professor Ledewitz's point. He thought that Bork misread the lessons of his Senate defeat:

The decisive factor [in Bork's defeat] . . . was that a large number of Americans . . . do not want the Constitution to be construed as narrowly as Bork would construe it. They do not think that states should be allowed to forbid abortion . . . or to enforce racial restrictive covenants . . . . They do not think that the federal government should be free to engage in racial discrimination. . . . They do not think that states should be free to enact "savage" laws, or that a judge should practice "moral abstention" . . . . They do not believe that under Chief Justice Rehnquist as under his predecessors "the

---

<sup>127</sup> See *id.* at 234–35 (citing *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)) (arguing that judiciary usurps constitutional power when employing Harlan's approach).

<sup>128</sup> See *id.* at 233–34 (conceding that state never possessed interest in applying law to married couples, and never did enforce it, but still rejecting Justice Harlan's formulation of constitutional right to privacy).

<sup>129</sup> See *id.* at 233 (acknowledging without questioning Harlan's argument that "no other state or nation, though many shared Connecticut's moral policy, had imposed a criminal prohibition on the use of contraceptives").

<sup>130</sup> *Id.* at 234.

<sup>131</sup> Ledewitz, *supra* note 9, at 418.

political seduction of the law continues apace” . . . . The people are entitled to ask what the benefits to them of originalism would be, and they will find no answers in *The Tempting of America*.<sup>132</sup>

Justice Harlan’s jurisprudence, as exemplified in *Poe v. Ullman*, continues to illuminate issues of how to interpret constitutional texts—issues that will animate our discussions of the law for the rest of time. Yet, coming from our Anglo-American traditions of unwritten constitutions and evolving ones, the argument that tradition lives is a strong one. Magna Carta’s “law of the land” has grown with that land, as has due process in our land.<sup>133</sup> Personally, I would prefer to remain in the common law camp, the camp of Holmes and Harlan, than the camp of Bork or even John Hart Ely. Restraint exists. Tradition lives.

### CONCLUSION

A paragraph that I wrote, closing a chapter in *The Burger Court: Counter-Revolution or Confirmation* in 1998, still describes the problem, at least as I see it (and I don’t often agree with things I wrote over a decade ago):

The moderate highly principled approach of John Harlan II seems to have few advocates, though many admirers. As Anthony Lewis has said, “[We are] all activists now . . . [Activists] for what is a different question.” Perhaps the real battle of future courts will not be “dignity” versus “deference,” originalism versus instrumentalism, or liberalism versus conservatism. The real battle presaged by the Burger Court—perhaps the most activist Court of our history—will be to seek a principled resolution of cases before the Court, a resolution that carefully utilizes Judge Posner’s “flexibility in the joints.” It must be a resolution free from political control but wary of political restraints; it must properly preserve separation of powers and federalism, and respect constitutional and even common-law restraints, while addressing Justice Harlan’s living traditions and Roscoe Pound’s prophecy that the “law must be stable and yet it cannot stand still.”<sup>134</sup>

<sup>132</sup> POSNER, *supra* note 13, at 254 (quoting BORK, *supra* note 8, at 240, 259).

<sup>133</sup> *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (arguing that due process is not limited to procedure, but conforms to situations that deprive individuals of life, liberty, or property).

<sup>134</sup> Henry, *supra* note 13, at 44 (quoting Lewis, *supra* note 33, at ix, PETER IRONS, BRENNAN VS. REHNQUIST: THE BATTLE FOR THE CONSTITUTION, at xi (1994), and ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 (1923), respectively); *see also* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 35–36 (1987) (describing flexibility of constitutional language in relation to Establishment Clause).



In closing, I would say that in one important sense, Justice Harlan could be thought of as an originalist. He believed his approach both faithful to the principles of the nation and more likely to lead to just decisions. He was far more confident than Judge Bork that good judges can, as they have for centuries, exercise their authority in a principled, restrained way without requiring an ahistorical, formal rule to constrain them.

Justice Harlan was living our traditions.