JOHN MARSHALL HARLAN AND CONSTITUTIONAL ADJUDICATION: AN ANNIVERSARY REHEARING

H. JEFFERSON POWELL*

INTRODUCTION

Fifty years ago, Justices Hugo Black and John Marshall Harlan II retired within a week of one another, and by the end of 1971 both were dead. Their departure from the Supreme Court was momentous in several ways. In a real sense, it marked the end of the Warren Court. In the two terms since Chief Justice Earl Warren stepped down, the Court had largely maintained the decisional trajectory set under Warren. Once President Richard Nixon filled almost half its seats, the emergence of a distinctive Burger Court was inevitable. But the fact that it was Black and Harlan who were gone profoundly affected the nature of the new era.

The Supreme Court's constitutional decisions in the preceding decade had reflected a coherent constitutional vision. In particular, on

issues involving race, voting rights, criminal procedure, and the First Amendment, the Court almost invariably arrived at "liberal" outcomes reflecting the majority's commitment to an egalitarian and libertarian understanding of the Constitution's substance.[1] Justice Black usually agreed with the outcomes, while Justice Harlan was a frequent dissenter, but together they played a vital role. Their colleagues often seemed almost cavalier about the details in the reasoning the Court gave for its decisions, but Black and Harlan shared a fierce commitment to the proposition that what matters in constitutional adjudication is not just the result but, equally, the methods of constitutional reasoning used in reaching the decision. To be sure, they were at odds over the *correct* methods, with Black insisting that constitutional law is fixed by textual meaning and Harlan defending the role in constitutional law of "the common-law approach to legal development."[2] But as long as they were on the Court, they jointly championed the importance of reasoning and not just results.

After Black and Harlan left, most of the justices discarded the substantive vision driving the Warren era majority, but they also abandoned the concern for judicial method that Black and Harlan shared.[3] The result was a Court committed to the exercise of power by shifting majorities but serving no coherent understanding of the Constitution and disciplined by no

---

* Professor of Law, Duke University. I am deeply indebted to Henry Monaghan, Barry Sullivan, and James Boyd White for the close and generous readings they gave this article. Many thanks to them, and also to Charles Fried and Sara Powell for their comments and encouragement, and to my wife Sarah who, as always, took time away from her own busy professional work to think about mine.

1. For the most part, the Warren Court justices were spared the difficulties that arise when egalitarianism and libertarianism collide. In his great Harvard Law Review "Foreword," Professor Charles Fried, who clerked for Justice Harlan during the October Term 1960 (in which *Poe v. Ullman* was decided), observed that "the Warren Court transformation did have a core coherence that few on the Court, in the bar, or in the country wanted to do without. It was not a theory, but it was a promise: that the Constitution of the United States somewhere, somehow, provided a basis for holding back the most palpable abuses and indecencies of organized government." Fried immediately added that "[n]o one said this better than Justice Harlan" despite his frequent dissents, and quoted Harlan's *Poe* dissent to demonstrate that assertion. Fried, Foreword: Revolutions?, 109 HARV. L. REV. 13, 74 (1995). I agree with Fried about the Warren Court's fundamental orientation and about Harlan's role as an internal critic rather than a simple outsider.

2. John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance,* 49 A.B.A. J. 943 (1963), *reprinted in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY 289, 292 (David L. Shapiro ed., 1969). On Black's views, see generally HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH (1968).

3. The most junior of Nixon's appointees, then-Associate Justice William Rehnquist, had a coherent constitutional vision very different in substance from the Warren Court's, but Rehnquist was eclectic in the means he adopted to pursue it. *See* Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1318 (1982).

principled methods of reasoning.[4] Our current, lamentably politicized practices of federal judicial selection and block voting on the appellate courts have their origin, in part, in what the Supreme Court became after Black and Harlan left. Perhaps it is time, on the fiftieth anniversary of their departure, to consider what Black and Harlan may have to teach us.

In this article, I consider Justice Harlan's understanding of how we should go about addressing constitutional law questions through the lens of his elaborate dissent in *Poe v. Ullman*, decided in 1961.[5] In *Poe*, a bare majority of the justices declined to rule on the constitutionality of a Connecticut statute criminalizing the use of contraception as applied to married persons.[6] Black and Harlan were two of the dissenters, with Black merely noting that he "believe[d] that the constitutional questions should be reached and decided."[7] Harlan, on the other hand, filed a substantial, two-part opinion that addressed both the justiciability of the suit and the validity of the statute, which Harlan concluded was a violation of Fourteenth Amendment due process at least with respect to a married couple.[8] I focus on Harlan's *Poe* opinion because it was his most elaborate discussion of his general views on constitutional adjudication. And I focus on Harlan rather than Black because in my view, Harlan's perspective is the less well known, or at least the less well understood. Black's constitutional textualism is, rhetorically and to some extent substantively, very similar to the methodological position the late Justice Antonin Scalia articulated. It would be difficult to fully explore Black's contemporary relevance without discussing Scalia as well, and to do that in addition to explaining Harlan's

---

4. Professor Vincent Blasi famously described the Burger Court as characterized by "rootless activism." *See* Vincent Blasi, *The Rootless Activism of the Burger Court* (1986), *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 199, 200-01, 205, 208 (Vincent Blasi ed., 1983).

5. Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

6. I briefly discuss the views expressed by the plurality and concurring opinions in note 13 and Section I.F, *infra*.

7. *Poe,* 367 U.S. at 509 (Black, J., dissenting).

8. Justice Douglas's dissent, like Harlan's, discussed both justiciability and the merits. In a three-sentence opinion, Justice Stewart stated that he agreed with Douglas's and Harlan's discussions of justiciability and added that "in refraining from a discussion of the constitutional issues," he did not imply that he would disagree with them on the statute's invalidity. *Id.* at 555 (Stewart, J., dissenting). Four years later, in *Griswold v. Connecticut*, Stewart concluded that Douglas and Harlan were wrong and the statute was constitutional, perhaps because he thought that in the interim the Court had definitively rejected substantive due process. *See also Roe v. Wade*, 410 U.S. 113, 167–68 (1973) (Stewart, J., concurring) ("In 1963, this Court, in *Ferguson v. Skrupa*, 372 U.S. 727, purported to sound the death knell for the doctrine of substantive due process . . . [but] it was clear to me . . . [in 1965] that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause.").

views would expand this article into a book. In any event, as the reader will soon discover, to write about Harlan is necessarily to write about Black as well, so the latter will not be ignored.[9]

The article begins with a detailed examination of Harlan's dissent in *Poe v. Ullman*. In this first section, I discuss the account Harlan gives of constitutional adjudication, his justification for his understanding of due process, and his application of that understanding to analyze, and ultimately reject, the constitutionality of the state law. I show that Harlan identified his approach to due process adjudication as a specific example of the general approach to constitutional decision making to which Chief Justice John Marshall gave canonical expression in *McCulloch v. Maryland*. By doing so, Harlan clearly implied that it was his view of constitutional decision making, not Black's, that truly respects the text of the Constitution. Harlan's disagreement with Black thus was an argument over *how* the written Constitution is properly understood and enforced, not—as Black claimed—a debate between an approach obedient to the authoritative text and a view of constitutional law that wrongly transforms judges into lawmakers.

This first section of the article asks the reader to engage with me in a very close reading of Harlan's opinion. I consider in detail Harlan's arguments, the intellectual debates that were the context of his views, and the implications of the particular cases he cites. I recognize that some readers may find the detail tedious at times, but I ask their forbearance. Harlan's painstaking attention to details is an essential aspect of his respect for history and precedent that balances his reliance on overarching themes in analyzing constitutional questions. I also attempt to avoid the anachronism of reading back into Harlan's opinion what later justices and commentators have made of it, and I ask the reader to do the same.[10] We cannot truly give Harlan a rehearing unless we first allow him to speak in his terms, not ours.

This sort of close reading, I think, is key to understanding Harlan's opinion and, more broadly, to evaluating the understanding of constitutional law—what he called "the rational process in constitutional adjudication"—that Harlan advocated and employed in *Poe.* Harlan argued that the Constitution is the basic charter of our society and contains broad principles of government, not simply narrow rules susceptible to what John Hart Ely

9. In addition, I am co-author of a book arguing for Black's relevance to contemporary law in the area of the First Amendment. *See* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 241–42 (2009).

10. For similar reasons I generally do not rely on opinions that Harlan wrote after *Poe* and *Griswold*. I think Harlan's views on constitutional decision making were broadly consistent over time. This article's concern is not with Harlan's decisions as a whole but with the particular approach he set out in *Poe* and amplified in one important respect in *Griswold*.

once labeled "clause-bound interpretivism."[11] Because the Constitution is this kind of governing instrument, constitutional adjudication demands the exercise of a degree of individual judgment in order to determine what the Constitution requires. In doing so, judges are fulfilling rather than ignoring—as Black charged—their duty to base their constitutional decisions on the requirements of the Constitution because the *real* Constitution is not Black's imagined collection of discrete rules but a statement of fundamental principles. Through their engagement in a meticulous consideration of precedent and of the arguments in past constitutional debates, and by reasoning from broad principles to the particular issue before the court, judges remain within the legitimate scope of their authority.

The second section of the article discusses Harlan's concurrence in *Griswold v. Connecticut*, the 1965 decision in which the Court, with Black dissenting, held that the contraception statute at issue in *Poe* could not be constitutionally applied to married persons. Harlan's chief concern, I explain, was to answer Black's charge that a position like Harlan's licenses improperly subjective decision making by judges. According to Harlan, Black's position does not in fact achieve the goal that supposedly justifies it—the prevention of such illegitimate subjectivity. In contrast, a judge following Harlan's approach will necessarily exercise an appropriately constrained legal judgment.

In the final section of the article, I argue that we should grant Harlan a rehearing on three themes he develops in his *Poe* and *Griswold* opinions. First, we should consider whether Harlan was right that all approaches to constitutional adjudication—such as Black's—that attempt to eliminate the role of personal judgment are fundamentally flawed. Conversely, we ought to ask whether Harlan made a convincing case for his "rational process" as a legitimate form of judicial decision making rooted in American constitutional tradition. Finally, we should take seriously Harlan's portrayal of constitutional law as an ongoing conversation rather than a series of legal battles. My answer on each point is that Harlan is persuasive. His open consideration of broad themes in our constitutional tradition, his respectful and intellectually honest use of precedent, and his insistence that individual decisions focus on the details of the particular case before the Court invite similarly open responses from colleagues and

11. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12–13 (1980) (defining "clause-bound interpretivism" as the view that "the various provisions of the Constitution be approached essentially as self-contained units and interpreted on the basis of their language, with whatever interpretive help the legislative history can provide, without significant injection of content from outside the provision."). Professor Ely was perhaps hesitant about applying the term to Justice Black, I think unnecessarily so. It would doubtless be wrong to attribute to Black "a historically straitjacketed literalism," *id.* at 2, but all that proves, I think, is that Black was a smart lawyer.

critics. If we allow him a rehearing, I believe we will conclude that Harlan has much to contribute to contemporary constitutional law.

I. THE BASIC CHARTER OF OUR SOCIETY: *POE V. ULLMAN*

A. The Intellectual Context of Justice Harlan's Dissent

Arguably, Justice Harlan's most famous opinion was the dissent he wrote, speaking for himself alone, in the Supreme Court's first important contraceptives case, *Poe v. Ullman*, decided in 1961.[12] *Poe* combined appeals from declaratory judgment actions brought in state court by a married couple, a married woman, and a physician, all seeking to invalidate a Connecticut statute criminalizing the use of contraceptives, at least as applied to married persons. The state supreme court upheld the statute, but in the United States Supreme Court a bare majority voted to dismiss the appeals as non-justiciable.[13] Justice Harlan wrote a carefully crafted opinion that not only rebutted the arguments against reaching the merits, but went on to conclude that the statute's application to a married person or her doctor would violate the due process clause of the Fourteenth Amendment.[14]

The *Poe* dissent has proven to have a long afterlife. Although Harlan once again spoke for himself alone when the Court struck down the Connecticut contraceptives ban as to married persons in *Griswold v. Connecticut*,[15] in subsequent cases the Court has relied on his *Poe*

12. *Poe*, 367 U.S. at 522–55 (Harlan, J., dissenting). Twice before the Supreme Court refused to address the merits of a challenge to a contraception ban, the second involving the same Connecticut statute. *See* Gardner v. Massachusetts, 305 U.S. 559 (1938) (dismissing appeal for want of a substantial federal question); Tileston v. Ullman, 318 U.S. 44 (1943) (dismissing appeal because physician plaintiff lacked standing).

13. Justice Frankfurter concluded for a plurality that "we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced." *Poe*, 367 U.S. at 508 (Frankfurter, J., plurality opinion). Justice Brennan agreed, in an opinion as brief and opaque as Frankfurter's was labored and opaque, that the appeals "must be dismissed for failure to present a real and substantial controversy." *Id.* at 509 (Brennan, J., concurring in the judgment). I consider the justiciability debate in subsection I.F.

14. Harlan explained his unusual decision to discuss a constitutional question that the Court had not reached: "such issues, as I see things, are entangled with the Court's conclusion as to the nonjusticiability of these appeals." *Id.* at 524 (Harlan, J., dissenting).

15. Griswold v. Connecticut, 381 U.S. 479, 499–502 (1965) (Harlan, J., concurring in the judgment). Harlan's brief opinion cited the "reasons [he] stated at length" in *Poe* and responded to the argument about judicial restraint Black

analysis.[16] Even justices unenthusiastic about what they perceive to be its implications have acknowledged that Harlan's *Poe* opinion has been influential.[17] But the opinion's fame—or notoriety—may stand in the way of understanding, sixty years after Justice Harlan wrote it, the *Poe* dissent's deepest lessons. Therefore, in reading what follows in sections I and II of this article, the reader should put to one side what later justices have made of Harlan's opinion. In particular, it will be useful to resist the temptation to categorize the *Poe* dissent as presenting a "substantive due process" argument. While the opinion does indeed locate the state law's invalidity in its violation of substantive constitutional limitations imposed by the Fourteenth Amendment's due process clause, the term "substantive due process" itself has acquired so much baggage that it is a hindrance rather than a help in attempting to understand Harlan's 1961 opinion.[18] For that

---

advanced in his *Griswold* dissent. *Id.* at 500–02 (Harlan, J., concurring in the judgment). I discuss this debate between Harlan and Black in section II below.

16. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598–99 (2015); Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (plurality opinion of O'Connor, Kennedy, & Souter, J.J., at this point for the Court) ("[T]he Court adopted [Harlan's *Poe*] position four Terms later in *Griswold v. Connecticut* . . . ."); Youngberg v. Romeo*,* 457 U.S. 307, 320 (1982). The *Casey* quotation reflects the interesting fact that the original opinion of the Court in *Griswold* has essentially dropped out of analytical use: the *Casey* joint opinion relies heavily on Harlan's *Poe* dissent but makes no substantive use of Douglas's opinion other than to imply, inaccurately, that Douglas relied on "the substantive component of the Due Process Clause" in discussing marital privacy. *Casey*, 505 U.S. at 848 (citing *Griswold*, 381 U.S at 481–82)).

17. *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (arguing that "Justice Harlan's influential dissenting opinion in *Poe v. Ullman*" did not support the majority's analysis); Washington v. Glucksberg, 521 U.S. 702, 721 n.17 (1997) (quarreling with a concurrence's reliance on the *Poe* dissent while conceding that "Justice Harlan's opinion has often been cited in due process cases").

18. In contemporary usage "substantive due process" is the usual way to refer to the inquiry whether one of the due process clauses forbids a governmental action (legislative or executive) because it impermissibly infringes a substantive liberty interest, and is contrasted with "procedural due process," which requires government to afford someone adequate procedures before depriving him or her of life, liberty or property. The phrase is inelegant, and occurs in Supreme Court opinions very rarely before the 1970s.

I am aware of only two opinions in which Justice Harlan employed the phrase, in both instances with negative connotations. In the earlier, Harlan observed that the requirement, since repealed, that a suit to enjoin a state statute be heard by a three-judge district court originated in congressional "ire [over] the frequent grants of injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds." *See* Swift & Co. v. Wickham, 382 U.S. 111, 127 (1965). In the later opinion, Harlan expressly distinguished the freedom of contract doctrine, for which he preferred to reserve the term "substantive due process," from the constitutional methodology he advocated in

reason, I will use the term Harlan preferred, "due process," to refer to the mode of analysis he commended in *Poe*.

The key jurisprudential background to the *Poe* dissent lay in the Supreme Court's rejection a quarter century before of the early twentieth century freedom of contract cases, often referred to collectively by the name of the most famous, *Lochner v. New York*.[19] The New Deal critique of *Lochner* had several distinct elements, which various critics on and off the Court weighted differently. The simplest focused on the fact that the freedom of contract cases invoked the word "liberty" in the due process clauses as the doctrine's basis in the Constitution's language. Reviving the old textual argument that Justice Brandeis had thought persuasive in principle, critics sometimes argued that a requirement of due *process* of law doesn't speak to the substance of the law at all.[20] The due process clauses simply can't do the work that the freedom of contract doctrine needed them to do.

Another objection to *Lochner* took Justice Holmes's famous dissent in that case as its lodestar. Holmes's objection was not to freedom of contract's inadequate textual basis. In his dissent he indicated that the Court could legitimately invalidate a statute that might fairly be said to "infringe fundamental principles as they have been understood by the traditions of our people and our law." His concern was with the source of the doctrine, which he thought based on a contested "economic theory" rather than on American legal or cultural traditions. Holmes believed it was clear from the pervasive limitations on contractual freedom that the "Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire." The *Lochner* decisions thus were rooted not in a proper source of constitutional law but in the personal "convictions

---

Poe. "Under the rubric of 'equal protection' this Court has in recent times effectively substituted its own 'enlightened' social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of 'substantive' due process. I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant. Due process, as I noted in my dissenting opinion in *Poe v. Ullman*, is more than merely a procedural safeguard; it is also a 'bulwark . . . against arbitrary legislation.'" Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) (internal citation omitted).

19. Lochner v. New York, 198 U.S. 45 (1905).

20. *See* Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("Despite *arguments to the contrary which had seemed to me persuasive*, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure.") (emphasis added), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

or prejudices" of the judges, even if the mistake was inadvertent, the product of intellectual confusion rather than conscious mendacity.[21]

The Court, at least as seen in retrospect, signaled its repudiation of *Lochner* freedom of contract in 1937, and by February 1941, there were no sitting justices who thought freedom of contract is a fundamental constitutional value.[22] The reconstituted Court was unanimous in agreeing with Holmes that *Lochner*'s protection of contractual freedom was a mistake, and some of the justices explained how the old Court had gone wrong in terms of mistaken constitutional method. Justice Felix Frankfurter thought that the Court had been right to assume that "[i]n each case" the due process clauses put a duty on the courts to engage in "the detached consideration of conflicting claims." Frankfurter thought the error in *Lochner* was the Court's selection of which claims to vindicate.[23] Chief Justice Harlan Fiske Stone accepted the legitimacy of due process challenges on substantive grounds, but thought such challenges ordinarily should be evaluated against a strong presumption that legislation is constitutional. For Stone, the *Lochner* mistake lay in concluding without

---

21. *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting). Harlan agreed with Holmes that the freedom of contract doctrine resulted from the Justices' uncritical adoption of contestable, extra-legal social or economic ideas. *See, e.g.*, Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 382 (1969) (*Lochner* era "economic due process . . . was based on self-mesmerized views of economic and social theory") (citations omitted).

22. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923) (a freedom of contract precedent)). Justice James C. McReynolds, the last adherent to the pre-1937 doctrine, retired early in 1941.

23. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring) ("[I]n considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."). Frankfurter was much readier to find a violation of due process when executive officers offended his "'sense of justice'" than when the Court was asked to reject the rationality of the legislative judgment embodied in a statute, even if the law was arguably a "legislative invasion" of "freedom of expression." *Compare* Rochin v. California, 342 U.S. 165, 173 (1952) (Frankfurter, J., for the Court), *with Kovacs*, 336 U.S. at 95 (Frankfurter, J. concurring). *See also* Beauharnais v. Illinois, 343 U.S. 250, 261–64 (1952) (Frankfurter, J., for the Court) (upholding a state group libel statute: while the due process clause authorizes the Court "to nullify action which encroaches on freedom of utterance under the guise of punishing libel," "we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups [because] it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem").

adequate justification that the presumption had been overcome.[24] By the mid-1950s, the Court's decisions generally followed Stone in adjudicating substantive due process claims by applying an almost toothless form of "rational basis" scrutiny.[25]

Justice Black eventually settled on a different and more radical critique of *Lochner*. What if the enterprise of identifying constitutional principles not clearly expressed in constitutional text is itself impossible, and *any* attempt to carry it out inevitably results in the judges invalidating whatever offends their political and moral sensibilities? Over the course of the 1940s, Justice Black had come to this conclusion, and he adopted his strongly text-centered approach as the only defensible method of constitutional decision making.[26] The Constitution *is* its text, and

---

24. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (Stone, J.) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators"). But as he suggested in the famous footnote four in *Carolene Products*, Stone did not think "the operation of the presumption of constitutionality" had to be invariant across types of due process claims. *Id.* at n.4. *See also* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 544 (1942) (Stone, C.J., concurring) ("There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned") (citation omitted).

25. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483, 491 (1955). Justice Black viewed even rationality review under the due process clauses as illegitimate in principle, but neither he nor his colleagues were much troubled by the theoretical inconsistency between a nominal inquiry into a law's rationality and Black's outright rejection of substantive review under the due process clauses. *Compare Williamson*, 348 U.S. at 488 (explaining, in an opinion of the Court Black joined, that "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"), *with* Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (opinion of the Court by Black, J., purporting to disavow the use of the due process clause "to strike down laws which [are] thought unreasonable"). *See also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 673–74 (1966) (Black, J., dissenting) (acknowledging rationality review under the equal protection clause). Justice Harlan was unwilling to overlook the methodological inconsistency and declined to join Black's *Ferguson* opinion. *See Ferguson*, 372 U.S. at 733 (Harlan, J., concurring).

26. *See, e.g.*, Int'l Shoe Co. v. Wash. Off. of Unemployment Comp. & Placement, 326 U.S. 310, 325–26 (1945) (Black, J., dissenting) ("There is a strong emotional appeal in the words 'fair play', 'justice', and 'reasonableness.' But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. . . . [A]pplication of this natural law concept, whether under the terms 'reasonableness', 'justice', or 'fair play', makes judges the supreme arbiters of the country's laws and practices."). At

constitutional law is by definition the exegesis of that text and its meaning.[27] Furthermore, by limiting judicial review to the enforcement of norms demonstrably embedded in the text of the Constitution, courts could avoid the "intrusion by the judiciary into the realm of legislative value judgments."[28] Courts that depart from the text of specific constitutional prohibitions leave the scope of individual rights and governmental authority alike at the mercy of individual judges' personal views of justice.[29] The creation of norms is the business of the people in constitution-making and of the legislature in ordinary lawmaking. For Black, judges are norm-enforcers only.[30]

---

this early point in Black's development of his textualist approach, he was also willing to concede that judicial enforcement of specific, express prohibitions "requires interpretation, and interpretation, it is true, may result in extension of the Constitution's purpose." *Id.* at 325. At a later stage even this ambiguous admission of doctrinal development was muted or disappeared.

27. As Black later put it, individual constitutional rights are defined by "constitutional guarantees, both explicit and necessarily implied from explicit language." Jackson v. Denno, 378 U.S. 368, 407 (1964) (Black, J., dissenting in part and concurring in part).

28. *Ferguson*, 372 U.S. at 729. Black went on to quote Holmes that "'Courts should be careful not to extend [express constitutional] prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.'" *Id.* (quoting Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)).

29. *See, e.g.,* Shotwell Mfg. Co. v. United States, 371 U.S. 341, 378 (1963) (Black, J., dissenting) ("[T]he more precise words of the Fifth Amendment . . . are a far more certain safeguard against the use of compelled confessions than the tractable and pliable protections which the Court may or may not afford under the due process 'shock the conscience' test"); Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring) ("[F]aithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous [due process] standards stated by the majority."); Adamson v. California, 332 U.S., 46, 83 (1947) (Black, J., dissenting) (under *Lochner*-style due process "the power of legislatures [becomes] what this Court would declare it to be at a particular time independently of the specific guarantees of the Bill of Rights.").

30. *See, e.g.,* One 1958 Plymouth Sedan v. Pennsylvania., 380 U.S. 693, 703 (1965) (Black, J., concurring) ("I cannot agree that because we ourselves might believe the practice of obtaining evidence in that manner 'shocks the conscience' or is 'shabby' or 'arbitrary,' we are commanded or even authorized by the Constitution to prevent its use as evidence. That seems to me to be amending the Constitution, which is the business of the people, not interpreting it, which is the business of the courts."); *Adamson*, 332 U.S. at 91–92 (Black, J., dissenting) (quoting Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am., 315 U.S. 575, 601 n.4 (1942) (Black, Douglas & Murphy, JJ., concurring) ("In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a

But this new textualism[31] appeared to come with a price. Black's disavowal of the Fourteenth Amendment's due process clause as a substantive limitation put the Court's precedents protecting freedom of speech, press, and religion against state and local government in jeopardy. Black had come to approve strongly of those precedents, but they originated in the application of the same due process logic employed in *Lochner* and the other freedom of contract decisions.[32] Once Black had fully developed his textualist understanding of constitutional adjudication, from his perspective, the state free speech cases could not be justified by *Lochner*ian reasoning. But by 1949, Black had found a solution to this conundrum. The Fourteenth Amendment, he explained, had been intended to "incorporate" (apply against the states) all the provisions of the first eight amendments.[33] Black's original purpose argument for "total incorporation" never

---

responsibility which the Constitution entrusts to the legislative representatives of the people.")).

31. I am going to use the term "textualism" as shorthand for Justice Black's understanding of constitutional decision making although, as the reader will see, Justice Harlan insisted that *his* very different approach was the path of true fidelity to the Constitution's text.

32. *See, e.g.,* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black & Douglas, JJ., concurring). Black's first important opinion in the area explicitly analyzed the issue before the Court by "'weigh[ing] the circumstances and apprais[ing] the reasons'" for the limitation of press and religious freedom under review. Marsh v. Alabama, 326 U.S. 501, 509 (1946) (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)). Black's conclusion that the Court should uphold the press and religious freedom claims thus rested on a straightforward application of *Lochner*-era logic, with those freedoms substituted for freedom of contract as constitutional values entitled to searching judicial protection. *See Marsh*, 326 U.S. at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.") Black soon realized that such reasoning was inconsistent with his rejection of *Lochner* as a method, and by the time *Poe* was decided, *Marsh*'s language of balancing conflicting constitutional interests was anathema to him. The total incorporation theory preserved *Marsh*'s result while breaking the methodological connection to *Lochner*.

33. *See Adamson*, 332 U.S. at 71–72 (Black, J., dissenting). Black's incorporation theory is logically independent of his textualism. On its face, moreover, total incorporation seems difficult to justify as an interpretation of the words "due process of law." Black would later suggest what seems to me a plausible argument that his specific Fourteenth Amendment theory was consistent with his general textualism when understood as a construction of the privileges or immunities clause. *See* Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("[T]he words 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' seem to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States.").

persuaded a majority of the Court, but the symmetry and apparent simplicity of equating Bill of Rights and Fourteenth Amendment liberties influenced even justices unwilling to subscribe entirely to Black's theory.[34] And justices unwilling to embrace Black's textualism nonetheless strove to distinguish their reasoning from that of the *Lochner* era in vindicating substantive claims to "liberty."[35]

In *Poe v. Ullman*, in contrast, Harlan took exactly the opposite approach. Adjudication of substantive claims to liberty under the due process clauses—*Lochner*'s method if not its particular outcome—is a

---

34. On the same day the Court decided *Poe*, it held in *Mapp v. Ohio* that the exclusionary rule long applied where the federal government violated the Fourth Amendment should apply equally to unreasonable state searches in violation of the Fourteenth Amendment. "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." Mapp v. Ohio, 367 U.S. 643, 655 (1961). Justice Harlan dissented. *Id.* at 672. From *Mapp* on, the Court regularly treated those liberties protected by the Fourteenth Amendment due process clause that paralleled freedoms protected by the first eight amendments against federal interference as co-extensive with their Bill of Rights counterparts. By the time Black and Harlan left the Court, this process of selective incorporation had resulted in the incorporation in the Fourteenth Amendment of the vast majority of provisions in the Bill of Rights, although the Court continued to determine whether the specific right at issue was incorporated by asking whether it was "fundamental" in some sense rather simply by observing, with Black, that the right is protected by the Bill of Rights. *See Duncan*, 391 U.S. 148–50, n.14 (discussing the "variety of ways" in which the Court had expressed the inquiry). Black cheerfully accepted these decisions as vindications in practice of the total incorporation theory to which he continued to adhere. *See, e.g., id.* at 171 (Black, J., concurring) ("I believe as strongly as ever that the Fourteenth Amendment was intended to make the Bill of Rights applicable to the States. I have been willing to support the selective incorporation doctrine, however, as an alternative [because], most importantly for me, the selective incorporation process has the virtue of having already worked to make most of the Bill of Rights' protections applicable to the States."). Harlan consistently objected to even a partial adoption of Black's incorporation reasoning. *See, e.g., id.* at 179 (Harlan, J. dissenting) (in decisions holding that Fourteenth Amendment due process protects a liberty also protected by a Bill of Rights provision, "[t]he logically critical [factor] was not that the rights had been found in the Bill of Rights, but that they were deemed, in the context of American legal history, to be fundamental"). For Harlan's discussion of incorporation in *Poe*, see below.

35. In *Poe* for example, Justice Douglas concluded that the Connecticut statute violated the due process clause as well as the First Amendment. *See* Poe v. Ullman, 367 U.S. 497, 513–15 (1961) (Douglas, J., dissenting). But Douglas expressly denied that he was following *Lochner*, *id.* at 517, and indicated that the liberty interest he thought protected was closely linked to express provisions in the Bill of Rights. *See id.* ("'Liberty' is a conception that sometimes gains content from the emanations of other specific guarantees").

paradigm example of legitimate constitutional decision-making, not the dangerous, suspect, or even outright illegitimate tool that his colleagues feared. A court should decide an issue of constitutional law, when the correct outcome is not dictated by precedent, through a "rational process" that requires the judges to determine what overarching constitutional principles and which aspects of constitutional history are relevant to the question before the court. In doing so, each judge must interpret the scope and significance of precedent, evaluate conflicting arguments, and determine which decision will be the most consistent with American constitutional tradition taken as a whole. These are not tasks, Harlan thought, that can be performed simply by a semantic inquiry into the meaning of a constitutional provision, or a value-free historical investigation of its origins. Instead, they require the individual judge to reach conclusions about persuasiveness and analogy that involve the exercise of that individual's personal judgment—what I shall call normative judgment. Certainly, as Black insisted, a court does not sit to tell us its members' private judgments on what they think is just. At the same time, on difficult constitutional questions, the Court's members have no alternative than to tell us their personal judgments on what they think the law of the Constitution requires.

The broadest and most important aspect of the *Poe* dissent lies here. At the heart of textualism lay Black's claim that in order to decide a constitutional issue legitimately, the judge must ordinarily[36] avoid the intrusion of his personal viewpoints into his analysis of the meaning of constitutional language and its applicability to the facts before the court. In contrast, according to Harlan, an approach to constitutional decision making—such as Black's textualism—that denies the inevitability, and the propriety, of personal, normative judgment in constitutional law is indefensibly wrong-headed. Far from being the original or authentic form of constitutional adjudication, textualism misunderstands the constitutional text and misidentifies the role of the constitutional judge. Harlan's audacious claim in *Poe* is that the due process analysis he presented there, with its unequivocal affirmation that judges can and must make normative judgments in coming to constitutional decisions, represents the authentic form of constitutional adjudication in the tradition of *McCulloch v. Maryland*, the true path of fidelity to the written Constitution.

36. For Black's slightly different view of the Fourth Amendment, see below at note 53.

B. A Framework of Constitutional Principles

Justice Harlan began his discussion of the merits in *Poe v. Ullman*[37] by deliberately underlining the role of his personal, normative judgment in his constitutional analysis.

> *I consider* that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. *I believe* that a statute making it a criminal offense for married couples to use contraceptives is *an intolerable and unjustifiable* invasion of privacy in the conduct of the most intimate concerns of an individual's personal life.[38]

It is difficult to imagine a more pointed challenge to a constitutional lawyer such as Justice Black, who believed that legitimate constitutional adjudication depends on the adoption of a methodology that denies any role to the judge's own normative evaluations. In contrast, Harlan left the reader with no doubt that his constitutional conclusion was the product, in part, of a personal judgment rather than an impersonal calculus—"I consider . . . I believe" —and that his judgment depended in part on a weighing of competing normative considerations—"intolerable and unjustifiable"—rather than a neutral, value-free interpretation of constitutional language.

For Black, Harlan's characterization of his conclusion in *Poe* amounted to a confession that the conclusion stemmed from Harlan's commission of the cardinal judicial sin of allowing his personal policy preferences—or in Holmes's *Lochner* phrase, his "convictions or prejudices"—to drive his thinking. As Black explained this viewpoint a few years later in *Griswold*, "I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose. . . . The power to make such decisions is of course that of a legislative body."[39]

Clearly, Justice Harlan was aware that he was inviting the charge of following the *Lochner*-era justices in substituting his personal preferences for the judgment of the legislature. The accusation, obviously, would be all the more plausible from Black's perspective, in that Harlan made no claim

---

37. Below, in section I.F, I discuss the first part of Harlan's dissent, which addressed the justiciability of the case. For our purposes, we can see the significance of his discussion of justiciability more readily if we examine his discussion of the merits first.

38. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting) (emphasis added).

39. Griswold v. Connecticut, 381 U.S. 479, 512–13 (1965) (Black, J., dissenting).

that either the constitutional text or Supreme Court precedent expressly mandated his judgment on the Connecticut statute. For these reasons, Harlan introduced his substantive discussion of the statute's validity with a defense of due process analysis that turned criticisms like Black's upside down. According to Harlan, the logical structure of due process as a method is the logic of all constitutional law. It expresses "the framework of Constitutional principles" that should govern all legitimate constitutional adjudication.[40]

Harlan began by taking note of a structural principle that limits the role of the judiciary in reviewing state legislation for its compatibility with the Constitution of the United States. The national Constitution is not the source of state legislative powers, and from a federal constitutional-law standpoint, a state law is valid unless it runs afoul of a prohibition imposed by the Constitution.[41] "Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government."[42] Harlan's view of constitutional adjudication thus shared a common background assumption with Black's, specifically, that judicial review is not some general power to supervise the activities of state governments, but is limited to the enforcement of legal principles properly grounded in the Constitution.[43] But from that assumption on, Harlan's *Poe*

40. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting) ("Since [the arguments he would go on to address] draw their basis from no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of Constitutional principles in which I think the issue must be judged.").

41. *Id.* ("In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are 'the powers of government inherent in every sovereignty.'") (quoting The License Cases, 46 U.S. (5 How.) 504, 583 (1847) (opinion of Taney, C.J.)). I am not certain what distinction (if any) Harlan intended to draw between a state's police powers and its authority to legislate "for the health, safety, morals or welfare of its people." *Id.* The important points are that as a general matter, state legislatures derive their powers from the respective state constitutions and that the affirmative scope of those powers is undefined. The states' authority with respect to some aspects of federal elections and the Article V amendment process, in contrast, is delegated by the federal Constitution and thus is an exception to the general principles Harlan invoked. *See, e.g.,* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995) ("[I]n certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution.").

42. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

43. *Cf.* Boddie v. Connecticut, 401 U.S. 371, 393–94 (1971) (Black, J., dissenting) (denying that the Supreme Court has "'unlimited authority to supervise all assertions of state and federal power . . . .'") (quoting Williams v. North Carolina, 325 U.S. 226, 271 (1945) (Black, J., dissenting)). In *Boddie*, in an opinion written by Justice Harlan, the Court held that the Fourteenth Amendment's

dissent outlined an account of constitutional law radically different from Black's textualism.

The next sentence in Harlan's account of his "framework of Constitutional principles" is rich with meaning but its central message is that *any* attempt to eliminate normative judgment from constitutional decision making is unworkable, illegitimate, and at odds with the mainstream judicial tradition.

> But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching 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.[44]

Let us begin by considering Harlan's assertion that "the basis of judgment . . . must be a *rational* one," which he echoed in his next sentence by referring to "the *rational* process in Constitutional adjudication."[45] The adjective "rational" that I just emphasized was not a reference to the platitude that judges should avoid elementary logical errors. It was instead shorthand for a deliberate and provocative assertion that the courts can and must make constitutional decisions by reasoning through the exercise, in part, of normative judgment, a basis for decision that someone like Black thought entirely extra-judicial. Harlan's choice of words makes his deliberate challenge to Black clear. Over time, to be sure, Black had used a variety of phrases to describe the employment of normative judgment that he rejected as the usurpation of legislative authority.[46] Only a year before *Poe*, however, Black and Harlan had clashed over their conflicting views of judicial inquiry into the validity of state legislation using the language of rationality.

Flemming v. Nestor, which Harlan wrote for the Court, upheld a provision of the Social Security Act against a variety of constitutional attacks brought by a claimant whose benefits were terminated after he had

---

due process clause invalidated a court fee requirement that precluded indigent persons from seeking a divorce. *Boddie*, 401 U.S. at 382-83.

44. *Poe*, 367 U.S. at 539–40 (Harlan, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

45. *Id.* (Harlan, J., dissenting) (emphasis added).

46. In a footnote in his *Griswold* dissent, Black provided an extensive list of the phrases he thought had been used to express this error. Griswold v. Connecticut, 381 U.S. 479, 511 n.4 (1965) (Black, J., dissenting) (cataloging "the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice . . . .").

been lawfully deported because he had been a member of the Communist Party years before. Harlan concluded that the provision requiring termination did not violate the Fifth Amendment due process clause because it was not "so lacking in rational justification as to offend due process."[47] Harlan's rationale was, in part, that there was a logical connection between the goals of the Social Security Act and terminating payments to someone no longer eligible to reside in the United States.[48] But Harlan also explained it could not "be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute."[49] That part of the reasoning was not a matter of logical relationship but of normative acceptability. Harlan and his colleagues in the majority did not think it was unconstitutional oppression for Congress to deny Social Security benefits to supporters and former supporters of Communism.[50]

Black dissented because he thought the statutory provision violated several different constitutional provisions.[51] Black also explained at some length that the appellee had failed to present a cognizable due process claim at all, rather than simply (as Harlan thought) that the claim was unpersuasive. Black denounced "the Court's assumption of [a] power to hold Acts unconstitutional because the Court thinks they are arbitrary and irrational [on the ground that such a decision can] be neither more nor less than a judicial foray into the field of governmental policy." For the Court to inquire into the rationality of a statute, Black asserted, was to enter a "field" of decision "with no standards except its own conclusion as to what is 'arbitrary' and what is 'rational.'" Stepping away from a rigorous adherence to the constitutional text, according to Black, empowers the Court both to invalidate laws that violate no constitutional prohibition for reasons "wholly dependent upon this Court's idea of what is 'arbitrary' and 'rational,'" and equally to uphold laws "on the ground that they are neither

47. Flemming v. Nestor, 363 U.S. 603, 612 (1960).

48. *Id.* (Harlan reasoned that Social Security benefits the economy by increasing the "over-all national purchasing power" and that "[t]his advantage would be lost as to payments made to one residing overseas.").

49. *Id.*

50. Harlan did not address the obvious First Amendment issue because he thought that Nestor was procedurally barred from presenting a First Amendment claim and, in any event, had not seriously argued the point. *Id.* at 613 n.7.

51. According to Black, the termination of benefits provision was an uncompensated taking, a denial of *procedural* due process, a violation of the ex post facto and bill of attainder clauses, and "part of a pattern of laws all of which violate the First Amendment." *Id.* at 628 (Black, J., dissenting). *See also id.* at 622 (Black, J., dissenting) (just compensation and due process); *id.* at 626–28 (Black, J., dissenting) (ex post facto and bill of attainder).

arbitrary nor irrational, even though the Acts violate specific Bill of Rights safeguards."[52]

Justice Black's 1960 dissent in *Flemming* threw down the gauntlet to the approach and language that Justice Harlan had used in addressing the appellee's due process argument. Harlan's 1961 dissent in *Poe* took up that challenge, and served notice that Harlan was doing so by describing his framework of constitutional principles in the very language that Black had rejected. Moreover, having signaled that his *Poe* opinion would engage Black's critique of his due process method, in the same sentence Harlan upped the ante. Harlan did not intend simply to defend the legitimacy of due process as one method among many. The form of due process reasoning he was presenting was, in Harlan's view, the core of *all* legitimate constitutional adjudication. "*Precisely because* it is the Constitution alone" that warrants any judicial review of laws enacted by a legislature with plenary competence over ordinary issues of government, "the basis of judgment as to the Constitutionality of state action *must be a rational one*," must be grounded in the sort of normative judgment that Black thought beyond judicial authority.[53]

As suggested earlier, the primary attraction of Justice Black's understanding of constitutional law lay in the claim—easily stated as if it were a self-evident truth—that because the Constitution is a written document with an unchanging text, unless amended, constitutional adjudication is, by definition, a matter of "stick[ing] to the simple language" of the text.[54] And because the Constitution is a text, judicial review is legitimate only when it is limited to the enforcement of "policies written into the Constitution" by language that restrains the courts "within clearly marked constitutional boundaries." Constitutional decision making, in other words, may require *interpretive* decisions about what the Constitution's clearly marked "policies" are as a factual matter, but it precludes the intrusion of any personal, normative evaluation of the meaning, importance, or weight of the principles and values the constitutional text embodies. Such questions are resolved by the text and are beyond judicial consideration.[55]

---

52. The language quoted in this paragraph all comes from a single, dense discussion in Black's dissent, *id.* at 625–26. (Black, J., dissenting).

53. Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)) (emphasis added).

54. Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

55. For the quoted language, see Adamson v. California, 332 U.S. 46, 91–92 (1947) (Black, J., dissenting) (quoting Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am., 315 U.S. 575, 601 n.4 (1942) (Black, Douglas & Murphy, JJ., concurring)). *See also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960) ("Of course the decision to provide a constitutional safeguard for a particular right, such as the fair trial requirements of the Fifth and Sixth Amendments and the right of free speech protection of the First, involves a

Harlan's response was that Black-style textualism has constitutional law exactly backward. It is *precisely because* the constitutional text is "the only commission" for the judiciary's power of judicial review that the Supreme Court is obligated *not* to approach that text as Black would have it do, "in a literalistic way, as if we had a tax statute before us."[56] The Constitution is indeed written law, but it is "the basic charter of our society,"[57] not a detailed statutory regime to be applied through strict adherence to the literal meaning of its language. Harlan disclaimed any suggestion that the constitutional text is empty or unconstraining—it "set[s] out in spare but meaningful terms the principles of government"[58]—but even that assertion of the text's authority was a direct contradiction of Black's view. For Harlan, the central role of the Constitution's text is to set out general principles that demand the exercise of judgment in their application, rather than to prescribe narrow rules the specific meaning of which need only be construed. Given the kind of text it is, the Constitution demands Harlan's approach.

---

balancing of conflicting interests. Strict procedures may release guilty men; protecting speech and press may involve dangers to a particular government. I believe, however, that the Framers themselves did this balancing when they wrote the Constitution and the Bill of Rights. . . . Courts have neither the right nor the power to review this original decision."). Black's textualism obliged him to allow for judicial judgment whether a search or seizure is "unreasonable" under the Fourth Amendment. *See, e.g.*, Rochin v. California, 342 U.S. 165, 176 (1952) (Black, J., concurring) ("Some constitutional provisions are stated in absolute and unqualified language. . . . Other constitutional provisions do require courts to choose between competing policies, such as the Fourth Amendment which, by its terms, necessitates a judicial decision as to what is an 'unreasonable' search or seizure.'"). But even as to the Fourth Amendment, Black sometimes attempted, rhetorically at least, to suggest that the court was determining a fact rather than making a value judgment. *See e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960) ("There may be much difference of opinion about whether a particular search or seizure is unreasonable . . . if it *is* unreasonable, it is absolutely prohibited").

56. For Harlan, the language of the Internal Revenue Code could preclude judicial reliance on policies that Congress might have intended but failed to state in the text. *See, e.g.,* United States v. Calamaro, 354 U.S. 351, 359 (1957) (rejecting the government's reliance on "the policy of the statute" even though legislative history and an administrative interpretation of the provision at issue expressed apparent congressional purpose because "we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there"). The Constitution, Harlan insisted, is a very different kind of document.

57. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (citing *McCulloch*, 17 U.S. (4 Wheat.) at 316).

58. *Id.*

Harlan supported the sweeping description of constitutional law we have been examining with a single, unadorned citation, but his choice of authority underscored his claim to be stating not an idiosyncratic perspective, but the mainstream understanding of constitutional adjudication in American law. Harlan, a careful legal craftsman with an eye for detail, provided no pinpoint citation to the decision he cited, and I think it clear that he intended the reader to give thoughtful consideration to his implicit claim that *McCulloch v. Maryland*, read as a whole, supported all that he had just written. In turn, we can understand Harlan's account of constitutional decision making more clearly if we examine the seminal opinion of Marshall on which Harlan was relying.

McCulloch was, of course, the Supreme Court's great 1819 decision upholding the constitutionality of the Second National Bank and its immunity from state taxation in a magisterial opinion written by Chief Justice John Marshall. *McCulloch*, "perhaps the greatest of our constitutional cases," did not simply decide two issues of great practical importance at the time.[59] Of even broader, lasting significance was the approach to constitutional adjudication that Marshall advocated and *McCulloch* exemplified.[60] Like Justice Harlan's opinion in *Poe*, Marshall's

---

59. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 15 (1969). The only justification for Professor Black's qualifying adverb, in my view and perhaps in his, is that "our constitutional cases" include *Brown v. Board of Education*. But it is the decision in *Brown*, not Chief Justice Warren's deliberately muted opinion, that commands admiration. Marshall's opinion in *McCulloch*, and his description of constitutional decision making, are of at least as momentous importance as the Court's specific holdings. The contemporary Supreme Court continues to treat the *McCulloch* opinion as "foundational" to constitutional law. *See* Gamble v. United States, 139 S. Ct. 1960, 1968 (2019) (relying on Marshall's reasoning). *See also* Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1492–93 (2019) ("As Chief Justice Marshall explained, the Founders did not state every postulate on which they formed our Republic – 'we must never forget, that it is *a constitution* we are expounding.'") (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)). Harlan himself held Marshall and the *McCulloch* opinion in high regard. *See, e.g.,* Reid v. Covert, 354 U.S. 1, 69 (1957) (Harlan, J., concurring in the result) (relying on "[n]o less an authority than Chief Justice Marshall, in *M'Culloch v. Maryland*") (citation omitted).

60. Marshall himself clearly thought it more important that *McCulloch*'s mode of analysis be understood and accepted than that lawyers and other Americans agreed with the Court's actual holdings. *Cf.* John Marshall, Opinion, *A Friend to the Union* II (April 28, 1819), THE PHILADELPHIA UNION, *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 103 (Gerald Gunther ed. 1969) ("I do not fear contradiction from any fair minded and intelligent man when I say that the principles laid down by the court for the construction of the constitution may all be sound, and yet the act for incorporating the Bank be unconstitutional.").

in *McCulloch* was, in part, his rebuttal to a view of constitutional law that he thought wrong-headed, pernicious even. The argument for Maryland presented in the case by Luther Martin, the state's attorney general and one of the few dissenting members of the Philadelphia framers' convention, was in Marshall's immediate sights. But behind Martin, and the original source of much of Martin's argument, stood Thomas Jefferson and his 1791 cabinet opinion recommending that President Washington veto the bill creating the First National Bank.[61]

Jefferson's argument that the bank bill was unconstitutional rested on an approach to constitutional reasoning that anticipated in remarkable ways Justice Black's much later position. Jefferson thought that a strict adherence to the semantic meaning of the Constitution's language was essential because he believed anything else would allow the "interpreter" to reach whatever conclusion he wished. In Jefferson's view, "[t]o take a single step beyond the boundaries thus specially drawn" by the constitutional text "is to take possession of a boundless field of power, no longer susceptible of any definition."[62] The necessary objective, if the Constitution is to be binding law, was to remove the exercise of personal judgment. To this end, Jefferson invoked narrow definitions of the Constitution's terms, legal canons of construction evolved to interpret statutes, wills and contracts, and even a brief excursion into the at-the-time still secret history of the framers' convention, in his attempt to persuade Washington that fidelity to the written Constitution was inconsistent with approval of the bank.[63]

Marshall's belated answer to Jefferson accused the latter of fundamentally misunderstanding what type of written instrument the Constitution is.

> 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. It would, probably, never be understood by the public. Its nature,

---

61. Jefferson was secretary of state. For a discussion of the antagonistic intellectual relationship between Jefferson's and Marshall's bank opinions, see H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 23–32 (2016). Marshall was thoroughly familiar with Jefferson's opinion since he had printed much of it in his biography of Washington. *Id.* at 27 n.15.

62. Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), *reprinted in,* JEFFERSON POWELL, LANGUAGES OF POWER: A SOURCEBOOK OF EARLY AMERICAN CONSTITUTIONAL HISTORY 42–43 (1991).

63. *Id.*

> therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . In considering this question, then, we must never forget that it is *a constitution* we are expounding.[64]

The Constitution is thus, by definition, an outline of the American political system (in Harlan's words, American society's "basic charter"), and so constitutional adjudication must proceed not by breaking down the Constitution into isolated clauses and words, but by making sense of the text as a whole, in light of the purposes and principles that the judge perceives the Constitution to embody. That is what it means to recall that "it is *a constitution* we are expounding."[65] Marshall's description of the reasoning processes the judge must employ in doing so is, I think, unmistakably normative, not simply an investigation into facts or the interpretation of the meaning of discrete words.[66]

Harlan reiterated this view of what Marshall meant the year after *Poe*. In *Glidden v. Zdanok*, Harlan quoted Marshall in brushing aside what

---

64. *McCulloch*, 17 U.S. (4 Wheat.) at 407.

65. *Id.*

66. Many passages in *McCulloch* seem to me to support this assertion. For a partial sampling, see *id.* at 406 (the Tenth Amendment leaves "the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a *fair* construction of the whole instrument.") (emphasis added); *id.* at 407 (the Constitution is to "receiv[e] a *fair and just* interpretation") (emphasis added); *id.* at 408 (rejecting any conclusion that hampers the accomplishment of "the public good" "unless the words imperiously require it"); *id.* at 409 (basing a conclusion on "the dictates of reason"); *id.* at 421 (in evaluating the constitutionality of an act of Congress based on the necessary and proper clause, among the necessary considerations are whether it uses "means which are *appropriate*" and "consist with the letter *and spirit* of the constitution") (emphasis added); *id.* at 426 (the Bank's immunity from state taxation rests on "no express provision [but] on *a principle which . . . entirely pervades the constitution*") (emphasis added); *id.* at 430–32 (rejecting the state's arguments first on the basis of "*just* theory," and then, "waiving this theory for the present," concluding that the state's position is not "consistent with a *fair* construction of the constitution" because the "principle" on which it rests is "capable of changing totally the character of the instrument") (emphasis added). This aspect of *McCulloch* is even clearer in Marshall's newspaper essays defending his opinion, although in 1961 Harlan would not have had access to the essays since they were edited and published in 1969. *See, e.g.*, John Marshall, Opinion, *A Friend of the Constitution* III (July 2, 1819), ALEXANDRIA GAZETTE, *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 168 (Gerald Gunther ed., 1969) (stating that constitutional decisions should conform to "that great paramount law of reason, which pervades and regulates all human systems").

Harlan thought was the sort of over-nice parsing of constitutional language Black's textualism invited.[67] In a much earlier case, the Court had stressed the fact that Article III's list of the possible categories of federal court jurisdiction refers to "*all* Cases" falling within some categories of federal jurisdiction but merely to "Controversies" (with no adjective) with respect to others. Harlan dryly observed that "[t]o derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that 'it is *a constitution* we are expounding,'" and then went on to read the earlier decision as actually based on a constitutional principle that was "well-settled and understood" from the beginning but expressed *nowhere* in the text.[68]

The parallels between the *Poe* dissent and the *McCulloch* opinion lie both in the positive account they give of the Constitution and in the narrow textualism they reject. Harlan doubtless hoped that knowledgeable readers would take note of both. In addition, equating his approach with that of Marshall brought with it two other welcome implications. First, as he went on to assert in his very next sentence, Harlan propounded his "rational process in Constitutional adjudication" as a general truth about constitutional law, and not simply a special defense of a controversial mode of argument. In doing so, Harlan not only rebutted the charge of Black and others that due process was a deviation from an earlier constitutional orthodoxy,[69] but implicitly claimed that his "rational process" of adjudication applies to constitutional issues, such as the scope of congressional power, where the constitutional text arguably provides more guidance.[70] Second, the citation to *McCulloch* reminds the knowledgeable reader that Marshall had hinted that our understanding of the Constitution's requirements can properly develop over time.[71] Harlan's opinion would go

---

67. Glidden Co. v. Zdanok, 370 U.S. 530, 562 (1962) (Harlan, J.) (plurality opinion) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407)).

68. *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 407)). The precedent in question was Williams v. United States, 289 U.S. 553, 572–73 (1933).

69. *See* Lincoln Fed. Labor Union v. Nw. Iron & Metal Co., 335 U.S. 525, 536 (1949) (Black, J.) (claiming that in "steadily reject[ing] the due process philosophy enunciated in the [*Lochner*] line of cases," the Court "has consciously returned closer and closer to the earlier constitutional principle").

70. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 188–99 n.27 (1968) (analyzing and extending doctrinal principles and economic reasoning found in earlier cases, and taking note of the role of the commerce clause's text, in upholding extension of Fair Labor Standards Act protections to state employees).

71. *See McCulloch*, 17 U.S. (4 Wheat.) at 415 (the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs"); *id.* at 422–23 (pointing out that experience of a national bank's "importance and necessity" "in the administration of our finances" had persuaded "statesmen of the first class" to abandon their "previous opinions" that the bank was not a necessary and proper means of executing the fiscal powers and to concur in "the importance of this instrument, as a means to effect the legitimate objects of

on to defend the legitimacy of development and change in constitutional law. Harlan's initial citation to *McCulloch* foreshadowed that argument and his claim that it is the recognition of development, not Black's nominal rejection of change in the Constitution's application, that is the historical norm.

C. The Meaning of "Due Process of Law"

Having succinctly but clearly set out his overall view of constitutional adjudication, Justice Harlan turned to address the issues raised by analyzing the validity of the Connecticut contraceptives law under the due process clause of the Fourteenth Amendment. Seen in the context of his perspective, due process is not the anomaly that Justice Black and others claimed, but its legitimacy and limits still must be established.

> But as inescapable as is the rational process in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.[72]

Once again, Harlan chose to express himself in language that implicitly, but no doubt deliberately, rejected Black's style of textualism. The due process clauses are, of course, authoritative texts, but if we are to keep in mind Chief Justice Marshall's injunction to remember that "it is a *constitution* we are expounding,"[73] the "rational process" of expounding the clauses is not simply a matter of discovering and applying meaning that is already there, fixed in the words of the clauses. Constitutional decision making, as Harlan and (in Harlan's view) Marshall understood it, necessarily involves an element of creative judgment that can rightly be described as "giving meaning to the prohibitions" that the due process clauses impose.

---

the government"). These suggestions that some form of doctrinal development in constitutional law is legitimate are even clearer in Marshall's newspaper essays. *See, e.g.*, John Marshall, Opinion, *A Friend of the Constitution* III (July 2, 1819), ALEXANDRIA GAZETTE, *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 170 (Gerald Gunther ed., 1969) (the Constitution "is intended to be a general system for all future times, to be adapted by those who administer it, to all future occasions that may come within its own view").

72. Poe v. Ullman*,* 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

73. The words "*a constitution*" are italicized in the earliest printed versions of *McCulloch* of which I am aware.

Once again, Harlan had suggested a great deal in a very few words. A textualist like Black ordinarily starts with the assumption that constitutional provisions have clear, discrete, semantic content or that the history of their adoption will establish their meaning. As a consequence, the Constitution is in principle unchanging in application. One answer is correct and all others are wrong, then as now. Because textualism views constitutional adjudication as the discovery of an objective fact about the text rather than a rational process of determining the appropriate meaning to give to the text, it is easy for the textualist to conclude that the substance he finds congenial is the text's obvious meaning.[74]

Harlan, on the other hand, thought it absurd to assume self-evident clarity about a basic constitutional charter that sets out the principles of government. The Constitution's specific wording is certainly meaningful, but how to explicate and apply that meaning is often subject to serious debate, a fact that textualism effectively side steps. A judge cannot properly address the interpretation of constitutional provisions, and especially ones written broadly or ambiguously such as the due process clauses, based on presumption or intuition-based fiat.[75] Furthermore, textualists often assume that the application of the relevant constitutional provision is unproblematic, that once the meaning of the provision's words is determined, that meaning maps onto an actual constitutional controversy without the intervention of personal normative judgment. Harlan thought otherwise. Both in interpretation and application, the constitutional decision maker must weigh conflicting views and determine which, in the judge's mind, is most persuasive.

---

74. In Harlan's view, Black sometimes fell into this trap. For example, in *Wesberry v. Sanders* the Court announced, in an opinion written by Black, that the language of Article II requires that congressional districts be drawn on an equal-population basis. 376 U.S. 1, 11 (1964). Five years later, Harlan commented that Black's "constitutional reasoning I still find it impossible to swallow," although he accepted *Wesberry* as precedent that "I consider myself bound" to follow. Kirkpatrick v. Preisler, 394 U.S. 542, 552 (1969) (Harlan, J., dissenting). In *Wesberry* itself, Harlan had filed an opinion that in his view—and that of many other constitutional lawyers—had eviscerated Black's textual and historical arguments as completely implausible. *Wesberry,* 376 U.S. at 21 (Harlan, J., dissenting). *Compare id.* at 7–8 ("[C]onstrued in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."), *with id.* at 41–42 (Harlan, J., dissenting) (summarizing his twenty-page discussion of text and history with the conclusion that "the language of Art. I, §§ 2 and 4, the surrounding text, and the relevant history are all in strong and consistent direct contradiction of the Court's holding."). This is discussed further in section II, below.

75. On the due process clauses' ambiguity, see *Poe*, 367 U.S. at 540 (It is "a truism" to say that the clauses are "not self-explanatory" while the history of the Fourteenth Amendment "sheds little light on the meaning of the provision").

It was characteristic of Harlan's opinion writing to begin a constitutional analysis by bringing up positions or doctrines that he did not think controlling, and explaining why he was setting them to one side. In his *Poe* opinion, he had already taken that approach in the first part of his dissent, going through a number of considerations about justiciability and showing the reader why, in his view, they did not support the Court's dismissal of the appeal. The technique's intended effect presumably was to increase the persuasiveness of Harlan's approach by showing the reader that alternative perspectives were untenable.[76] So the first part of Harlan's specific discussion of due process in *Poe* dealt with two alternative understandings of the clauses that Harlan believed that the Court had repeatedly rejected and rightly so because they are flawed in principle.[77]

The first of these alternatives would read the due process clauses as "limit[ed] to a guarantee of procedural fairness."[78] Although Harlan respectfully commented that this position had been "ably and insistently argued," he argued that the argument rested on a misunderstanding of the historical background and structural function of the language of "due process of law." The phrase originated in chapter 39 of Magna Carta, in which the king promised not to "go against [any free man] or send against him, except by the lawful judgment of his peers or by the law of the land."[79] The monarch's promise to respect "the law of the land" or "due process of

76. This is discussed below. See also James Boyd White's insightful analysis of Harlan's use of the same technique in Harlan's great free speech opinion in Cohen v. California, 403 U.S. 15 (1971), in White, *Living Speech: Resisting the Empire of Force* 190–91 (2008).

77. In *Poe*, Harlan did not discuss a third view of the due process clause that he later rejected, the process of "selective incorporation" of some but not all Bill of Rights provisions, since that series of cases effectively began with *Mapp v. Ohio*, decided the same day as *Poe*. *See Poe*, 367 U.S. at 497 (Harlan, J., dissenting). As the pattern became clear, Harlan consistently rejected selective incorporation as equally ahistorical and even more illogical than Black's total incorporation position. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 166 (1968) (Harlan, J., dissenting) (the selective incorporation precedents have "compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether [the relevant Bill of Rights clause] should be incorporated into the Fourteenth, jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out.'").

78. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting).

79. This English translation is that of the Magna Carta Project. *See The Magna Carta Project,* MAGNA CARTA RESEARCH, https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39# [https://perma.cc/2RR7-265L] (last visited July 11, 2021). The original Latin translated as "by the law of the land" is "per legem terrae." *Id.*

law"[80] was what we would call a procedural guarantee against lawless executive action. Under English constitutional norms as they eventually settled, such a guarantee could not be extended to limit Parliament's plenary legislative powers, nor was there any need for such a limitation. Since Parliament is the sovereign source of law, by definition it cannot be a lawless tyrant.

Constitutional arrangements in the United States are very different. American legislatures are not sovereign and there is no conceptual difficulty with the ideas of unlawful legislation or legislative tyranny. Indeed, binding the legislature by laws adopted by the sovereign People is part of the point of the written American constitutions.[81] Therefore, Harlan concluded, despite the procedural sound of the due process and law of the land clauses found in state constitutional documents and the Fifth and Fourteenth Amendments, if they are to accomplish the purpose of prohibiting tyranny they must prohibit oppression through legislation as well as unfair or inadequate procedure in executive actions.

> 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. *Compare, e.g.*, *Selective Draft Law Cases*; *Butler v. Perry*; *Korematsu v. United States.* 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.'[82]

Harlan supported this explanation of why American constitutional law had to extend beyond the original scope of Magna Carta to encompass legislative tyranny with a citation to three earlier decisions. Since he did not gloss the cases, the citation is cryptic on its face, but I think we can work out why Harlan cited them. Doing so will further clarify our understanding

---

80. A fourteenth century act of Parliament adopted this wording in a paraphrase of chapter 39. *See* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 14–15 (1964).

81. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.").

82. *Poe*, 367 U.S. at 541 (Harlan, J., dissenting) (citations abbreviated).

of why Harlan rejected the fair-procedures-only reading of the due process clauses, but that clarification requires a closer look at the cases.

Harlan's citation invites the reader to "*[c]ompare*" the Supreme Court's decisions upholding the World War I military draft,[83] the traditional authority of local government to require an inhabitant "to labor for a reasonable time on public roads near his residence without direct compensation,"[84] and the World War II exclusion of American citizens with Japanese ancestry from the West Coast.[85] In the two earlier decisions, the Court reasoned that legal tradition, and, in the case of the military draft, the delegation to Congress of the power to raise armies, demonstrated that requiring individuals to perform what were understood as lawful obligations owed to the public, was not a denial of an individual claimant's liberty.[86] With the distinct and additional point that the challengers made no claim that government had failed to follow appropriate procedures in executing its power, the Court could conclude that due process had not been violated. From Harlan's perspective in *Poe*, the two cases illustrated a Court carefully examining the substantive validity of governmental action that restricted the freedom of the individual and concluding that the restriction was not oppressive or tyrannical because it was pursuant to long-settled understandings of the individual's duties under law.

Compare this to the *Korematsu* exclusion-order decision. A contemporary lawyer would conceptualize Fred Korematsu's claim in equal protection terms. Korematsu was subjected to mandatory and, if necessary, forcible exclusion from the area of his home and work solely because of his racial or ethnic identity. But the Fifth Amendment has no equal protection clause, and the Supreme Court's decisions holding that the federal government has the same equal protection duties as do the states—bound

83. Selective Draft Law Cases, 245 U.S. 366 (1918).

84. Butler v. Perry, 240 U.S. 328, 330 (1916).

85. Korematsu v. United States, 323 U.S. 214 (1944). *Korematsu* is often remembered as upholding the related detention in internment camps of those subject to the West Coast exclusion order, but the majority expressly declined to reach the validity of the detention order. *See id.* at 223 ("[W]e are dealing specifically with nothing but an exclusion order"). Surprisingly, the Supreme Court's recent disavowal of *Korematsu* made precisely this mistake. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018). The parallel between the actual decision in *Korematsu* and the executive order upheld in *Trump* (which excluded certain otherwise eligible foreign nationals from admission into the United States) is not quite as remote as the Court's faulty memory made it seem.

86. *Selective Draft Law Cases*, 245 U.S. at 378 (rejecting the argument that "compelled military service is . . . in conflict with all the great guarantees of the Constitution as to individual liberty" because "the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it"); *Butler*, 240 U.S. at 333 ("[T]o require work on the public roads has never been regarded as a deprivation of either liberty or property").

by the Fourteenth Amendment's express equal protection clause—were decades away. Korematsu was obliged, therefore, to frame his central constitutional challenge as the claim that he had been denied due process of law. His brief argued that the exclusion order violated the due process clause's substantive protection of his liberty to live, work, and move as he chose, its implicit prohibition on racial discrimination, and its guarantee of procedural due process.[87] As the *Poe* dissent would assert years later, Korematsu's brief claimed that the transplant of Magna Carta's limit on executive oppression into the American constitutional setting necessarily expanded due process beyond a requirement of fair procedures. "The utter inequality which has been practiced herein would seem to violate the due process clause of the 5th Amendment for due process is synonymous with 'law of the land' which, in America, cannot mean one law for one citizen and another for another citizen."[88]

The government's response was to deny that Fifth Amendment due process puts any substantive limitation on the exercise of the federal war powers.[89] The Court, however, refused to accept that argument even as it ruled in the government's favor. Justice Black's opinion for the majority[90]

---

87. Brief for Petitioner in Korematsu v. United States, No. 22 (O.T. 1944), at *47–49.

88. *Id.* at *48.

89. The Court's earlier *Hirabayashi* decision upholding a curfew order limited to persons of Japanese ancestry gave some credence to this bald assertion. *See* Brief for Respondent in Korematsu v. United States, No. 22 (O.T 1944) at *25 ("[I]f an order was 'an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty'") (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)). Perhaps uneasy at relying too heavily on so broad an assertion, at one point in its brief the government qualified its position slightly. *See id.* at *24 ("Measures coming within the war power do not violate the Fifth Amendment, whether or not they could be sustained in normal times, although that Amendment must be considered in determining the validity of a particular exercise of the war power under the circumstances which evoke it."). But the government also cited the *Selective Draft Law Cases* as supporting its Fifth Amendment argument because that decision "denied the limiting effect of several other constitutional provisions with respect to" Congress's war powers authority to impose "sacrifices on the part of individuals." *Id.* at *25.

90. Black's opinion is unmistakably at odds with his later textualism, which denied any substantive dimension to the due process clauses other than the formal role the Fourteenth Amendment clause played in the incorporation of the Bill of Rights. But in 1944, Black had not yet fully developed his textualist ideas. *See* above n.32 discussing Black's opinion for the Court in *Marsh v. Alabama*. Even after the 1940s, however, Black was willing to give non-procedural, substantive effect to the due process clauses when a question of racial equality was at stake. In *Bolling v. Sharpe* and *Loving v. Virginia*, Black joined without stating any reservation opinions of the Court that invoked the substantive dimension of due process to invalidate, respectively, de jure racial segregation in the District of Columbia and a state miscegenation law. *See* Loving v. Virginia, 388 U.S. 1, 12

clearly acknowledged that the exclusion order was a direct, and indeed severe, intrusion into substantive constitutional interests protected by the due process clause. Black signaled as much at the beginning of his analysis.

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[91]

The Fifth Amendment due process clause, in other words, puts a severe substantive limit on the extent to which Congress and the executive can restrict the exercise of "civil rights" along racial lines regardless of the procedures used to enforce the restriction.

Later in his opinion, Black restated the Court's agreement with Korematsu that the exclusion order affected a constitutionally protected liberty, at this point without mentioning the issue of racial discrimination. "Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions."[92] Nonetheless, the majority upheld the exclusion order because it concluded it could not second guess the

---

(1967) (the right to marry is a "fundamental freedom" and limiting it by racial classifications "is surely to deprive all the State's citizens of liberty without due process of law" in violation of the Fourteenth Amendment); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (public school segregation imposes on black children "a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause" of the Fifth Amendment). To be sure, the *Loving* Court offered its due process rationale as an alternative to a more developed equal protection holding, but Black declined to join Justice Stewart's brief opinion concurring in the judgment on equal protection grounds alone. *See Loving*, 388 U.S. at 13 (Stewart, J., concurring). Black's decision not to join Stewart is all the more striking because, as we shall see below, three years before *Loving*, Black and Stewart filed dissents in *Griswold v. Connecticut* that rebut in tandem what they both saw as incorrect revivals of *Lochner* era substantive due process. This may only show that, as I myself think, Justice Black was a great, but not always consistent, constitutional lawyer. *See* Walt Whitman, *Song of Myself* ("Do I contradict myself?/Very well then I contradict myself./(I am large, I contain multitudes)."

91. *Korematsu*, 323 U.S. at 216.

92. *Id.* at 219–20. *See also id.* at 218 ("[E]xclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either.").

conclusion of Congress and the executive that the nation had faced "circumstances of direst emergency and peril" at the relevant time.[93] Korematsu's challenge to the exclusion order was unsuccessful not because he had failed to present weighty claims to due process protection but because the Court thought them outweighed by a showing of military necessity it could not reject and because under war time conditions it is normatively appropriate for citizens to accept the imposition of hardships and interferences with their freedom.[94] In their dissents, Justices Murphy and Jackson came to the opposite conclusion because they thought, for similar but distinct reasons, that the government's arguments failed to meet the demands of due process.[95]

We can now return to the question of why Harlan thought *Korematsu*, like the military draft (*Selective Draft Law*) and public-road labor (*Butler*) decisions, supported his argument that due process cannot be limited to guaranteeing fair procedure. In none of the three cases did the individual(s) press a procedural due process argument. In fact, Fred Korematsu conceded that he had no procedural due process claim in the

---

93. *See id.* at 218 ("'[W]e cannot reject as unfounded the judgment of the military authorities and of Congress'") (quoting and relying on *Hirabayashi*, 320 U.S. at 99).

94. *See id.* at 219 ("[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.").

95. Murphy explained that the correct "judicial test" would require the government to show "a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger." *Id.* at 234 (Murphy, J., dissenting). In his view, what the government had offered as justification for a blanket exclusion order were unpersuasive arguments based ultimately on racism and wholly inadequate as a basis for depriving citizens of "equal protection of the laws . . . their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely." *Id.* at 233–39 (Murphy, J., dissenting). Jackson grounded his dissent on the "fundamental assumption [that] underlies our system . . . that guilt is personal and not inheritable." *Id.* at 243 (Jackson, J., dissenting). Like Murphy, Jackson's reasoning blended substantive and procedural concerns. By upholding an order forcibly driving citizens from their homes based on their ancestry, Jackson thought the majority had "validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." *Id.* at 243, 246 (Jackson, J., dissenting).

Justice Roberts also dissented because he thought Korematsu had been subject to conflicting orders requiring him to shelter in place and to leave the area. *See id.* at 232 (Roberts, J., dissenting) ("[I]f a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law"). The majority insisted that the orders in question were not in conflict. *Id.* at 220.

district court.[96] If due process guarantees only fair procedures, the outcome in each case would have been unchanged—the government would have prevailed—but for a different reason. The challenger(s) to the law in question would have failed to present a constitutional claim. But in all three cases the Court discussed at length the substantive validity of the law.

In the *Selective Draft Law* and *Butler* decisions, the conclusion of the due process inquiry was that the interference with the individual's autonomy did not intrude on an aspect of liberty traditionally respected by American law. Indeed, history validated the legitimacy of the restriction on liberty in question, and thus the challengers had received due process of law. In contrast, in *Korematsu*, all the justices agreed that the case involved a severe governmental intrusion into aspects of individual liberty traditionally respected in American law, and without historical justification.[97] The majority and the dissenters parted company over whether the Court was obliged to accept the government's claim that the exclusion order did in fact rest on "pressing public necessity," but no justice denied that due process required the government to make such a showing given the severity of the invasion of liberty.

Taken together, the three cases Harlan cited show the Court reviewing the substantive validity of legislation, on issues unrelated to the

---

96. *Id.* at 220 (Korematsu "stipulated in his trial that he had violated [the exclusion order], knowing of its existence."). *See also* Selective Draft Law Cases, 245 U.S. 366, 376–77 (1918) (the cases were criminal prosecutions, and the Supreme Court reviewed the defendants' objections to the district courts' rulings); Butler v. Perry, 240 U.S. 328, 333 (1916) ("Ample notice appears to have been given and disregarded. There was an orderly trial and conviction before a duly constituted tribunal").

97. At this point, one may well object that in 1944 the American legal tradition could hardly be said to have safeguarded freedom from racial discrimination in reality. The point is sadly undeniable, but if we give a charitable reading to Justice Black's opinion, we might say that he was expressing what he thought the tradition *ought* to have been doing all along. All racial discrimination *should be* "immediately suspect" and "subject to the most rigid scrutiny." Justice Murphy is not usually remembered as a precise judge, but on this issue he rather carefully spoke in aspirational rather than descriptive terms. "Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States." *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Jackson pointed out that American criminal law has never treated ancestral "guilt" as a basis for criminal liability, and that in effect that is what discriminations based on race amount to, at least in the criminal law context. *Id.* at 243 (Jackson, J., dissenting) ("Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.").

discredited freedom of contract doctrine, and illustrated the way that history could inform the Court's judgment about the weightiness of an individual's claim to liberty. The decisions thus provided clear support for Harlan's claim that the Court had repeatedly rejected the procedure-only understanding of due process, authority which he reinforced by immediately following the citations with words quoted from a seventy-five-year-old decision, *Hurtado v. California*. The proposition that "in this country," the "guaranties of due process" have "'become bulwarks against arbitrary legislation'" thus predates the *Lochner* era.[98]

Read as provisions in our basic charter of government, the most faithful construction of the spare but meaningful terms of the due process clauses had long been known to require that the clauses be given a substantive application. As *Hurtado* had explained long before, "[a]pplied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but in that application . . . they must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[99] By limiting American due process to its English scope, the procedure-only interpretation of the clauses not only contradicts long-standing precedent—precedent older than *Lochner* and untainted by the error, if such it be, of freedom of contract—but makes the American guaranties unable to achieve, in the American constitutional setting, what the English approach does under very different constitutional arrangements: It leaves American citizens vulnerable to oppressive and arbitrary interferences, unsanctioned by the sovereign, with their liberty.

The second flawed understanding of due process that Justice Harlan dismissed as untenable was Justice Black's theory of total incorporation, which Harlan described as the view that "the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action."[100] In later opinions, Harlan put great weight on the argument that Black was historically mistaken, and that the incorporation theory did not carry out the purposes of the Fourteenth Amendment's leading proponents as Black believed.[101] In *Poe*, however, written just as the great incorporation

98. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting Hurtado v. California, 110 U.S. 516, 532 (1884)).

99. *Hurtado,* 110 U.S. at 532.

100.*Poe*, 367 U.S. at 540–41 (Harlan, J., dissenting). In discussing the incorporation theory, Harlan mentioned neither the term nor Black.

101.*See, e.g.,* Duncan v. Louisiana, 391 U.S. 145, 174–76 (1968) (Harlan, J., dissenting). Harlan also criticized incorporation for imposing on the states not just the general principle of a particular Bill of Rights provision but its details as well. *See id.* at 173 n.1 (Harlan, J., dissenting) (citing his critiques of incorporation). For his history, Harlan relied chiefly on an article by Professor Charles Fairman that

struggles of the 1960s were beginning,[102] Harlan offered a different and more fundamental objection.

The incorporation theory, Harlan correctly pointed out, required one to disregard a long series of Supreme Court precedents. "Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights."[103] But for Harlan, the error with incorporation went beyond its violation of the principle of *stare decisis*. The theory's proponents, he argued, had radically misunderstood how a judge should approach the text of the Constitution. The underlying flaw in the incorporation theory is, in other words, the same as that which renders the procedure-only interpretation of due process untenable. Both approaches mislead their proponents into ignoring Chief Justice Marshall's injunction to remember it is a *Constitution* we are expounding. In his *Poe* dissent, Harlan interwove his demonstration of the incorporation theory's version of this mistake with his affirmative discussion of how a court should decide a novel and difficult constitutional question in the tradition of *McCulloch*.

Harlan's starting point for contrasting the incorporation theory with Marshallian constitutional adjudication was to point out that the idea of substantive protections for liberty that are not spelled out by specific language in the constitutional text long predates the adoption of the Fourteenth Amendment.

> [I]t is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are . . . fundamental; which belong . . . to the citizens of all free governments," *Corfield*

Fairman wrote in response to Black's seminal incorporation opinion in *Adamson*. *See id.* at 174, n.9 (Harlan, J., dissenting) ("The overwhelming historical evidence marshalled by Professor Fairman demonstrates, to me conclusively, that the Congressmen and state legislators who wrote, debated, and ratified the Fourteenth Amendment did not think they were 'incorporating' the Bill of Rights"). More recent research suggests that Fairman (and Harlan) greatly overstated the case against Black's belief that leading proponents thought the amendment would incorporate the Bill of Rights. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

102. Looking back from the end of the decade, Harlan described it as "a decade that has witnessed revolutionary changes in the most fundamental premises of hitherto accepted constitutional law." Desist v. United States, 394 U.S. 244, 266 (1969) (Harlan, J., dissenting). It is clear from the context that Harlan chiefly had in mind the almost-complete selective incorporation of the Bill of Rights into the Fourteenth Amendment.

103. *Poe*, 367 U.S. at 541 (Harlan, J., dissenting).

> *v. Coryell*, for "the purposes [of securing] which men enter into society," *Calder v. Bull*.[104]

Once again, to understand fully what Harlan's opinion means, we should take seriously the cases he cites as authorities. The *Corfield* language was from an opinion written by Justice Bushrod Washington "riding circuit" in a case decided four years after *McCulloch*. One issue in *Corfield* involved the scope of the clause in Article IV of the Constitution providing that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[105] Washington rejected the argument that a New Jersey law limiting oyster and clam harvesting to residents of the state violated the Article IV clause. In doing so, he opined that the term "privileges and immunities" is "confin[ed]" to "those privileges and immunities which are, in their nature, fundamental," and that the privilege of engaging in oyster fishing was not among them.[106] In its immediate context, Washington's point was to contrast the general legal rights that he thought the Article IV clause protects with access to a state's natural resources, which in his view were "the common property of the citizens of such state."[107] But Washington's discussion of the privileges and immunities that Article IV *does* protect was to prove widely and extremely influential, and it is that discussion that Harlan invoked in *Poe.*[108]

Justice Washington offered two approaches to describing the scope of the privileges and immunities clause. Washington first described the method a court should use in determining if a privilege or immunity is

---

104. *Id.*

105. U.S. CONST. art. 4, § 2, cl. 1.

106. Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

107. Washington's distinction paralleled one Marshall had drawn in *McCulloch* between a state tax on the operations of the national bank, which the Court held invalid, from "a tax paid by the real property of the bank, in common with the other real property within the state," which Marshall expressly noted would be constitutional. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). National unity, which both the *McCulloch* tax immunity doctrine and Article IV safeguard, is consistent with recognizing some degree of state authority to control the use of resources found within the state by non-residents. Given the centrality of private property rights to early American constitutional thought, it is unsurprising that Washington made it clear that as a general matter the right "to take, hold and dispose of property, either real or personal" is a fundamental privilege protected by Article IV. *Corfield*, 6 F. Cas. at 552.

108. *See, e.g.,* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 384 (1978) ("[T]he Court has described [*Corfield*] as 'the first, and long the leading, explication of the [Privileges and Immunities] Clause. . . .'") (citation omitted); Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAN. L. REV. 609, 632–33 (2014) ("For almost two hundred years, the leading case interpreting the meaning of 'privileges and immunities' has been *Corfield v. Coryell*. . . .").

"fundamental" and thus within the clause. Second, he "enumerate[d]" the rights the clause protects. As to the first approach, Washington went beyond simply attaching the label "fundamental" to rights he personally thought important. Privileges and immunities are fundamental if they "belong, of right, to the citizens of all free governments" and if they "have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[109] Deciding whether a particular privilege is within Article IV's protection thus requires the court to make a normative judgment about the importance of the privilege to a governmental system like ours and an historical judgment about the privilege's status in the American legal tradition.[110] Both elements are present in Justice Harlan's due process analysis.

Washington's second approach was, on the surface, very different. Rather than suggesting a method of inquiry, he proffered a list of answers. In fact, despite asserting that "it would perhaps be more tedious than difficult to enumerate" the privileges and immunities that are fundamental, Washington insisted on providing the reader with two lists. One was a catalog of specific "right[s]" that Washington thought covered by Article IV,[111] while the other asserted that "fundamental principles" under Article IV "may . . . be all comprehended under the following general heads."[112] A careless reader who glanced too quickly at what one commentator has called "the famous *Corfield* list of privileges and immunities"[113] might well

109. *Corfield*, 6 F. Cas. at 551.

110. Washington also observed that fundamental privileges and immunities are those "the enjoyment of [which] by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.'" *Id.* at 552.

111. *See id.* ("The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.").

112. *Id.* at 551.

113. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867-1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 305 n.503 (2009). Professor Wildenthal's important article is not directly concerned with *Corfield*, and I do not mean to fault him for eliding what I

think that Justice Harlan was making a serious mistake in citing *Corfield* in *Poe*. Washington's claim that very broad constitutional language should be construed to mean a specific list of rules seems to be precisely the logic of total incorporation.

Harlan, however, made no mistake, and a close reading of *Corfield* shows that it supports Harlan's argument against incorporation. Washington's set of specific rights was expressly non-exclusive[114] and he explained that the rights he did mention were on the list because they "are clearly embraced by the general description of privileges deemed to be fundamental."[115] In other words, they are an incomplete specification of the "fundamental principles" outlined in Washington's other list. Washington described that list of principles in terms broad enough to serve as a comprehensive description of the constitutional relationship between government and individual liberty. Article IV concerns "fundamental principles [that] may be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."[116]

Washington's enumeration approach to explaining the privileges and immunities clause converges with his other methodological discussion. Both assume that American constitutional law can and must work at times with principles that cannot simply be deduced from the Constitution's words, that courts have the capacity and the obligation to discern the specific legal entitlements that must be recognized to give those principles their proper effect, and that in doing so judges must make normative as well as historical judgments rather than simply consult a determinate enumeration of those rights.[117] Harlan's understanding of constitutional adjudication embraces each of these assumptions, while Black's textualism and his incorporation theory both rest on his fundamental disagreement with all three.

Harlan's second quotation in the sentence we are considering is from a decision even older than *Corfield*. *Calder v. Bull*, decided in 1798, was one of the Supreme Court's first constitutional law cases and addressed

---

believe a closer reading shows to be two distinct lists making somewhat different points.

114. The list of specific rights ends with the comment that "[t]hese, and many others which might be mentioned, are, strictly speaking, privileges and immunities. . . ." *Corfield*, 6 F. Cas. at 152.

115. *Id.* at 552.

116. *Id.* at 551–52.

117. The language of the privileges and immunities clause virtually demands that courts make such judgments. It is faintly ironic that Washington's *Corfield* opinion itself has sometimes been treated, in later cases, as a determinate list. *Id.* at 552.

the meaning of the *ex post facto* clause of Article I § 10. There was no opinion of the Court, and the phrase Harlan quoted is from Justice Samuel Chase's seriatim opinion, which the "Court has recognized as providing an authoritative account of the scope of the *Ex Post Facto* Clause."[118] Harlan's interest, however, lay not in Chase's discussion of that clause but in a discussion earlier in the opinion of a question that Chase himself admitted was not before the Court. Are there limitations on what a state legislature or Congress can do that are not derived from the text of any constitutional provision? Chase's answer was an emphatic yes.

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. . . . The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments. . . . An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[119]

Chase also provided examples of legislative acts that would be contrary to the purposes of free republican governments and thus, in his view, of no legal effect, but he made it clear that the list was not exclusive.[120] Determining if a legislative act violates "the great first principles of the social compact" seems, in his view, to be primarily a normative judgment, although Chase, who was a signatory to the

118. Stogner v. California, 539 U.S. 607, 611 (2003).

119. Calder v. Bull, 3 U.S. (3 Dall.) 386, 387–89 (1798) (opinion of Chase, J.). The first sentence in this passage is not entirely clear: I believe that Justice Chase meant that he could not concede that there are no legal constraints on a state legislature except those imposed "expressly" by a constitutional text. *Id.* at 387. Chase subsequently made it clear that he thought that Congress is similarly constrained.

120. *Id.* at 388 (opinion of Chase, J.) (prefacing his list with "[a] few instances will suffice to explain what I mean.").

Declaration of Independence, doubtless thought the history of American revolutionary and constitutional thought relevant to that judgment.[121]

The specific questions before Justice Chase in 1798 and Justice Washington in 1823 were different, and they use somewhat different terminologies, but their opinions both rest on the assumption that constitutional law is not limited to parsing the specific language of the Constitution, and each displays a robust confidence in the legitimacy of courts making normative judgments about the existence and application of constitutional principles that cannot be ascribed in any strong sense to constitutional texts. From this shared perspective, the incorporation theory's attempt to constrain due process analysis within the textual confines of the Bill of Rights is simply bad constitutional law, an "altogether inadmissible" "political heresy."[122] For Harlan, quoting Chase had the additional advantage of reminding the knowledgeable reader that Justice William Iredell's opinion in *Calder* had criticized Chase along lines very similar to those Justice Black would employ a century and a half later. Black's approach to constitutional law, in other words, was proposed, and challenged, a very long time ago.[123]

Harlan intended to do more than show that the incorporation theory and, by implication, Black's textualism in general are untenable. The quotations from *Corfield* and *Calder* affirmatively demonstrate that crucial aspects of his understanding of due process go back to the Supreme Court's

---

121. *See id.* ("The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence.").

122. *Id.* at 389.

123. *Id.* at 399 (opinion of Iredell, J.) ("If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."). Some scholars have wondered if Iredell was in fact responding to Chase, noting in particular that Iredell spoke only of objections to legislation based on "natural justice," an expression that Chase did not use. This seems highly unlikely to me: Iredell's remarks have no apparent role except to rebut Chase. In any event, the Chase and Iredell opinions have long been read as a debate over Chase's claim that the purposes of an American free government put legal limits on legislative power even in the absence of an express textual prohibition. *See, e.g.,* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469, 491 (1833) (argument of counsel) ("Judge CHASE affirms these positions; Judge IREDELL denies them, in *Calder* v. *Bull*. . . .") (citation omitted). Harlan would have quoted Chase with this long-standing understanding in mind.

earliest period and were held by Marshall Court justices. But establishing an historical pedigree for his views did not, in itself, answer Black's and Iredell's claim that all fundamental principles approaches amount, in the end, to the assertion by judges of the power to set aside legislation *merely* because in the private *opinion* of the judges the statute conflicts with *abstract* principles. Harlan's refutations of the procedure only and incorporation views of due process therefore play only a preliminary, albeit critical, role in setting the stage for Harlan to present what he claimed is the authentic and traditional understanding of due process. Harlan's presentation was shaped in part by the need to show that his understanding is not rightly open to criticisms like Black's.

Let us recall Harlan's most basic assumption. As *McCulloch v. Maryland* taught, the Constitution is the basic charter of our society and establishes our general principles of government. It does not follow that the Constitution's provisions are all pitched at a high level of generality. Harlan thought, for example, that the Article III and Sixth Amendment guarantee to federal criminal defendants of trial by "jury" incorporated the historical common law definition of that term, including aspects of the definition that are unnecessary to the general principle served by the guarantee.[124] But it would be inconsistent with the Constitution's "nature" to treat the broadly-worded due process clauses as if they were discrete rules with an historically fixed meaning. The clauses state, on their face, a general principle, and fidelity to constitutional text requires that judges treat them as such by making inescapably normative judgments about how the general principle applies in specific cases.[125] The further and inevitable consequence is that the judicial applications of due process will develop over time, not because the courts are illegitimately amending the text but because the text itself demands a "rational process in Constitutional adjudication" that fills out the meaning-as-applied of the clauses' general principle through a common-law style elaboration of doctrine.[126] What then is that principle?

As he suggested by the language he borrowed from *Corfield v. Coryell*—"rights . . . 'which belong . . . to the citizens of all free

124. *See* Duncan v. Louisiana, 391 U.S. 145, 182 n.21 (1965) (Harlan, J., dissenting) (The Sixth Amendment imposes "the common-law . . . requirements" that the jury consist of exactly twelve persons and reach its verdict unanimously.).

125. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (The Constitution's "nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.").

126. Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

governments'"—for Harlan due process concerns the basic relationship between the individual and American government.[127]

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. [And] the supplying of content to this Constitutional concept has of necessity been a rational one.[128]

Both individual freedom and government's authority to seek the common good are constitutionally weighty values, and the Constitution neither requires nor permits that either be simply dismissed out of hand. Because both are so important, when liberty and government come into conflict, it is impossible even in theory to resolve the conflict by using a methodological algorithm or by consulting a predetermined list of answers. The judicial task in such a controversy is to find the point of balance that respects the just claims of both liberty and authority in the light of the ongoing tradition of American legal thought that has its roots in, among other sources, Magna Carta's rejection of governmental oppression.

The details of how Justice Harlan thought a court should ascertain that balance will unfold as we work through the rest of his *Poe* opinion. It may assist the reader to know up front that by the term "balance," Harlan did not in fact mean the sort of interest balancing that Justice Frankfurter had championed and Justice Black had attacked for years, and that after Harlan and Black left became characteristic of the Burger Court.[129]

For Harlan in *Poe*, the normative judgments due process requires courts to make are genuinely *legal* judgments, not quasi-legislative choices among competing values, and judges make them by considering criteria found in the law, not in their personal opinions. "Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and

---

127. *Id.* at 541 (Harlan, J., dissenting) (quoting Corfield v. Coryell, 6 F. Cas., 546, 551 (C.C.E.D. Pa. 1823)).

128. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

129. In a classic article, Professor Aleinikoff explained that "although [Harlan's *Poe* dissent] purports to be a balancing opinion, [it] is in fact nothing of the kind." T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 998 n.308 (1987). It might be more exact to say that Harlan used the "balance" metaphor in a different sense than did the Burger Court, but Aleinikoff and I agree substantively that Harlan in *Poe* was not engaged in "balancing" as the term is ordinarily used.

historically developed."[130] The judge's task in a novel or difficult due process case is not to assign metaphorical "weights" based on the values he or she would assign personally to the individual and governmental interests in conflict. Instead, the judge must use the law's tools of reasoning to evaluate the scope of those interests, the extent to which the interests overlap in the particular case, and the propriety of subordinating one interest to the other in the particular case. The judge must make these evaluations in light of history and precedent, guided by the holdings and analyses in earlier cases.

Harlan was aware, of course, that his insistence on the role of personal judgment in due process analysis—"there is no 'mechanical yardstick,' no 'mechanical answer'"[131]—opened him to Black's long-standing charge that such an approach to due process is a usurpation of the legislative function.[132] Immediately after describing due process as entailing a search for the correct balance between "liberty and the demands of organized society," Harlan flatly denied that due process decision making, as he understood it, freed judges "to roam where unguided speculation might take them."[133]

Harlan concluded his general discussion of due process with a lengthy quotation from Justice Frankfurter's opinion for the Court in *Rochin v. California* which asserted that "'the limits that bind judges in

---

130. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

131. The quotations are from a Frankfurter opinion that discussed at some length Frankfurter's approach to due process. *See* Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting) ("Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable."). This article does not explore the complex relationship between the constitutional thought of Frankfurter and that of Harlan. I agree with the widely-accepted view that his older colleague strongly influenced Harlan in his first years on the Court; on the fundamental question of whether constitutional law should resemble common law in its intellectual method or instead follow Black-style textualist lines, the two were in unchanging agreement. In addition, both accepted the inevitability of a role for personal judgment in constitutional adjudication, although as discussed below, think they disagreed quite sharply on what that means. We need not resolve the exact degree to which the *Poe* dissent is compatible with Frankfurter's views beyond these points.

132. *See, e.g.,* Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement, 326 U.S. 310, 326 (1945) (Black, J., concurring in the result) ("[A]pplication of this natural law concept, whether under the terms 'reasonableness', 'justice', or 'fair play', makes judges the supreme arbiters of the country's laws and practices. . . . This result, I believe, alters the form of government our Constitution provides.") (internal citation omitted).

133. *Poe,* 367 U.S. at 542 (Harlan, J., dissenting).

their judicial function'" as a general matter also limit a court's exercise of normative judgment in making due process decisions.[134] But what preceded Harlan's invocation of *Rochin* subtly recast Frankfurter's original point. Frankfurter's argument was essentially defensive, and insisted that Black's critique was unjustified because "'considerations that are fused in the whole nature of our judicial process'"[135] *constrain* the extent to which a judge can exercise a legislative-like discretion in judgment. But Harlan's *Poe* dissent flipped the response to Black from defense to offense. What Harlan offered the reader was an affirmative description of how a judge, working within the *McCulloch* tradition of constitutional adjudication, ought to go about deciding due process issues. Harlan's point was that a decision reached through the means he described does not require or permit the judge to act like a legislator or engage in "unguided speculation" because his or her reasoning is at every point entirely and legitimately judicial.[136] Black's critique was erroneous because Black's own understanding of constitutional adjudication, which disavowed the unavoidable and legitimate use of normative judgment, was fundamentally flawed.

How then should a judge, confronted with a novel or difficult due process claim, approach the task of deciding it? First, a court evaluating a due process claim is, in real sense, speaking for "our Nation" and its judgment must therefore be based on existing American political and legal traditions, which provide the starting point and legitimating basis for its analysis.

> 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. The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The

134. *Id.* at 542, 544 (Harlan, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 170–71 (1952) ("The matter was well put in *Rochin v. People of State of California*[:] '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.'")) (internal citation omitted).

135. *Id.* at 544–45 (Harlan, J., dissenting) (quoting *Rochin*, 342 U.S. at 170).

136. *Id.* at 542 (Harlan, J., dissenting).

> new decision must take "its place in relation to what went before and further [cut] a channel for what is to come."[137]

Adherence to tradition anchors due process decisions in two sources of constitutional law reasoning that Harlan thought unquestionably legitimate. First, the English constitutional and common-law background to the written Constitution and early American constitutional discussions, and second, "the course of this Court's decisions."[138] In this regard, Harlan's invocation of "tradition" might have seemed innocuous to someone like Black, although Black would have insisted that past precedent, if sufficiently erroneous, must give way to present judgment about the Constitution's textual meaning. *Lochner*, after all, was one of many cases in "the course of this Court's decisions" on freedom of contract.[139]

For Harlan, however, to understand due process as a tradition of thought is not merely to recognize the relevance of specific past authorities to today's decision. The English and founding-era background are not a set of rules encoded in the words of the due process clauses as Black sometimes suggested. Instead, they provide the foundation of principle and purpose on the basis of which the Court legitimately makes decisions that go beyond what earlier constitutional lawyers had recognized.[140] Due

---

137. *Id.* at 542, 544 (Harlan, J., dissenting) (quoting *Irvine*, 347 U.S. at 147 (Frankfurter, J., dissenting)). In a case decided four years before *Poe*, Harlan explained that the Court's understanding of the scope of Congress's powers may properly develop over time. *See* Reid v. Covert, 354 U.S. 1, 67–69 (1957) (Harlan, J., concurring in the result) (rejecting the argument that an Article I power is "incapable of expansion under changing circumstances" and relying on the necessary and proper clause and *McCulloch v. Maryland*).

138. *Id.* at 542 (Harlan, J., dissenting).

139. *Id.* (Harlan, J., dissenting).

140. *Cf.* Trs. of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627–28 (1819) (Marshall, C.J.) (holding that the contracts clause of Article I section 10 invalidated a state statute rewriting the terms of the college's royal charter). Marshall rejected as inconsistent with the nature of the constitutional text the argument that the specific purpose of the clause was to prohibit legislative interference with contemporary, executory contracts and that the clause was therefore inapplicable to the modification of a government grant long since executed.

> It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent occurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by

process thought is therefore a "living" tradition, one in which the Court's obligation is to identify and continue the trajectory of thought and decision rather than to return continually to the explicit understandings of any past point in time. Acting within a living tradition in Harlan's sense did not involve, as Black feared, the exercise of a "broad, unbounded judicial authority" or transform the Court into "a day-to-day constitutional convention."[141] The reliance on established legal principles and appropriate adherence to *stare decisis* that Harlan required validate a well-reasoned due process decision even if it upholds a claim of liberty never recognized in the past, and also serve as a basis for determining when a precedent ought not be followed. Due process decision making is a living and legitimate tradition because correct due process reasoning accommodates change and development while ensuring fidelity to past constitutional principles.[142]

As we saw above, earlier in his opinion Justice Harlan insisted that *all* constitutional law, and not simply the law of the due process clauses, depends for its legitimacy on "the rational process in Constitutional adjudication," the exercise of normative judgment about how constitutional principles apply to a particular issue, and not simply on an exegesis of the relevant constitutional text. Harlan returned to that assertion in presenting the second aspect of sound due process thinking. "[T]he supplying of content to this Constitutional concept has of necessity been a rational process. . . . Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed."[143] Previous understandings and existing precedent are the starting point for inquiry into

---

> the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise.

Id. at 644–45.

141. Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting). *See also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 675–76 (1966) (Black, J., dissenting) ("I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.").

142. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

143. *Id.* at 542, 544 (Harlan, J., dissenting) (internal citations omitted).

the scope of liberty under the due process clauses, but they do not provide a determinate set of answers to the question, nor (*pace* Justice Black) do the provisions of the Bill of Rights.

> [T]he imperative character of Constitutional provisions . . . must be discerned from a particular provision's larger context. And, inasmuch as this context is one not of words, but of history and purposes, the 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, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[144]

The larger context of the due process clauses that their "history and purposes" provide is the constitutional imperative of prohibiting oppressive or tyrannical governmental action regardless of its nature, form, or source.[145] Restricting "liberty" to the particular freedoms mentioned in the Bill of Rights, as Black would have the Court do, would leave even the most oppressive interference with liberty unchecked if it took a form different from those anticipated and addressed by the makers of the Bill of Rights, and in so doing, make the United States Constitution's prohibition on tyranny narrower than the Magna Carta's.[146]

To achieve their historically identified purpose, therefore, the due process clauses must be "suppl[ied]" a content that addresses all potential forms of oppression. Rather than borrowing language from an earlier case, which might have implied that there is some canonical formula, Harlan summarized due process liberty as protecting "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary

144. *Id.* at 542–43 (Harlan, J., dissenting) (internal citations omitted).

145. *Id.* at 543 (Harlan, J., dissenting).

146. As noted earlier, because Parliament is sovereign, as a conceptual matter unlawful legislative action is usually thought a conceptual impossibility in English constitutional theory. By banning unlawful executive action, the Magna Carta thus prohibited the only form of illegal political oppression possible in the English system.

impositions and purposeless restraints."[147] In support, he offered a string citation to earlier due process cases led by *Allgeyer v. Louisiana*, the first case in which the Supreme Court upheld a freedom of contract claim.[148] Invoking *Allgeyer*, the original fountainhead of *Lochner* era doctrine, was a bold and even startling act in the post-New Deal era, but Harlan's point in doing so seems clear. Harlan held no brief for freedom of contract as a special constitutional value, and the next three cases in the string citation were ones in which the Court *rejected* a contractual freedom claim while defending the legitimacy of judicial protection for liberty.[149] The implication of the citations was that what was right about *Allgeyer* was not its decision to give special protection to freedom of contract, but its methodological assumption that the Court can legitimately make normative judgments about which aspects of liberty do deserve such protection. Harlan made that implication explicit by adding, immediately after the string citation, the assertion that due process analysis requires judges to

147. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

148. Allgeyer v. Louisiana, 165 U.S. 578, 591–92 (1897).

149. Holden v. Hardy, 169 U.S. 366, 391 (1898), and Booth v. Illinois, 184 U.S. 425, 428 (1902), cited *Allgeyer* as recent authority for the conclusion that the fourteenth amendment prohibits "unjust and oppressive legislation," although they rejected the particular due process claims before the Court. *See Holden*, 169 U.S. at 392 (citing *Allgeyer*, 165 U.S. at 591). *See also Booth*, 184 U.S. at 428 ("Many propositions that meet our entire approval.") (quoting *Allgeyer*, 165 U.S. at 589). The opinion of the Court in Nebbia v. New York, 291 U.S. 502 (1934), was particularly apt from Harlan's perspective. *Nebbia* cited *Allgeyer* once in a footnote, glossing the statement that "neither property rights nor contract rights are absolute." *See Nebbia*, 291 U.S. at 523, n.9 (citing *Allgeyer,* 165 U.S. at 591). Furthermore, *Nebbia* ignored *Lochner* altogether, while reiterating the general due process principle that oppressive legislation may be unconstitutional. *See id.* at 539 (stating that legislation "is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.").

Harlan rounded off the string of authorities by citing Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 247 (1957), (overturning a state supreme court's refusal to permit a former Communist Party member to take the bar examination), and Skinner v. Oklahoma, 316 U.S. 535, 543 (1942) (Stone, C.J., concurring) (concluding that a state law requiring the sterilization of persons convicted of repeatedly committing crimes of moral turpitude violated due process). Stone's underlying concern was with the absence of adequate procedures, but he treated the constitutional problem as a substantive flaw in the statute. *See Skinner*, 316 U.S. 535, 544–45 (1942) (Stone, C.J., concurring). Including *Schware* in the list was a bit puckish, since *Black* wrote the opinion of the Court, although to be fair to the latter, his reasoning was basically procedural, with strong First Amendment overtones. *See Schware*, 353 U.S. at 247. Harlan joined Frankfurter's separate opinion which described the due process principle involved as prohibiting reliance on "a wholly arbitrary standard or on a consideration that offends the dictates of reason." *Id.* at 249 (Frankfurter, J., concurring).

recognize "what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[150]

Citing *Allgeyer*, rather than the better-known *Lochner*, suggested a second point. The opinion of the Court in *Lochner* made no effort to explain why contractual freedom is constitutionally weighty, contenting itself with the statement that *Allgeyer* had said that it was,[151] but in *Allgeyer* the Court had been less cavalier and had reasoned that the importance of freedom of contract was implied in the basic liberty to live a free and productive life.[152] *Allgeyer*, in other words, was a proper example of the "rational process in Constitutional adjudication," although in Harlan's view the Court might have made a misstep in including contractual freedom as a fundamental aspect of liberty.[153] The fact that the Court had subsequently abandoned *Allgeyer*'s specific freedom of contract holding supported Harlan's overall account of due process since the "living tradition" of due process had ultimately corrected the Court's error.

Harlan brought out the implications of rehabilitating *Allgeyer* as a principle of analysis by reviewing two 1920s decisions, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, which had invalidated respectively a prohibition on the teaching of foreign languages and a requirement of public school attendance as violations of Fourteenth Amendment due process.[154] Harlan admitted that "today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief."[155] However, as Harlan pointed out, *Meyer* and *Pierce* reached their results not by construing the text of the First Amendment's "explicit guarantees" but by making the sort of normative judgments that *Allgeyer,* and Harlan, thought due process demands and therefore legitimates.[156]

---

150. *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

151. *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

152. *See Allgeyer*, 165 U.S. at 589 ("The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.").

153. *Poe*, 367 U.S. at 540 (Harlan, J., dissenting).

154. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

155. *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

156. *Id.*

> As was said in *Meyer*, "this court has not attempted to define with exactness the liberty thus guaranteed. Without doubt, it denotes, not merely freedom from bodily restraint." Thus, for instance, when in that case and in *Pierce*, the Court struck down laws which sought not to require what children must learn in schools, but to prescribe, in the first case, what they must not learn, and in the second, where they must acquire their learning, I do not think it was wrong to put those decisions on "the right of the individual to . . . establish a home and bring up children," *Meyer*, or on the basis that "The 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." *Pierce*.[157]

The rights to "establish a home and bring up children" and the freedom from "any general power . . . to standardize its children" are not of course expressly stated in the Constitution's text.[158] To approve them as "the basis" for the Court's specific holdings in *Meyer* and *Pierce* is to recognize the capacity of judicial reasoning to identify the legitimacy and scope of the principles necessary to make normative judgments about what the "liberty" protected by the text requires.

Nothing in this due process analysis changes, Harlan added, if one rests *Meyer* and *Pierce* on the freedoms of "conscience and expression," even if one speaks of these aspects of liberty as First Amendment freedoms incorporated into the Fourteenth Amendment. Harlan expected the reader to recall that the Court had consistently rejected Black's theory of total incorporation, and that as a consequence the rationale for treating a Bill of Rights freedom as protected by Fourteenth Amendment due process cannot be,as Black maintained, simply that the freedom finds textual expression in the Bill of Rights. "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."[159] Due process reasoning, the normative search for the correct balance between liberty and authority based on the Constitution's purposes "as they have been rationally perceived and historically developed," is an inescapable and entirely legitimate tool of constitutional law.[160]

---

157. *Id.* at 543–44 (Harlan, J., dissenting) (citations adjusted) (quoting *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 399).

158. *Id.* at 543 (Harlan, J., dissenting) (quoting *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 535).

159. *Id.* at 544 (Harlan, J., dissenting).

160. *Id.*

D. Due Process Analysis Misapplied: The Parties' Arguments

Having set out "the framework of Constitutional principles in which I think the issue must be judged" in section I of his discussion of "Constitutionality," Justice Harlan turned to the merits of the particular constitutional issue *Poe v. Ullman* presented.[161] Harlan divided his discussion of the merits into two sections, and in doing so created what seems on its face an interpretive difficulty. Section II asserts, but makes no effort to show, that the liberty in question is one of those "interests [that] require particularly careful scrutiny of the state needs asserted to justify their abridgment."[162] Particularly in light of Justice Black's accusations that views such as Harlan's rest on nothing but the judge's "own concepts of decency and fundamental justice,"[163] section II's bald declaration that the Connecticut statute "*unquestionably*" deprives [the appellants] of a substantial measure of liberty" is striking, and unlikely to be accidental.[164] What point was Harlan making?

The answer, I believe, lies in the role that section II plays in the *Poe* dissent as a whole. The reader will recall that in discussing due process analysis generally, Harlan first tried to persuade the reader that the procedure only and total incorporation views of Fourteenth Amendment due process are untenable, and having set out that negative backdrop, he presented his own approach as persuasive in part because it is free of the problems with the other positions. In parallel fashion, section II attempted to demonstrate that the primary arguments of both the appellants and the state gave untenable descriptions of the constitutional interests lying on either side of the controversy in *Poe*.[165] In doing so, section II's purpose

---

161. *Id.* at 539 (Harlan, J., dissenting).

162. *Id.* at 543 (Harlan, J., dissenting). In fact, section II does not actually identify what claim of liberty that Harlan thought persuasive. The reader already knows the answer to that question, however, because Harlan gave it in his discussion of whether the case was justiciable. *See id.* at 536 (Harlan, J., dissenting) ("[T]he most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law"). See the discussion in section I.F.

163. Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

164. *Poe*, 367 U.S. at 545 (Harlan, J., dissenting) (emphasis added).

165. *See* Brief for Appellants in Poe v. Ullman, Nos. 60, 61 (O.T. 1960), at *8 (summarizing two lead arguments as "[t]he Connecticut laws prohibit the most effective methods of contraception but permit prescription and use of the most unreliable methods. . . . The Connecticut laws are not reasonably related to the presumed end."). Their brief discussed "a constitutionally protected interest in the privacy of their homes," *id.* at *28–29, as one of the factors weighing in their favor in their fourth argument, that "[t]he hardship upon individuals and the injurious social consequences of these laws far outweigh any assumed advantages." *Id.* at *9. *See* Brief for Planned Parenthood Federation of America, Inc. in Poe v. Ullman, Nos. 60, 61 (O.T. 1960), at *9 ("*[A]micus* Federation will in this brief seek to

was to render more persuasive Harlan's description of those interests, and his resolution of the correct point of balance between them in section III.

The shared and central flaw of the main arguments presented by the opposing parties, Harlan's discussion indicates, was that they stated the respective interests at stake in simple, abstract terms. The *Poe* appellants offered the Court a range of arguments, but clearly signaled to the Court that their central claim was that the contraception statute was sheerly irrational when viewed as a means to any legitimate purpose. The amicus brief filed in support of the married couple appellants focused even more narrowly on the irrationality of the law given the facts as the amicus presented them.

Framing the constitutional challenge in these terms fit the claim within a pattern of analysis that the Court as an institution clearly accepted, even if Justice Black thought it improper. Only six years before, in an opinion written by Justice William O. Douglas—who purported to share Black's total incorporation theory—a unanimous Court entertained a due process attack on a state law regulating the provision of eyeglasses that the lower court concluded was "not 'reasonably and rationally related to the health and welfare of the people.'"[166] *Williamson v. Lee Optical* rejected the due process claim on its merits—"It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."—but Douglas's opinion gave no indication that the lower court's analytical inquiry (is this a rational means to serve public health and welfare?), as opposed to its conclusion, was faulty.[167] The appellants' and amicus's counsel were not unjustified in thinking that precedent indicated that a due process challenge ought to be framed as a denial that the Connecticut law was a rational means to achieving the supposed public regarding end. That end, in *Poe*, was "the judgment—implicit in this statute—that the use of contraceptives by married couples is immoral."[168]

The problem with the appellants' argument, Justice Harlan explained, was that a court could not properly conclude in the abstract that the statute was sheerly irrational as a means of enforcing that moral judgment. As Harlan had already noted, the constitutional tradition recognized "the category of morality among state concerns" that a state legislature can legitimately address, and the fact that in this instance the

---

demonstrate that no facts exist which can sustain this legislation."). *Cf.* Brief for Appellee in Poe v. Ullman, Nos. 60, 61 (O.T. 1960), at *6 (quoting Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)) ("'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority . . . essential to the safety, health, peace, good order and morals of the community.'").

166. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 486 (1955).

167. *Id.* at 488.

168. *Poe*, 367 U.S. at 545 (Harlan, J., dissenting).

legislature was prohibiting private, consensual behavior could not therefore exclude it, per se, from the legislature's reach.[169] More specifically, the Connecticut statute was a regulation within "the area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others," and which gives rise to heated and conflicting moral views.[170] "[T]he very controversial nature of these questions [about the morality of contraceptives] would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views."[171] After all, a direct prohibition on activity judged immoral can hardly be thought an irrational means of enforcing morality, at least when viewed "simply, and in abstraction," as a question of logic.[172]

The state rested its primary defense of the statute on the law's basis in a legislative decision about morality. "When moral and welfare issues are involved, a State has great latitude, and that a State has direct responsibility over the morals and welfare of its people cannot be seriously questioned. State Legislatures have, in many instances, passed laws in the moral field which result in curtailing the range of conduct permitted to an individual."[173] The legislature's power to limit sexual activity on moral grounds is particularly clear, "since marriage so affects the morals and civilization of a people [that] its control and regulation is a matter of domestic concern within each State," and the legislature may "'promote the public morals'" by enacting laws that in its judgment "'protect purity [and] preserve chastity.'"[174] Anticipating Harlan's rebuttal to the appellants' irrationality argument, the state pointed out that the morality and safety of

---

169. *Id.* at 545–46 (Harlan, J., dissenting) ("[T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal."). Harlan acknowledged that the traditional range of legitimate state legislative concerns includes morality at the beginning of his constitutional discussion. *See id.* at 539 (Harlan, J., dissenting) (state legislation may address the "health, safety, morals or welfare of its people").

170. *Id.* at 546 (Harlan, J., dissenting).

171. *Id.* at 547 (Harlan, J., dissenting). *See also id.* (Harlan, J., dissenting) ("Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide.").

172. *Id.* (Harlan, J., dissenting).

173. Brief for Appellee in Poe v. Ullman, Nos. 60, 61 (O.T. 1960), at *9.

174. *Id.* at *8, *12 (quoting Commonwealth v. Allison, 227 Mass. 57, 62 (1917)).

birth control was controversial, and that "the Connecticut legislature had to make a choice between two divergent views."[175]

But as with the appellants' argument, Justice Harlan pointed out that the state's reasoning was too abstract to be convincing. Certainly, "the laws regarding marriage which provide . . . when the sexual powers may be used . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."[176] But the general proposition that states may express contestable moral judgments in regulating sexual behavior, indisputable as he saw it, could not establish the Connecticut statute's validity because the law went beyond expressing a moral judgment.

> [A]s might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the choice of means becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication.[177]

In other words, a due process challenge, however valid, should neither be framed nor answered in general terms, or with abstractions. Due process analysis must address the particular governmental action under review, and the specific aspect of liberty that the challengers claim has been infringed. Section II thus prepares the attentive reader to expect that Harlan's evaluation of the Connecticut law will turn on whether this particular law's specific impact on the practical scope of the married couple's liberty is a substantial and unjustifiable invasion of their privacy in light of our constitutional tradition and the case law.

E. Due Process Analysis in the Harlan Mode

Section III opens by immediately dismissing general propositions and assertions as the keys to due process reasoning. "*Precisely* what is involved here is this," Justice Harlan begins his analysis.[178] In his view the validity of the contraception prohibition turns neither on truisms about the

175. *Id.* at *7.
176. *Poe*, 367 U.S. at 546 (Harlan, J., dissenting).
177. *Id.* at 547 (Harlan, J., dissenting).
178. *Id.* at 548 (Harlan, J., dissenting) (emphasis added).

police power nor on abstract inquiries into the rationality of the law, but instead on "the *precise* character of the enactment" before the Court.[179]

> Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Potentially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the corpus delicti. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy. This, then, is the precise character of the enactment whose Constitutional measure we must take.[180]

If we are rightly to evaluate this "new claim to Constitutional protection," we must start with a clear eyed understanding of the practical sense in which the challenged law affects the liberty of the challengers.[181] To uphold the Connecticut statute is not simply to affirm the broad scope of state legislative authority or the existence of a logical connection between a moral objection to birth control and a ban on contraceptives. The precise issue before the Court was whether the statute may be applied to prosecute and punish a married couple for an aspect of their sexual intimacy. Such a judgment necessarily involves the further conclusion that the Constitution "of our Nation, built upon postulates of respect for the liberty of the individual," permits a state to use the brutal force of the criminal law process—investigations, procedures, publicity, and the shame as well as practical consequences of criminal conviction—in order to vindicate a legislative majority's views on a contested issue of private sexual morality.[182]

It is easy enough to imagine an opinion by a different judge, one not committed to Harlan's ideals of common-law reasoning and craftsmanship, that essentially ended its analysis with the paragraph just quoted. *Res ipsa loquitur*: Surely the American Constitution cannot be thought to permit the use of such extreme measures in the pursuit of a

179. *Id.* (Harlan, J., dissenting) (emphasis added).
180. *Id.* (Harlan, J., dissenting).
181. *Id.* at 544 (Harlan, J., dissenting).
182. *See id.* at 542 (Harlan, J., dissenting).

governmental interest at once so ethereal and so broad in scope! But for Harlan, specifying exactly what the constitutional question involved as a practical matter was only the beginning of the due process analysis, providing him not a conclusion, but an initial sense of how serious the constitutional question was. Given the legislature's decision to enforce its moral choice through the harshest means possible, the criminal law—itself a choice, as Harlan had pointed out[183]—the Connecticut "statute must pass a more rigorous Constitutional test than that merely going to the plausibility of its underlying rationale" and must "be subjected to 'strict scrutiny.'"[184]

---

183. *See id.* at 547–48 (Harlan, J., dissenting) (discussing the "variety of legal rules" that "readily suggest themselves" as means to achieve the legislature's end).

184. *Id.* at 548 (Harlan, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). It would be anachronistic to read Harlan as invoking the compelling interest/narrow tailoring strict scrutiny formula that the Court eventually developed as the standard of review for certain constitutional claims. In the *Skinner v. Oklahoma* opinion of the Court that Harlan quoted, Justice Douglas used the phrase "strict scrutiny" to qualify "the large deference" ordinarily accorded legislative distinctions: because the law under review provided for the sterilization of certain repeat criminal defendants but not others, and thus irreversibly deprived those affected of "one of the basic civil rights of man," the statutory discrimination could not be upheld on the basis of "neat legal distinctions" along "conspicuously artificial lines." *Skinner*, 316 U.S. at 541–42. Douglas was insisting that the Court should take a close look, not identifying a formal pattern of analysis. Harlan borrowed his words to make the same point, which he had earlier phrased as "particularly careful scrutiny." *Poe,* 367 U.S. at 543 (Harlan, J., dissenting). The reader should be aware, however, that Harlan's opinion for the Court in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), was an important step in the evolution of the now-familiar strict scrutiny formula. In that case, having concluded that the state's demand that the NAACP disclose its membership lists would compromise the members' "constitutionally protected right of association," Harlan proceeded to ask whether the state had an interest in disclosure weighty enough to justify limitation of the right. *Id.* at 463. "Such 'a subordinating interest of the State must be compelling.'" *Id.* (internal citation omitted). As with the word "strict," I believe Harlan intended his reference to a "compelling" interest to be an observation about the demanding nature of the proper judicial inquiry rather than code for a specific, formalized analytical requirement. It is not uncommon in constitutional law for a vivid expression to harden into a test or part of one. *Compare* United States v. Virginia, 518 U.S. 515, 558–59 (1996) (Rehnquist, C.J., concurring in the judgment) (criticizing the opinion of the Court for "introducing an element of uncertainty" by referring to the government's burden not only in traditional terms but also by the phrase "exceedingly persuasive justification. That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself."), *with* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017) ("Successful defense of legislation that differentiates on the basis of gender, we have reiterated, requires an 'exceedingly persuasive justification.'").

This flat pronouncement about the necessity of "strict scrutiny" parallels two observations Harlan made earlier in his opinion. First, that "a reasonable and sensitive judgment must [recognize] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment" and second, that the Connecticut statute "unquestionably" deprived the married couple "of a substantial measure of liberty in carrying on the most intimate of all personal relationships."[185] But on what basis does Harlan assume that the reader has to agree? Viewed in isolation, these statements might suggest that at a crucial juncture Harlan's analysis rests on a personal moral or political judgment announced *ipse dixit*—precisely what Black charged was true of Harlan-style due process. But the reader will recall Harlan's insistence that due process analysis does not leave judges,including himself,"free to roam where unguided speculation might take them."[186] The judge must instead look for the point of balance "which *our Nation*"—not the individual judge—"has struck between liberty and "the demands of organized society . . . having regard to what history teaches [including] the traditions from which ["this country"] developed as well as the traditions from which it broke."[187] It would contradict his basic account of due process if Harlan's personal moral intuitions dictated his constitutional conclusion.

Read in context, however, I think it clear that Harlan's assertion about "strict scrutiny" and other similar comments are not signs of a fatal self-contradiction in his thinking.[188] To be sure, in these statements there *is* an element of appeal to the reader's personal experience and common sense judgment about the character of the statute's intrusiveness. Harlan's insistence that his understanding of due process does not give free rein to personal and even intuitive evaluations does not entail the wholesale rejection of a positive role for such evaluations. In part, this reflects the inevitable role any judge's personality and character will play in his or her thinking precisely because he or she is *thinking*.[189] More crucially, however,

185. *Poe*, 367 U.S. at 543, 545 (Harlan, J., dissenting).

186. *Id.* at 542 (Harlan, J., dissenting).

187. *Id.* (Harlan, J., dissenting) (emphasis added).

188. *Id.* at 543, 545 (Harlan, J., dissenting) ("[A] reasonable and sensitive judgment *must*" recognize that some aspects of liberty "require particularly careful scrutiny" when the state interferes, and that the state law "*unquestionably*" deprived the married couple "of a *substantial* measure of liberty . . . .") (emphases added). *See also id.* at 549 (Harlan, J., dissenting) (the Connecticut statute "create[s] a crime which is grossly offensive to . . . privacy.").

189. As Harlan later would write in *Griswold*, a judge properly making a constitutional decision must consider "the teachings of history [and] the basic values that underlie our society" and display a "wise appreciation" for federalism, separation of powers, and their relationship to "American freedoms." Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment) (citing Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)).

Harlan assumed that the moral intuitions that inform a conscientious and competent judge's reasoning are not "'merely personal and private'" but "'deeply rooted in reason'" as understood in and by "'the compelling traditions of the legal profession.'"[190] What is phrased as *ipse dixit* is in reality an appeal to moral intuitions that Harlan assumes his reader will share because the intuitions themselves are shaped by the social and, perhaps even more importantly, professional traditions that are common to writer and reader.

Harlan therefore followed his rejection of mere plausibility as the appropriate "Constitutional test" for the Connecticut law by invoking the backdrop of Anglo-American legal traditions against which the statute's problematic validity was clear. "This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this that requires that the statute be subjected to 'strict scrutiny.'"[191] "[C]ommon understanding throughout the English-speaking world" is of course a broader concept than "English-speaking legal tradition." Judge and reader share necessarily share a common culture to the extent that they are members of a professional tradition within that culture. But as Harlan immediately went on to discuss, it is the professional, lawyerly understanding of liberty and privacy that Harlan primarily had in mind.

By this point, the reader—mine as well as Harlan's—will feel no surprise that Harlan began his examination of "the privacy of the home in its most basic sense" by dealing with different perspectives from his own.[192] Describing the Connecticut law's intrusion on liberty in terms of the privacy of the home posed two immediate problems for the plaintiffs' claim. First, "the concept of the privacy of the home receives explicit Constitutional protection in two places only," the Third and Fourth Amendments.[193] Second, the Connecticut statute "does not invade [that] privacy in the usual sense" addressed by the text of the Fourth Amendment, which "refers only to methods of ferreting out substantive wrongs, and . . . presupposes that substantive offenses may be committed and sought out in the privacy of the home."[194] The substantive offense the Connecticut law created did not intrinsically call for otherwise unlawful searches—and had nothing to do with housing soldiers! A textualist of the Black school, therefore, would likely conclude that the law could be enforced even against a married couple without raising constitutional doubts as long as the

190. *Poe*, 367 U.S. at 544–45 (Harlan, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 170-71 (1952)).

191. *Id.* at 548 (Harlan, J., dissenting).

192. *Id.* (Harlan, J., dissenting) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

193. *Id.* at 549 (Harlan, J., dissenting).

194. *Id.* (Harlan, J., dissenting).

police obtained a particularized search warrant supported by probable cause.

Harlan made short work of these objections as inconsistent with both the Court's decisions and the *McCulloch* understanding of constitutional law. He pointed out that on the same day it announced its decision in *Poe*, the Court handed down its decision in *Mapp v. Ohio*, restating its long-standing view that "the concept of 'privacy' embodied in the Fourth Amendment is part of the 'ordered liberty' assured against state action by the Fourteenth Amendment" due process clause.[195] The observation that the Connecticut statute did not fall within the letter of the Fourth Amendment "forecloses any claim to Constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions."[196] This was a barren understanding of the Fourth Amendment itself that the Court had rejected. And rightly so. Textualism's refusal to take account of constitutional purposes, history, and the development of doctrine is an inadequate approach to the text itself, a failure to recall with Marshall that "it is *a constitution* we are expounding."[197]

Having reminded the reader once again that enforcing the Constitution's text demands not the reduction of the document to its discrete linguistic parts, but rather the discernment of its overarching themes and purposes, Harlan began his affirmative discussion of the privacy that due process protects by quoting Justice Brandeis's well-known dissent in *Olmstead v. United States*.[198] *Olmstead*'s specific holding was that a warrantless, non-intrusive wiretap by federal officials did not violate the Fourth Amendment. However, Harlan invoked Brandeis not for his specific objection to that ruling, but for what Harlan termed "[p]erhaps the most comprehensive statement of the principle of liberty" underlying privacy decisions such as *Mapp*.[199]

---

195. *Id.* at 549 (Harlan, J., dissenting) (citing Mapp v. Ohio, 367 U.S. 643, 650 (1961)). The opinion of the Court in *Mapp* repeatedly referred to "the right to [or "of"] privacy." *See Mapp,* 367 U.S. at 650–57, 660, n.7.

196. *Poe*, 367 U.S. at 549 (Harlan, J., dissenting).

197. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

198. Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

199. The Supreme Court overruled *Olmstead* in Katz v. New York, 389 U.S. 347, 350–51, n.6 (1967), in an opinion that nonetheless appeared to reject without mention Brandeis's broad language ("the Fourth Amendment cannot be translated into a general 'right to privacy'") (citing a famous article co-authored by Brandeis "on the right to be let alone" in a sentence stating that this right is "left largely to" state law). Harlan joined the Court's opinion but wrote a separate concurrence that implicitly disagreed with the Court's narrow view of the constitutional status of privacy. *See id.* at 361 (Harlan, J., concurring) (stating that Fourth Amendment

> 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, 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.[200]

Some of the significance of this passage for Harlan's argument may have rested in Brandeis's insistence that "right to be let alone" protects feelings, emotions, and the "spiritual nature" of persons in addition to more tangible interests.[201] But by beginning his argument about the Constitution's protection of the privacy of the marital home with a statement of constitutional principle not limited to marriage, the home, or privacy in a literal sense, Harlan's opinion once again linked his due process reasoning to Marshall's opinion in *McCulloch*. Traditional constitutional analysis reaches very specific conclusions (Congress can create a national bank) from very general principles ("Let the end be legitimate . . . .").[202]

Constitutional law cannot remain at the level of general principles, however crucial it is that constitutional lawyers reason from such principles. As we saw above, Harlan identified abstraction as the common error of the parties in *Poe*, and the paragraphs of his dissent following the *Olmstead* quotation connect Brandeis's grand rhetoric to the question of the contraception statute's validity through several steps. First, Harlan connected the general concept of a "right to be left alone" with the specific

---

protection extends to circumstances in which the individual has a subjective expectation of privacy "that society is prepared to recognize as 'reasonable'").

200. *Poe*, 367 U.S. at 550 (Harlan, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

201. *Id.* at 549–50 (Harlan, J., dissenting) (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)).

202. *McCulloch* invoked a cornucopia of general principles on its way to concluding that the national bank was constitutional. For Marshall's familiar formulation of the relationship of ends and means in analyzing the scope of Congress's implied powers, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

idea of the privacy of the home. Citations to other opinions that he summarized as "amply show[ing] that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character" demonstrated that Harlan's association of liberty, privacy, and the home was a long-standing theme in the Court's decisions.[203] That line of decisions in turn rebutted any textualist complaint that the only constitutional references to domestic privacy, the Third and Fourth Amendments, are discrete prohibitions on specific modes of physically invading the home. "It would surely be an extreme instance of sacrificing substance to form" to limit "the Constitutional principle of privacy against arbitrary official intrusion" to the "two particular threats to that principle" that the founders had confronted.[204] "'A principle, to be vital, must be capable of wider application than the mischief which gave it birth.'"[205] The Third and Fourth Amendments evidence the Constitution's solicitude for the principle of sanctity of the home by addressing two egregious ways the principle was invaded in the late Eighteenth Century.

Harlan's second step was to explain the sense in which the Connecticut law impinged on the principle of domestic privacy despite the fact that the statute did not in terms authorize or require the physical invasion of anyone's home, which he conceded might be argued to be the concern of the Fourth and Fourteenth Amendments' ban on unreasonable searches. Harlan had already established to his satisfaction that "it is the purpose of [express constitutional] guarantees, and not their text" that governs due process analysis.[206] In his judgment, therefore, any argument

---

203. *Poe*, 367 U.S. at 550–51 (Harlan, J., dissenting) (emphasis added). Harlan quoted Boyd v. United States, 116 U.S. 616, 630 (1885), which helpfully provided a link between broad language similar to Brandeis's and what the older opinion called "the sanctity of a man's home and the privacies of life," and Wolf v. Colorado, 338 U.S. 25, 27 (1949), which stated that the "security of one's privacy against arbitrary intrusion . . . is basic to a free society." The reader who tracks down the additional pinpoint citations discovers that Harlan is drawing his or her attention to similar language in other opinions of the Court. *See* Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Frank v. Maryland, 359 U.S. 360, 365 (1959) ("[T]he broad constitutional proscription of official invasion [protects] the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state . . . ."); Davis v. United States, 328 U.S. 582, 587 (1946) (referring to "protection of the privacy of the individual, his right to be let alone"); Okla. Press Publ'g Co. v. Walling, 327 U.S. 186, 202–03 (1946) ("[I]ntru[sion] upon different areas of privacy . . . has brought forth some of the stoutest and most effective instances of [judicial] resistance . . . .").

204. *Poe*, 367 U.S. at 551 (Harlan, J., dissenting).

205. *Id.* at 552 (Harlan, J., dissenting) (quoting Weems v. United States, 217 U.S. 317, 349 (1910)).

206. *Id.* at 544 (Harlan, J., dissenting).

that the Constitution's protection of the home's privacy is limited to the narrowest reading of the Fourth Amendment's words would be "so insubstantial as to be captious."[207]

> [H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But . . . if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life.[208]

At the core of the Fourth Amendment's exclusion of unjustifiable governmental invasion of the physical home is a broader recognition of "'the private realm of family life which the state cannot enter,'"[209] a recognition "so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[210]

Harlan briefly presented his crucial third step, identifying respect for the intimate life of the married couple as specifically required by due process, as resting on a virtually self-evident and fundamental aspect of the constitutional protection of domestic privacy. Harlan states:

> Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. We would indeed be straining at a gnat and swallowing a camel were we to show concern for the niceties of property law involved in our recent decision, under the Fourth Amendment,

---

207. *Id.* at 551 (Harlan, J., dissenting).

208. *Id.* (Harlan, J., dissenting).

209. *Id.* at 552 (Harlan, J., dissenting) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

210. *Id.* at 551–52 (Harlan, J., dissenting). To illustrate this point, Harlan quoted Justice Brandeis's dissent in Gilbert v. Minnesota, 254 U.S. 325, 335–36 (1920) (statute forbidding parents to teach pacifism to their children "invades the privacy and freedom of the home"), and cited the *Meyer* and *Pierce* education decisions he discussed earlier. By 1961, all three opinions would most naturally be taken to make First Amendment arguments, although Brandeis rooted his position in the "rights, privileges, and immunities of . . . a citizen of the United States," whereas the other cases invoked due process. From Harlan's perspective, the uncertain textual basis for the arguments only reinforced his claim that the Constitution's purposes, rather than the details of its express prohibitions, should govern the due process analysis.

> in *Chapman v. United States*, and yet fail at least to see any substantial claim here.[211]

The central purpose of the Constitution's protection of the privacy of the home is to ensure governmental respect for the social, emotional, and spiritual importance of the family in the American political community, and constitutional law can and should express that respect in effective legal terms.

Harlan spent more time answering the obvious rejoinder that privacy "manifestly is not an absolute," and that every state's law regulated sexual behavior, "however privately practiced," in multiple ways that no one in 1961 would think unconstitutional.[212] Harlan implicitly equated that hypothesized objection with the state's actual argument in *Poe.* It started from a general, abstract proposition—state legislative power reaches issues of morality—to draw a specific conclusion—the state may punish the use of contraceptives by a married couple—without taking any account of the circumstances that took the specific instance out of the general proposition. A more precise analysis would note that the "traditional offenses against good morals" concern behavior that the state can forbid altogether, while "the intimacy of husband and wife is necessarily an essential and accepted feature of marriage."[213] The question in *Poe* was not whether the state can enforce limitations on sexual behavior *simpliciter*, but whether the Constitution allows the state "having acknowledged a marriage and the intimacies inherent in it . . . undertakes to regulate by means of the criminal law the details of that intimacy."[214] When the constitutional question *Poe* presented is stated with precision, Harlan thought it clear that "the appellants have presented a very pressing claim for Constitutional protection."[215]

As Harlan had written earlier, in a case involving a serious argument that an important aspect of liberty is at stake, "a reasonable and sensitive judgment . . . require[s] particularly careful scrutiny of the state needs asserted to justify" the government's action, and so he turned finally to consider what might justify the imposition of criminal sanctions on the use of contraception even by married persons.[216] By this standard, the state

---

211. *Poe*, 367 U.S. at 552 (Harlan, J., dissenting) (citing Chapman v. United States, 365 U.S. 610 (1961)). *Chapman* invalidated a warrantless search of rented premises because the Court concluded that, under the relevant state's law, the landlord who had consented to the search was not legally entitled to do so. 365 U.S. at 616–17. Harlan joined the opinion of the Court.

212. *Poe*, 367 U.S. at 552 (Harlan, J., dissenting).

213. *Id.* at 553 (Harlan, J., dissenting).

214. *Id.* (Harlan, J., dissenting).

215. *Id.* (Harlan, J., dissenting).

216. *Id.* at 543, 554–55 (Harlan, J., dissenting). Harlan repeated his previous statement that in such a case, the Constitution requires more than a mere rational

had in essence conceded the law's invalidity since it had made no argument "even remotely suggest[ing] a justification for the obnoxiously intrusive means it has chosen to effectuate [its moral] policy."[217] But Harlan did not rest his conclusion that the statute was unconstitutional on waiver grounds. The state's non-enforcement of the law, he reasoned, undercut any possible claim that the Connecticut government *actually* treated the state's moral interest as important, while the statute's uniquely harsh nature when compared to the laws of other states and countries supported his judgment that a law criminalizing a married couple's use of contraceptives is inconsistent with freedom.[218]

Due process analysis, as Justice Harlan portrayed it in *Poe*, does not involve the subordination of American governmental actions to individual judges' idiosyncratic moral compasses. In deciding whether to accept or reject a due process claim, the judge's obligation is to reach the decision that best maintains "the balance which our Nation . . . has struck between [personal] liberty and the demands of organized society."[219] Harlan's discussion therefore paid careful attention to Supreme Court precedent and to the ideas connecting the Court's decisions. But since there is no formula for finding the constitutional balance between liberty and society, no code containing a list of predetermined right answers, on Harlan's view the rational process through which the judge reaches that decision necessarily involves the exercise of the individual's personal judgment. Section III of his discussion of the Connecticut statute's validity is a sustained attempt to demonstrate that Harlan's judgment is a persuasive application of long-standing themes in the Supreme Court's case law, but it makes no effort to deny that the judgment is John Marshall Harlan's and not the presentation of an undeniable fact. The last two sentences in Harlan's substantive discussion illustrate the interplay of the objective and the subjective in his due process thinking.

> I must agree with Mr. Justice Jackson that "[t]here are limits to the extent to which a legislatively represented

---

relationship between the government action and "the effectuation of a proper state purpose." *Id.* at 554 (citing his earlier discussion at 542–45).

217. *Id.* at 554 (Harlan, J., dissenting).

218. *See id.* at 554–55 (Harlan, J., dissenting) ("To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time . . . conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation or necessary. But conclusive in my view, is the utter novelty of this enactment. . . . Indeed, a diligent search has revealed that no nation, including several which quite evidently shared Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.") (footnote omitted).

219. *Id.* at 542 (Harlan, J., dissenting).

> 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.[220]

In quoting the redoubtable Jackson's concurrence in *Skinner*, a precedent that played a significant role earlier in his opinion,[221] Harlan reminded the reader once more that to be persuasive, a novel constitutional argument must "depend on grounds which follow closely on well-accepted principles and criteria [and] take 'its place in relation to what went before.'"[222] But he did so in terms that acknowledged the role of his personal judgment, and indeed of Jackson's, in the particular constitutional conclusions they reached in *Skinner* and *Poe*.

F. Why Did Justice Harlan Discuss the Merits in *Poe*?

Like Justice Harlan, his colleagues in the majority of *Poe v. Ullman* also thought it important that Connecticut prosecutors had no history of prosecuting married couples for violating the contraceptives ban, but they ascribed a very different significance to the fact than did Harlan. Justice Frankfurter thought that "[e]ighty years of Connecticut history demonstrate a . . . tacit agreement [not to prosecute under the law]. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."[223] The statute, in other words, was essentially a dead letter that posed no practical threat either to the married plaintiffs or to the physician plaintiff, and as such, their claims were non-justiciable. In response, Part One of Harlan's dissent, entitled "Justiciability," explained why he thought the Court ought to reach the merits, and did so at some length. We will not linger over the technical arguments in Part One,[224]

---

220. *Id.* at 555 (Harlan, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)).

221. *Id.* (Harlan, J., dissenting).

222. *Id.* at 544 (Harlan, J., dissenting) (quoting Irvine v. California, 347 U.S. 128, 147 (1954) (Frankfurter, J., dissenting)).

223. *Id.* at 507–08 (Frankfurter, J.) (plurality opinion) (discussing the claim of the married couple plaintiffs). *Cf. id.* at 508 (as to the physician plaintiff, "we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced."); *id.* at 509 (Brennan, J., concurring) ("The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples.").

224. Harlan's discussion of justiciability carefully parsed different justiciability themes and precedents, employing what will be to my reader his now-familiar technique of discussing so he could reject doctrines and principles that he thought did not apply. *See id.* at 526 (Harlan, J., dissenting) ("[I]t is well to proceed

convincing though I believe them to be, but Harlan's explanation in Part One of *why* he wrote Part Two on "Constitutionality" sheds further light on his understanding and application of due process.

The problem, as Harlan acknowledged, was that the majority's decision to dismiss the lawsuit rather than adjudicate the constitutional claim made it seem odd or even inappropriate for a dissenting Justice to discuss the merits. In fact, doing so appeared to prejudge a future case involving the same issue.[225] Justices Black and Stewart, who also thought *Poe* justiciable, did not address the substantive question in the case, and Harlan thought it important to indicate why he did not likewise abstain.[226]

> Regrettably, an adequate exposition of my views calls for a dissenting opinion of unusual length . . . . While ordinarily

---

to a disclosure of those [justiciability limitations] which are *not* involved in the present appeals . . . ."). As to "the precise failing in these proceedings which is said to justify refusal to exercise our mandatory appellate jurisdiction: that there has been but one recorded Connecticut case dealing with a *prosecution* under the statute," Harlan pointed out that "the very purpose of [that one] prosecution was to change defiance [of the statute] into compliance," with apparent *in terrorem* success. *Id.* at 531, 534. The result of the majority's decision not to address the constitutional claim thus was to enable the state "to maintain at least some measure of compliance with this statute and still obviate any review in this Court, by the device of purely discretionary prosecutorial inactivity. . . . All that stands between the appellants and jail is the legally unfettered whim of the prosecutor and the Constitutional issue this Court today refuses to decide." *Id.* at 537–38 (order of quotations altered).

225. Professor Fried, a great–and admiring–student of Harlan as judge, has expressed reservations about Harlan's decision to discuss the merits. *See* Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1239 (2004) ("I am not sure that was the right thing to do. The majority had not expressed a view on the merits. After the Court's disposition, they were not part of the case, so what Justice Harlan did was once again to commit himself to a position that could be (and was) relevant in future cases, but in a context where it could not control the result in this case."). Fried's concern is a serious one, but for the reason expressed in the text I think Harlan justified his choice.

226. *See Poe*, 367 U.S. at 509 (Black, J., dissenting) ("Mr. Justice BLACK dissents because he believes that the constitutional questions should be reached and decided."); *id.* at 555 (Stewart, J., dissenting) ("Since the appeals are nonetheless dismissed, my dissent need go no further. However, in refraining from a discussion of the constitutional issues, I in no way imply that the ultimate result I would reach on the merits of these controversies would differ from the conclusions of my dissenting Brothers."). Stewart ultimately did reach a different conclusion on the merits than Harlan. *See* Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting). As Stewart's reference to dissenting "Brothers" indicated, Douglas also reached the merits, but Douglas, a less punctilious judge than Harlan, did not indicate any concern about the propriety of opining on the substantive constitutional question. *See id.*

> I would not deem it appropriate to deal, in dissent, with Constitutional issues which the Court has not reached, I shall do so here because such issues, as I see things, are entangled with the Court's conclusion as to the nonjusticiability of these appeals.[227]

Harlan's somewhat surprising phrasing—one might expect "the constitutional issues are entangled with *my* conclusion as to justiciability"—foreshadows an important theme in his subsequent discussion of constitutionality. Namely, that the due process inquiry, if done correctly, involves a precise definition of the claim of liberty being examined. To put it another way, the majority's failure to comprehend the true nature of the liberty at stake directly contributed to its mistaken conclusion that the plaintiffs' claims were nonjusticiable. But in what way?

In summarizing his argument why the Supreme Court should dismiss *Poe*, Justice Frankfurter wrote that it was unnecessary for the Court to exercise its jurisdiction "in order to protect appellants from the hazards of prosecution," because they faced no realistic danger of being exposed to those hazards including the final hazard, the risk of conviction under a law they thought unconstitutional.[228] Justice Harlan's response was that "it misconceives . . . the nature of these appellants' rights to say that the failure of the State to carry through any criminal prosecution requires dismissal of their appeals."[229] All Frankfurter's assertion could actually mean was that "as a matter of prediction, [the state was] unlikely to decide to prosecute." But the liberty protected by due process is not a chimerical "freedom" from ultimate government sanction that can be exercised only by playing the odds and acting at one's peril.

> As I will develop later in this opinion, the most substantial claim which these married persons press is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted. And I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor.[230]

---

227. *Poe*, 367 U.S. at 523–24 (Harlan, J., dissenting).
228. *Id.* at 508 (plurality opinion).
229. *Id.* at 535 (Harlan, J., dissenting).
230. *Id.* at 535–36 (Harlan, J., dissenting).

The Constitution's protection of marital privacy, Harlan will "develop later," does not merely guarantee an ultimately favorable outcome in the event of a prosecution. To protect the life of the home in a truly meaningful way, due process must safeguard the intensely private and emotional intimacy of marital sexual expression against unjustified governmental invasion. To do so entails not just protection against punishment for its exercise, but also immunity from the deep injury that governmental investigation and examination would cause,[231] and indeed from the anxiety and restraint that the fear of criminal law consequences alone might impose.[232] The privacy of the marital home is substantially impaired by the existence of a law with such consequences.

The majority's refusal to address the constitutional claim in *Poe* was thus, for Harlan, in practical effect a rejection of that claim, and its failure to understand that fact was intrinsic to its conclusion that the case should be dismissed. Harlan therefore needed to address the merits in order fully to demonstrate the majority's error on justiciability. And in turn, Harlan's discussion of that preliminary issue in Part One of his dissent foreshadowed and undergirded his explanation in Part Two of the nature and substantiality of the liberty at stake.

II. THE PROBLEM OF JUDICIAL SELF-RESTRAINT: *GRISWOLD V. CONNECTICUT*

A little less than five months after the Supreme Court dismissed the appeals in *Poe v. Ullman*, Planned Parenthood opened a birth control clinic in New Haven, Connecticut, with Dr. Lee Buxton, the physician plaintiff in *Poe,* as medical director.[233] Within ten days, the state authorities arrested Buxton and Estelle Griswold, the executive director of Connecticut Planned Parenthood. Buxton and Griswold were subsequently convicted of aiding and abetting married women in violating the state ban on the use of contraceptives.[234] As the state supreme court laconically observed, "[t]he

231. The Constitution, Harlan promised to show, entitled the married plaintiffs to protection against "the substantial damage [that would] be accomplished by such a prosecution whatever its outcome in the state courts or here." *See id.* at 537.

232. *See id.* at 538–39 ("I cannot regard as less present, or less real [than the injury found sufficient in *Pierce v. Society of Sisters*], the tendency to discourage the exercise of the liberties of these appellants, caused by reluctance to submit their freedoms from prosecution and conviction to the discretion of the Connecticut prosecuting authorities.") The statute invalidated in *Pierce* was "not even to become effective for more than seventeen months after the time the case was argued to this Court" but the Court found that "allegations of present loss of business, caused by the threat of . . . future enforcement . . . sufficient" to make the case justiciable. *Id.* at 538 (discussing Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925)).

233. Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

234. *Id.*

principal offenders were not prosecuted."[235] After the state courts once again upheld the statute's constitutionality, the defendants appealed their conviction to the Supreme Court, which unanimously accepted their standing to assert the rights of "principal offenders" and held the statute unconstitutional, with Justices Black and Stewart dissenting.[236]

The justices in the majority in *Griswold* did not all agree on the rationale for their conclusion. At the Court's post-argument conference discussing the case, Justice Douglas advocated invalidating the statute on First Amendment freedom of association grounds, along the lines of his *Poe* dissent. Justice Black, according to another Justice's notes, made fun of that idea, stating "right of association is for me right of assembly & right of husband & wife to assemble in bed is new right of assembly to me."[237] When Chief Justice Warren assigned the writing of the opinion to Douglas, the senior associate justice in the majority, the latter nonetheless drafted an opinion on First Amendment grounds.

> Marriage does not fit precisely any of the categories of First Amendment rights. But it is a form of association as vital in the life of a man or woman as any other, and perhaps more so. We would, indeed, have difficulty protecting the intimacies of one's relations to NAACP and not the intimacies of one's marriage relation . . . . [Marriage] flourishes on the interchange of ideas [and its objects] are the end products of free expression.[238]

Before circulating it to the Court as a whole, Douglas sent the draft to Justice William Brennan, who strongly urged Douglas not to rely solely on the First Amendment. Douglas accepted the advice but made minimal adjustments to his original draft.[239]

The result was an uneasy compromise. In the published opinion, the old New Dealer Douglas vehemently denied that the decision was a return to *Lochner*-style substantive due process, and cited a barrage of Bill of Rights provisions as, apparently, the collective textual source of a constitutional right combining associational and privacy freedom.[240] While

---

235. State v. Griswold, 200 A.2d 479, 479 (Conn. 1964).

236. *Griswold*, 381 U.S. at 480–81.

237. BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 229, 237 (1985) (discussing the Court's internal deliberations).

238. *Id.* at 235 (from Justice Douglas's original draft).

239. *See id.* at 237–38.

240. *See Griswold*, 381 U.S. at 481–82 ("[W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation . . . .") (citation omitted); *id.* at 484 (explaining that "[v]arious guarantees create zones of privacy. The right of

four other justices nominally joined Douglas's effort, the plethora of filings—every member of the Court except Justice Clark either wrote or joined a separate opinion—indicates the breadth of discomfort with Douglas's opinion.[241] But it was the opinions of Black and Harlan that most directly carry on the discussion Harlan initiated in *Poe*.[242]

---

association contained in the penumbra of the First Amendment is one, as we have seen" and going on to mention the Third, Fourth, Fifth, and Ninth Amendments).

241. In addition to the opinions discussed in the text, Justice Goldberg, joined by the Chief Justice and Justice Brennan, filed a concurrence best known for its discussion of the Ninth Amendment, but clearly an exercise in due process reasoning strongly reminiscent of *Lochner*-era decisions even if somewhat reflective of Justice Harlan's *Poe* dissent. *Compare id.* at 486 ("the concept of liberty protects those personal rights that are fundamental"), *with id.* at 495 ("This Court recognized in *Meyer v. Nebraska* that the right 'to marry, establish a home and bring up children' was an essential part of the liberty guaranteed by the Fourteenth Amendment.") (citation omitted), *and id.* at 494–95 (stating that "Mr. Justice Brandeis, dissenting in *Olmstead v. United States*, comprehensively summarized the principles underlying the Constitution's guarantees of privacy") (quoting Brandeis and Harlan in *Poe*) (Goldberg, J., concurring). Justice White thought that "the State claims but one justification for its anti-use statute . . . to serve the State's policy against all forms of promiscuous or illicit sexual relationships . . . .", and on that basis concluded that the law was sheerly irrational. *See id.* at 505 (White, J., concurring in the judgment). Justice Stewart, who also joined Justice Black's dissent, accused White and Harlan of wrongly attempting to revive *Lochner* and Goldberg of "turn[ing] somersaults with history." *See id.* at 529 (Stewart, J. dissenting). Like Justice Black, Justice Stewart found unconvincing Douglas's attempt to rest the Court's judgment on a combination of Bill of Rights provisions. *Id.* at 528 ("As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law").

242. As I noted earlier, Harlan's *Poe* analysis has supplanted Douglas's opinion as providing the rationale for the judgment in *Griswold*. The failure of Douglas's opinion to wear well is unsurprising given his minimalist approach to lessening its reliance on the First Amendment: in its final form the opinion can hardly be accused of being tightly-reasoned, and it has also suffered from generations of law professors mocking Douglas's assertion that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484. That sentence, which Douglas added in his grudging redraft, *is* oddly phrased (either "penumbras" or "emanations" needed to go!) but the idea that constitutional provisions should often be given broader effect than a narrow reading of their text would require is hardly bizarre – indeed, as we have seen it is a central theme in Harlan's reasoning in *Poe*. Even the term "penumbra" as shorthand for this principle has the imprimatur of Holmes, whose opinion in *Olmstead* Douglas may have been recalling, perhaps subconsciously. *See* Olmstead v. United States, 277 U.S., 438, 469 (1928) (Holmes, J., dissenting) (referring to "the penumbra of the Fourth and Fifth Amendments" and asserting that "Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them"). A more-carefully constructed opinion arguing that the Bill of Rights should be read as

Black's dissent dealt gently with his frequent ally Douglas's opinion, at one point suggesting that Douglas's opinion was simply a mistaken application of common First Amendment principles. His primary criticism was that Douglas's reliance on the idea of a "right of privacy" was inconsistent with Douglas's insistence that his reasoning could find a proper textual basis in the "emanations" of several amendments.[243] Black's major concern was with the separate concurrences, which he described as revivals of *Lochner* and thus direct challenges to his claim that his textualism was constitutional orthodoxy.[244] Black spent several pages disparaging Goldberg's Ninth Amendment argument as novel and indeed "shocking," but made little attempt otherwise to address the details of the concurring justices' arguments, and he studiously ignored Harlan's *Griswold* opinion almost entirely.[245] Black's discussion of textualism and its allegedly

---

a coherent whole that is broader than its individual provisions read separately might have proven influential, although such an argument would differ little from Harlan's understanding of due process.

243. *See Griswold*, 381 U.S. at 510–11 (Black, J., dissenting) ("I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case."); *id.* at 508 ("The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not."); *id.* at 509–10 ("I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.").

244. *See id.* at 511 ("But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. . . . I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."); *id.* at 514–15 ("Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that of a number of others which they do not bother to name, e.g., *Lochner v. New York*. . . . The two they do cite and quote from, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner v. New York*") (citations omitted); *id.* at 523 n.18 ("Brother HARLAN . . . has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, e.g., *Poe v. Ullman* (dissenting opinion)") (citation omitted).

245. *See id.* at 518–20 (Black, J., dissenting) (discussing Ninth Amendment argument). Justice Black also joined Justice Stewart's dissent, and thus his criticisms of Goldberg. *See also id.* at 510 n.2 (Black, J., dissenting) (noting that

"natural law" antithesis repeated at some length the arguments he had long been making. But his dissent can nonetheless be read interestingly as an oblique response to Harlan's opinion in *Poe*.

Harlan, as the reader knows, insisted in *Poe* that "the supplying of content to th[e] Constitutional concept" of due process is "not one where judges have felt free to roam where unguided speculation might take them . . . . 'We may not draw on our merely personal and private notions.'"[246] Black's rejoinder in *Griswold* was that a judge following Harlan's view has nowhere else to derive the content he imports into the due process clause other than speculation and personal notions about justice. If the Court adopted Harlan's approach, Black repeatedly asserted, it would "require judges to determine what is or is not constitutional on the basis of *their own appraisal* of what laws are unwise or unnecessary" or "which offend *their notions* of natural justice."[247] A judge who would invalidate a law as an "arbitrary" interference with a "fundamental" but unwritten constitutional liberty is fooling himself, perhaps "'quite innocently,'" since his "'personal preferences . . . are all that in fact lie behind the decision.'"[248] "Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws

---

Justice Harlan's "views are spelled out at greater length in his dissenting opinion in *Poe*") (citation omitted).

246. Poe v. Ullman, 367 U.S. 497, 542, 544 (1961) (Harlan, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 170–71 (1952)).

247. *Griswold*, 381 U.S. at 511–12, n.4 (Black, J. dissenting) (emphases added). *See also id.* at 519 (criticizing Goldberg's claim that in due process/Ninth Amendment analysis, "judges will not consider 'their personal and private notions.' One may ask how they can avoid considering them."); *id.* at 521 (invalidating laws based on "the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational" is to adopt "a loose, flexible, uncontrolled standard" for decisions); *id.* at 522 (describing *Lochner* as "based on subjective considerations of 'natural justice,' [that are] no less dangerous when used to enforce this Court's views about personal rights than those about economic rights"); *id.* at 523 (in rejecting *Lochner*, the Supreme Court returned to "the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies"); *id.* at 523 n.18 (citing Harlan's *Poe* dissent as demonstrating Harlan's belief that courts can "strike down laws which they consider arbitrary or unreasonable"); *id.* at 525–26 (substantive due process leaves judges to "roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies"); *id.* at 526 (quoting Learned Hand to assert that substantive due process amounts to "rule[] by a bevy of Platonic Guardians").

248. *Id.* at 513 n.5 (Black, J., dissenting) (quoting LEARNED HAND, THE BILL OF RIGHTS 70 (1958)).

which it can 'not tolerate.'"[249] Black's textualism is the cure for the radical subjectivity of Harlan's due process.

Unlike Black, Harlan felt no need to discuss his general approach to due process adjudication or detail his thinking about the Connecticut statute, having stated them "at length in [his] dissenting opinion in *Poe v. Ullman*."[250] He briefly explained "the proper constitutional inquiry in this case [as] whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'"[251] The most interesting aspect of that statement, which quoted Justice Cardozo's well-known opinion for the Court in *Palko v. Connecticut*, is that Harlan chose to summarize his *Poe* inquiry in words he did not use in *Poe*. In his earlier opinion, Harlan cited *Palko*, but not for the expression he quoted in *Griswold*, and he did not refer to "basic values" at all. The point, as the reader knows, is that Harlan did not think due process reasoning can be reduced to a formula.

Harlan focused most of his attention in his brief opinion on rebutting Black's claim that the latter's textualism was the cure for the resort to personal preference Black attributed to Harlan.[252] Harlan made two

---

249. *Id.* at 511 n.4 (Black, J., dissenting) (quoting Linkletter v. Walker, 381 U.S. 618, 631 (1965)). Black's quotation of *Linkletter* as a description of anyone's understanding of due process analysis, much less Harlan's, was unfair. *Linkletter* held that *Mapp v. Ohio*'s extension of the exclusionary rule to state cases did not apply retroactively, and in reviewing search and seizure decisions leading up to *Mapp*, Justice Clark's opinion of the Court mentioned that in Rochin v. California, "the Court could not tolerate the procedure involved" (the introduction of evidence derived by forcibly pumping the stomach of the accused). *See Linkletter*, 381 U.S. at 631, 640. Justice Clark was in fact a critic of *Rochin*–the year before *Griswold*, he joined the part of a separate opinion by Justice Black that attacked *Rochin* as an example of the illicit "judicial philosophy which has relied on [the due process] clause" to afford judges "a wide and unbounded power" to strike down laws of which they disapprove. *See* Jackson v. Denno, 378 U.S. 368, 407 (1964) (Black, J., dissenting). *See also* Irvine v. California, 347 U.S. 128, 138 (1954) (Clark, J., concurring) (*Rochin* should be limited to "clear cases of physical coercion and brutality" because read as a broad principle the decision invites "such uncertainty and unpredictability that it would be impossible to foretell—other than by guess-work—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned . . . ."). Justice Clark's description of *Rochin* was a hostile characterization of the decision, not the endorsement of subjective decision-making Justice Black made it out to be.

250. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment).

251. *Id.* (Harlan, J., concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

252. Harlan also explained that he did not join Douglas's opinion of the Court because it implicitly accepted the dissenters' mistaken view that the due process

major points. The first was that Black's textualism started from a self-contradiction, his refusal to see that "[t]he Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom."[253] Rather than taking seriously the language of that text, with its broad reference to "liberty" and its deliberate echo of Magna Carta, the acolyte of text-bound constitutional decision making invoked the incorporation doctrine, which made no pretense of being an interpretation of the due process clause's words and, Harlan thought, had no plausible claim to an historical foundation. The result of such a wildly non-text-centered approach was, at least as applied by the dissenters in *Griswold*, "to restrict the reach of Fourteenth Amendment Due Process" to a narrower range than the words indicate, not by legal reasoning but by judicial fiat.[254]

Harlan went on, second, to respond directly to Black's repeated assertions in his dissent that his textualism avoided the dangers of subjective judicial decision making. The "justification" the dissenters offered "for their 'incorporation' approach to this case" rested "on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to 'interpretation' of specific constitutional provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the 'vague contours of the Due Process Clause.'"[255] Harlan agreed that judicial willfulness is a problem but flatly denied that Black was offering the solution.

> While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times."[256]

The fundamental objection to Black's position was not the fact, as Harlan saw it, that incorporation is a misreading of the Fourteenth Amendment's original purpose, but that *no* "formula" can guarantee

---

clause is limited to "right[s] assured by the letter or penumbra of the Bill of the Rights." *Id.* at 499 (Harlan, J., concurring in the judgment).

253. *Id.* at 500 (Harlan, J., concurring in the judgment).

254. *See id.* (Harlan, J., concurring in the judgment).

255. *Id.* at 500–01 (Harlan, J., concurring in the judgment) (citation omitted).

256. *Id.* at 501 (Harlan, J., concurring in the judgment) (quoting *id.* at 522 (Black, J., dissenting)).

judicial self-restraint. Judges wrongly insert their personal preferences into their constitutional decisions not because they are using the wrong intellectual tools, but because they are misusing their office.[257]

The cure for moral failure is moral reform. Harlan offered the same qualities that he had suggested in *Poe* are necessary for a judge to engage properly in due process analysis as themselves the only adequate and practicable check on wayward constitutional decision making. "Judicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[258] Unlike textualism, which minimizes or denies the role of judgment in constitutional law, and thus implicitly portrays those who disagree with the textualist as inept or acting in bad faith, Harlan recognized the inescapability of personal judgment and therefore of intelligent, good faith disagreement in applying the basic charter of our society. "Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it."[259] In Harlan's view, the conscientious practice of constitutional adjudication as he understood it, not textualism's "interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause," is the only effective safeguard against lawless constitutional decisions.[260]

---

257. As noted above, Harlan may have been substantially wrong in dismissing the historical argument for incorporation. Harlan offered the Court's reapportionment cases, which he also thought historically indefensible, as a recent example of policy-driven decisions supposedly resting on textualist premises, an especially apt example since Black was the author of Wesberry v. Sanders, which "'interpreted' 'by the People' (Art. I, § 2) . . . to command 'one person, one vote.'" *Id.* (discussing Wesberry v. Sanders, 376 U.S. 1 (1964)). Harlan thought the historical arguments he made in his dissent in *Wesberry* were "irrefutable" and "unanswered" by Black's discussion of history. *Id.* Nothing turns, for present purposes, on which justice had the better of that disagreement, although it is worth noting that Harlan's reading of history seems to have fared better than Black's in subsequent commentary. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1064 n.8 (2d ed. 1988); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 135 (1965); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 253–54 n.186 (1991) ("Justice Black's use of history in *Wesberry* is demolished in Justice Harlan's dissent.").

258. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in the judgment).

259. *Id.* (Harlan, J., concurring in the judgment).

260. *See id.* at 501-02 (Harlan, J., concurring in the judgment).

III. THE RATIONAL PROCESS IN CONSTITUTIONAL ADJUDICATION: HARLAN IN THE TWENTY-FIRST CENTURY

Justice Harlan has long enjoyed a reputation for the qualities of craftsmanship and intellectual honesty that I hope the reader is persuaded are fully on display in his opinions in *Poe* and *Griswold*.[261] That alone would be good enough reason to read those opinions and others with great care and attention to detail, as I have tried to do in sections I and II.[262] I also think Harlan's opinions have other important lessons to teach twenty-first century constitutional lawyers, and below I will explain what I think those are. Before I do, however, we should clear away a potential obstacle to rehearing Harlan, which I will state in question and answer form. Was Justice Harlan, especially through his *Poe* dissent, responsible for *Roe v. Wade*? The correct answer is yes . . . and no.[263]

Although the opinion of the Court in *Roe* did not mention *Poe v. Ullman*, the sense in which Harlan's dissent stands in the line of opinions that led to and beyond *Roe* is straightforward. Justice Stewart identified the fact in his concurrence in *Roe* itself, and the *Poe* dissent played a critical role in the controlling joint opinion in *Planned Parenthood v. Casey* that modified *Roe* and, as modified, reaffirmed it.[264] But the rationale for giving a negative answer is equally clear. It is difficult to imagine an opinion that less resembles Harlan's painstaking effort in *Poe* to connect constitutional purposes and precedents with the precise issue before the Court than the

---

261. Professor Jesse H. Choper once called Harlan "the finest legal craftsman ever . . . to sit on the Supreme Court."Jesse H. Choper, *Remarks on Justice Harlan and the Bill of Rights*, 36 N.Y. L. REV. 127 (1991). *See also* Stuart H. Shiffman, *Tales of Two Harlans*, 76 JUDICATURE 319, 319 (1993) (noting that Harlan was a justice "whom both liberals and conservatives admired and respected as a legal scholar and 'judge's judge'").

262. In discussing the virtue of prudence or judgment that a good judge must display, Professor Fried remarks that Aristotle thought that "the best means for teaching and acquiring virtue" is to "study the example of persons who to a high degree exhibit the virtue," and proposes his candidates for a list of past judges of great judgment, "Learned Hand, Robert Jackson, Henry Friendly, and John Marshall Harlan (the younger)." Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1041–42 (2011).

263. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

264. *See id.* at 168, n.3 (Stewart, J., concurring) (discussing *Griswold* as supporting the decision in *Roe* because "the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the 'liberty' that is protected by the Due Process Clause of the Fourteenth Amendment" and citing in support "Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in *Poe v. Ullman* . . . ."); Planned Parenthood v. Casey, 505 U.S. 833, 847–50, 858 (1992) (plurality opinion of O'Connor, Kennedy & Souter, JJ.) (relying on quotations from Harlan's *Poe* dissent).

majority opinion in *Roe* with its nonchalant attitude toward legal reasoning and the specifics of the case.[265]

Whatever the success of later efforts to justify "the central holding of *Roe*" in part through an "explication of personal liberty" based on the *Poe* dissent,[266] *Roe* itself was not an application of the framework of constitutional principles Harlan described, and he deserves neither credit nor blame for the decision.[267] Of equal importance, in *Poe* and *Griswold,* Harlan was proposing and enacting an approach to constitutional decision making generally, and his specific approach to due process can only be understood in the setting of his broader vision. We can and should consider what Harlan may have to contribute to our constitutional law thinking without reflexively evaluating his views in the light of our own views about *Roe*.

What follows, then, are some lessons for twenty-first century constitutional lawyers that I think Justice Harlan has to offer, fifty years after he left the Supreme Court.

A. Constitutional Decision Making Cannot be Reduced to an Algorithm

Like the other Justices appointed by Franklin D. Roosevelt, Hugo Black was a reformer, committed to eliminating the abuses they believed the pre-1937, *Lochner*-era Court had committed. The fundamental error of the old Court, as he saw it, was to treat constitutional decision making as involving the exercise of normative judgment by the judiciary. By definition, any such judgment requires individual judges to introduce their own moral and policy perspectives into their decisions. In doing so, the judges deny, in reality if not verbally, the authority of the written Constitution and the policy-making role of the legislature. The solution, in turn, was to restate the process of constitutional adjudication so as to eliminate any place for personal judgment and limit constitutional judges to

---

265. The canonical criticism of *Roe*'s sloppy workmanship is John Hart Ely's biting observation that *Roe* was "a very bad decision . . . because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).

266. *Casey*, 505 U.S. at 853 (plurality opinion of O'Connor, Kennedy & Souter, JJ.).

267. I think it likely that Harlan would have dissented in *Roe*, and he certainly would not have joined the sweeping trimester scheme, with its almost complete disconnect from the specific statutes before the Court in *Roe* and its companion decision. But I also think that speculation about the judgment that Harlan would have reached in *Roe* is beside the point. As we have seen, in *Griswold* Harlan expressly acknowledged that judges sharing the framework of constitutional principles he thought correct can and sometimes will disagree over the correct result in a particular case.

the role of interpreting norms entirely defined by the Constitution's language or by the legislature.

Black believed that what I have called his textualism achieved this end and was therefore the correct method of constitutional adjudication for definitional as well prudential reasons.[268] As a matter of definition, since the Constitution is a written text, constitutional law is textual interpretation. "Constitutional cases must be decided according to the terms of our Constitution."[269] And constraining judges "'to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution' and thus 'proceed[] within clearly marked constitutional boundaries . . . to execute policies written into the Constitution'" eliminates the danger that they will "'roam at will in the limitless area of their own beliefs as to reasonableness.'"[270] Textualism makes constitutional adjudication algorithmic.

Harlan thought Black's position erroneous and indeed indefensible. This was in part because Harlan believed it clear that textualism does not achieve the goal of excluding judicial subjectivity from judicial decisions. Black's constitutional opinions were no more demonstrably free of the influence of Black's personal judgment than anyone else's.[271] Indeed, in his *Griswold* concurrence, Harlan suggested that the claim to provide a neutral and algorithmic method for deriving constitutional decisions may actually trap the textualist in self-deception. A judge who believes that normative judgment must be excluded from constitutional decision making will be unable, if a person of integrity, to recognize the role that such judgments are unavoidably playing in his or her own decisions.

This is an old and powerful point. As Chief Justice Marshall acknowledged long ago, constitutional lawyers cannot hermetically seal off their legal opinions from their personal and sometimes conflicting political and moral beliefs. "The judgment is so much influenced by the wishes, the

---

268. Black's textualism served at least one other substantive purpose in his thinking: it expressed and justified his First Amendment absolutism, a viewpoint that rested on a sophisticated recognition that effective protection for freedom of speech must safeguard expression against *judicial* abridgment as well as invasion by the legislature or executive. *See* DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF THE ABSOLUTE FIRST AMENDMENT 246–53 (2009).

269. HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 14 (1968). *See also id.* at xvi ("[T]he courts should always try faithfully to follow the true meaning of the Constitution and other laws as actually written . . . .").

270. Griswold v. Connecticut, 381 U.S. 479, 525–26 (1965) (Black, J., dissenting) (citations omitted).

271. As noted above, Harlan thought Black's *Wesberry* one person/one vote opinion was a particularly egregious example of reading policy preferences into a constitutional provision that will not bear them.

affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on [a] great constitutional question ought to excite no surprise"[272] The path of wisdom lies in recognizing the part that one's normative commitments play, not in pretending they are irrelevant or can be denied a role in deciding a difficult case. The criticism is also a familiar one. Opponents of Black's intellectual heirs regularly point out that the conclusions reached by current day textualists and originalists coincide with the latter's apparent policy preferences with remarkable frequency. On this issue, Harlan's is only one more voice in a chorus.

Harlan's more fundamental critique of Black, and his real contribution to constitutional thought in the twenty-first century on this issue, lies elsewhere. Textualism, and indeed any algorithmic understanding of institutional adjudication, begs the question of how *this particular text* is to be read. As Marshall indicated in *McCulloch v. Maryland* and elsewhere, much of the time the language of the Constitution does not invite or even permit decision making by a verbal analysis in which normative judgments about the Constitution's purposes and overarching principles play no role.[273] The real Constitution is, in Harlan's words, the basic charter of our society and much of the time announces principles of government that must be applied to particular cases through a process involving the personal judgment of those who must do the applying.

Accepting Harlan's view of Black does not entail the conclusion that Black was wrong to worry that judges, and in particular Justices of the Supreme Court, may allow their personal preferences to overwhelm or inadvertently subvert their judgment about the best answer to a constitutional question. That is an ever-present danger. What does follow is that the enterprise of looking for an algorithmic or methodological solution to the problem of improper judicial decision making is wrong-headed. No amount of tinkering with a list of approved forms of argument can prevent a

---

272. 4 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 394 (Wm. H. Wise & Co. 1925) (orig. ed. 1804–07).

273. In discussing the scope of Congress's power over foreign and interstate commerce, Marshall wrote that "our constitution being . . . one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word," and proceeded to do so by invoking common English usage, the reader's judgment about what a reasonable "system for regulating commerce" must include, the implications of other constitutional provisions, past political practice, and "the primary objects for which the people of America adopted their government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824). *See also* John Marshall, Opinion, *A Friend of the Constitution* III (July 2, 1819), ALEXANDRIA GAZETTE, *reprinted in* JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 168 (Gerald Gunther ed., 1969) (stating that constitutional decisions should conform to "that great paramount law of reason, which pervades and regulates all human systems").

judge from allowing personal inclinations from influencing his or her constitutional conclusions, inadvertently or otherwise. Despite his quotations from Frankfurter, Harlan in reality refused to participate in the long-running argument between Frankfurter and Black over who had the better approach to constraining constitutional decision making. The problem of inappropriate judicial subjectivity is moral, not intellectual, and the only "solution" is to restate and practice constitutional adjudication as its great exponents have done. A judge whose constitutional decisions are justified by cogent opinions in the *McCulloch* tradition, and thus involve the exercise of personal, normative judgment, is practicing "judicial self-restraint" in the only sense that is meaningful or necessary.

B. Constitutional Decision Making in the *McCulloch* Tradition is the True Path of Fidelity to the Constitution

Recognizing that the negative question "how can we *constrain* judges to limit themselves to their proper role?" is wrong-headed puts great weight on the affirmative description of constitutional decision making we accept. As the reader knows, Justice Harlan spent much of his *Poe* dissent explaining how he understood "the rational process in Constitutional adjudication,"[274] and I believe that renewed attention to his understanding would greatly benefit twenty-first century constitutional lawyers.

The legitimacy of judicial review stems from the authority of the written Constitution as supreme law, but in order to respect that authority, the judge must take account of exactly what kind of text the Constitution is. "[W]e must never forget that it is *a constitution* we are expounding."[275] Chief Justice Marshall explained in *McCulloch* that the Constitution's "nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[276] In *Poe*, Harlan paraphrased Marshall's statement as meaning that "the basis of judgment" in a constitutional case "must be a rational one, approaching 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."[277] Attempts to assimilate constitutional decision making in general to the sort of clause-bound interpretivism often appropriate in statutory construction

274. Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

275. McCulloch v. Maryland*,* 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

276. *Id.*

277. *Poe*, 367 U.S. at 539 (Harlan, J., dissenting) (citing *McCulloch*, 17 U.S. (4 Wheat.) 316).

are mistakes, blatant failures to recall "that it is *a constitution* we are expounding."[278]

Constitutional adjudication that gives appropriate weight to the Constitution's "nature" as "the basic charter of our society" will put great weight on the "background of Constitutional purposes, as they have been rationally perceived and historically developed," that are relevant to the specific issue the judge must decide.[279] Discerning what those purposes are, both in historical background and as the ongoing tradition of judicial precedent and political practice has elaborated them, is not a simple matter of discovering preexisting normative judgments. There is in the process an ineluctable element of personal judgment, of weighing how persuasive differing arguments are, and of determining which among conflicting conclusions is more faithful to principle and precedent. Far from excluding the exercise of normative judgment, respect for a text such as the Constitution demands it.[280]

The flip side of Harlan's emphasis on constitutional purposes and principles is his insistence that the rational process in constitutional adjudication requires judges to define the issue before the court, and thus the scope of whatever decision the court should render, with great precision, and take painstaking account of relevant legal authority. In this regard as in others, Harlan's approach is the reverse of Black's textualism, which generally broke down the Constitution into its textual components and avoided reliance on considerations that transcend individual provisions. As Black's total incorporation theory demonstrates, doing so could lead

---

278. *See, e.g.*, BLACK, *supra* note 269, at xvi (courts must "follow the true meaning of the Constitution and other laws as actually written. . . .").

279. *Poe*, 367 U.S. at 540, 544. *See also id.* at 542–43 ("[T]he imperative character of Constitutional provisions . . . must be discerned from a particular provision's larger context" which may be "one not of words, but of history and purposes . . . .").

280. It would be a misplaced literalism in reading judicial opinions to take either Marshall or Harlan to deny that the Constitution also includes many provisions that often should be treated as specific rules more than as broad principles of government. The age requirements for members of Congress and the president come to mind. But the decision to treat a given provision as a clause-bound rule itself is an exercise of normative judgment (why not read the age requirements as establishing a broader, and vaguer, principle that elected federal officials must be mature?). Furthermore, provisions that look on their face like rules often give rise to questions that can only be answered by making non-rule-bound judgments of principle. *See, e.g.*, Myers v. United States, 272 U.S. 52, 128 (1926) (despite the delegation to the president of a textually unlimited power of appointment, Congress may prescribe qualifications for office "provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."). Finally, it is not the provisions that are plausible candidates for treatment as rules that generate most constitutional controversies.

Black to adopt very far reaching and context free conclusions. In contrast, as his *Poe* dissent illustrated, Harlan generally started from a comprehensive understanding of the constitutional principles at issue but reasoned his way to a judgment defined by the particular facts of the case and the relevant precedents. Harlan's rational process thus pushes constitutional decisions in the direction of overall coherence, while at the same time resisting the temptation to issue sweeping pronouncements that might later seem inconsistent with other constitutional principles.

Harlan's insistence on precision—in defining the issue before the Court, in dealing with relevant precedent, and in explaining the rationale for the resolution he thought correct—often separates his understanding of constitutional adjudication from Frankfurter's, although Harlan's quotations from Frankfurter in *Poe* may obscure that fact. Frankfurter's opinion for the Court in *Rochin v. California* can illustrate the difference. Frankfurter insisted, as Harlan would later do in *Poe*, that due process adjudication involves a "judicial exercise of judgment" rather than application of a fixed, "authoritatively formulated" set of rules.[281] At the same time, he wrote at great length to insist that the justices could "not draw on our merely personal and private notions" in deciding whether subjecting a criminal suspect to involuntary stomach-pumping violates due process.[282] But despite Frankfurter's insistence that his discussion of that question was "a disinterested inquiry pursued in the spirit of science," his *Rochin* opinion relied almost entirely on general references to "standards of justice" rather than the careful, step-by-step discussion of constitutional principles and precedents that pervades Harlan's dissent in *Poe*.[283]

Harlan would have accepted many, or perhaps even all of Frankfurter's generalizations as characterizations of the due process tradition's goal of preventing oppression and tyranny, or as ways of appealing to the reader's personal sense of what makes sense in light of the tradition. But in *Rochin,* the generalizations almost entirely displace the discussion of principle and precedent Harlan thought essential, leaving Frankurter's famous line "[t]his is conduct that shocks the conscience" suspiciously close to an affirmation of personal morality rather than a

---

281. Rochin v. California, 342 U.S. 165, 171, 169 (1952). *Cf. Poe*, 367 U.S at 542 (Harlan, J., dissenting) ("Due process has not been reduced to any formula; its content cannot be determined by reference to any code.").

282. *Poe*, 367 U.S. at 544 (quoting *Rochin*, 342 U.S. at 170).

283. *Rochin*, 342 U.S. at 172, 169. *See also id.* at 169 ("[C]anons of decency and fairness which express the notions of justice of English-speaking peoples . . . personal immunities which . . . 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'"); i*d.* at 173 ("[C]ertain decencies of civilized conduct . . . convictions cannot be brought about by methods that offend 'a sense of justice' . . . the community's sense of fair play and decency."); *id.* at 174 ("so brutal and so offensive to human dignity").

conclusion of constitutional law.[284] Harlan and Frankfurter both rejected Black's algorithmic mindset, and in a broad sense agreed on the inevitable role of normative judgment in constitutional adjudication, but Harlan respected a fundamental principle that Frankfurter in *Rochin* and elsewhere too often forgot. To be legitimate, "determinations of law emerge from working with texts that are common and public" rather than from private convictions about justice or generalities about civilized behavior.[285] This difference in practice in their understandings of personal judgment is so great as to be a matter of kind and not just of degree.[286]

The proper and, as Harlan believed, traditional approach to constitutional decision does not preclude error or generate inescapably correct outcomes in difficult cases. Different judges will sometimes come to different conclusions without anyone having acted improperly or beyond the legitimate scope of the judicial office. Constitutional law is not Euclidean geometry, and the lawyers and judges who must ask and answer constitutional questions are human beings rather than computer programs. Their judgments will reflect these truths. But this is not a flaw. The assumption that recognizing a role for personal judgment necessarily opens the door to willful judicial subjectivity assumes a grimmer view of the human ability to act with integrity and on principle than we need admit.[287] The devotees of algorithmic approaches to constitutional law share with their archenemies, the proponents of an ideologically defined "living Constitution," the underlying assumption that the individual judge's personal commitments must either rule or play no role whatsoever. Harlan, in his description of constitutional adjudication and in his practice in *Poe*, is proof that the assumption is erroneous.

C. Constitutional Law is an Ongoing Dialogue

Precisely because they are intended to eliminate the role of personal judgment and normative reasoning from constitutional law, algorithmic understandings of constitutional adjudication are intrinsically non-dialogical.[288] Intelligent adherents such as Justice Black recognize that there

---

284. *Id.* at 172. On the role of appeals to legally shaped, common-sense opinion, see *supra* at notes 188–90.

285. JOSEPH VINING, FROM NEWTON'S SLEEP 107 (1995).

286. I owe this point to Henry Monaghan.

287. "The use of rules to coordinate human enterprises of every sort assumes a generous and honest attitude . . . intelligence and good faith [and] that is a strength, not a weakness . . . ." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 67 (1991). Fried goes on to say about what I have labeled algorithmic views of constitutional adjudication that they rest on "too grim a view of human nature and of human intelligence." *Id.*

288. The same is true, I think, of views of a "living Constitution" that reduce constitutional law to the judicial enactment of an ideology. In what follows,

can be difficult questions and good faith disagreements,[289] but the ideal case is the constitutional issue for which the algorithm, properly followed, produces an incontrovertibly correct resolution. Constitutional adjudication is, at heart, an inquiry into facts, and those who dispute the facts have nothing to teach the better informed.[290]

In principle, the technique eliminates the need for discussion, which is central to the popularity of algorithmic arguments.[291] This is part of the reason the adherents to algorithmic views are generally impatient with *stare decisis*. Even if they concede that there are at times adequate prudential reasons for respecting a particular precedent, they do not understand precedents themselves to contribute to our understanding of "the imperative character of Constitutional provisions," as Justice Harlan thought.[292] At most, a precedent registers correctly the meaning derived through the algorithm and provides an example of its application to a factual situation. There is no strong sense in which a constitutional judge, at least if he or she sits on the Supreme Court, owes any particular duty to, or can derive any particular benefit from, the past course of constitutional adjudication.[293]

---

virtually everything I say about algorithmic approaches applies with equal force to ideological ones, the only change being that the role of the indisputable answer generated by the unquestionable method is played by the indisputable answer generated by the unquestionable moral and political theory.

289. *See, e.g.*, Gamble v. United States, 139 S. Ct. 1960, 1986 (2019) (Thomas, J., concurring) ("[T]here is room for honest disagreement, even as we endeavor to find the correct answer. . . . Reasonable jurists can apply traditional tools of construction and arrive at different interpretations of legal texts.").

290. *See* Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in part and dissenting in part) (describing "lawyers' work" in constitutional law as "reading text and discerning our society's traditional understanding of that text. . . . Texts and traditions are facts to study, not . . . [a] process . . . of making *value judgments* . . . .").

291. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 186 (1991) ("It is the illusion of our Age, to which we relentlessly cling, that men and women can create tools to solve moral and political problems, much as we have created technologies that solve physical problems.").

292. *See* Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

293. The qualification is necessary because most adherents to an algorithmic account of constitutional law assume that lower court judges are obliged to follow Supreme Court decisions even if the judge concludes that a decision is "demonstrably incorrect." *Compare Gamble*, 139 S. Ct. at 1989 (Thomas, J., concurring) ("[W]e should not invoke *stare decisis* to uphold precedents that are demonstrably erroneous . . . .") *with id.* at 1982 n.2 (Thomas, J., concurring) ("I make no claim about any obligation of "inferior" federal courts . . . or state courts to follow Supreme Court precedent."). As Henry Paul Monaghan pointed out in his classic article on constitutional precedent, the problem with a formulation such as Justice Thomas's "demonstrably incorrect" is that ""[w]hether a precedent is seen as *clearly* wrong is often a function of the judge's self-confidence more than of any

The principled refusal of adherents to algorithmic constitutional adjudication to accept the substantive value of engagement with precedent is a striking departure from traditional practice. The traditional view recognized the importance of taking the reasoning of past decisions into account, and gave special attention to opinions and opinion-writers generally thought to display good judgment.[294] And it is squarely contrary to the example Harlan gave in his *Poe* and *Griswold* opinions. In the *Poe* dissent, as we have seen, Harlan put great weight on the judge's obligation, in a constitutional case presenting novel or difficult claims, to situate his analysis in the ongoing tradition of constitutional adjudication, both in his description of due process analysis and in his careful use of precedent in addressing the merits of the appellants' claim. A lasting decision "builds on what has survived" in the tradition, and 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.'"[295]

For Harlan, constitutional thought is intrinsically a dialogue between the judge and the authorities, the present and the past. And it is equally a dialogue between the judge and his or her colleagues and critics, on and off the bench. Careful consideration of what past judges have thought about constitutional questions is itself a means of deepening one's understanding of the meaning of the Constitution quite apart from technical *stare decisis* concerns.[296] The same is true about the views of the judge's

---

objective fact." *Stare Decisis* and Constitutional Adjudication (1988), *reprinted in* Monaghan, *American Constitutional Law: Selected Essays* 532-33 (2018).

294. This traditional recognition of precedent as a source of wisdom is displayed in ways large and small, including (for example) the frequent, technically unnecessary indication in a citation that an opinion was written by a judge esteemed for good judgment. Even staunch supporters of algorithmic thinking continue this practice. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (citing Little v. Barreme, 2 Cranch 170, 179 (1804) (Marshall, C.J.); Miller v. Horton, 152 Mass. 540, 548 (1891) (Holmes, J.)) (parallel citations omitted).

295. *Poe*, 367 U.S. at 542, 544 (Harlan, J., dissenting).

296. Harlan accepted, of course, the legitimacy of the Court overruling precedent – the exercise of the power to overrule, after all, is itself part of the constitutional tradition and ratified by precedent. But he was slow to disregard even precedents he thought grievously wrong. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 98 (1966) (Harlan, J., concurring) ("Because judicial responsibility requires me, as I see things, to bow to the authority of *Reynolds v. Simms*, despite my original and continuing belief that the decision was constitutionally wrong, I feel compelled to concur in the Court's disposition of this case.") (citations omitted). Professor Monaghan has suggested to me that Harlan's separate opinion in Oregon v. Mitchell indicates that he believed precedent demonstrably in conflict with a constitutional provision's original meaning is particularly open to being overruled rather than distinguished. It should also be noted that Harlan thought it much harder

contemporaries who disagree on matters of substance. Harlan's understanding of due process was shaped, in part, by his careful consideration and rejection of Black's perspective. There is no formula, no code of right answers, no mechanical yard-stick for evaluating arguments, and no escape from the necessity in hard cases to make personal, normative judgments. There is only an ongoing conversation in which the individual participant's role is both to speak and to listen.

In his *Griswold* concurrence, Harlan explained to his reader the corollary to his understanding of constitutional adjudication as an ongoing conversation, extended over time, in which individual normative judgments about the issues discussed inevitably play a role. Disagreement among those who must decide constitutional questions cannot be eliminated, even in principle, and the desire of the devotees of algorithmic or ideological constitutional decision making to do so is a mistake. "Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it."[297] As long as the participants continue to speak and listen, their inevitable disagreements are the very means by which this tradition of dialogue lives.[298]

Harlan's relationship with Black displays the value of understanding constitutional law as a conversation.[299] Harlan sharply and

---

to reach the necessary level of clarity about historical meaning than many contemporary originalists do, and that Harlan's specific claim in *Mitchell* was that he did not need to extend the rationale of the *Reynolds* line of precedent to control a related but novel question. *See* Oregon v. Mitchell, 400 U.S. 112, 200, 219 (1970) (Harlan, J., concurring in part and dissenting in part) ("The history of the Fourteenth Amendment with respect to suffrage qualifications is remarkably free of the problems which bedevil most attempts to find a reliable guide to present decision in the pages of the past. Instead, there is virtually unanimous agreement, clearly and repeatedly expressed, that § 1 of the Amendment did not reach discriminatory voter qualifications. In this rather remarkable situation . . . I am satisfied that I am free to decide these cases unshackled by a line of decisions which I have felt from the start entailed a basic departure from sound constitutional principle."). *See also id.* at 152 (Harlan stating that the historical "'Stop' sign . . . compels" the Court not to "allow those decisions [invalidating state legislation] to carry us to the point of sanctioning Congress' decision to alter state-determined voter qualifications by simple legislation . . . .").

297. Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in the judgment). *See also Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (the constitutional "tradition is a living thing").

298. *See* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 260 (3d ed. 2007) ("[A] tradition is sustained and advanced by its own internal arguments and conflicts.").

299. Harlan and Black were warm personal friends, which did not prevent either from expressing intellectual disagreement in strong terms. *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 136–39 (1992). But there is in their opinions an underlying civility and respect that is all too often missing in contemporary constitutional disagreements.

systematically disagreed with Black's textualist understanding of constitutional adjudication, both theoretically—Harlan thought Black was wrong about the implications of the Constitution's existence as a text—and in practice. But as the reader knows, Harlan worked out his own position, as articulated in *Poe* and *Griswold*, largely through rebutting Black's arguments. Black, in other words, was essential to Harlan. And their intellectual conflict can continue to enrich constitutional thought. Fifty years after they left the Court, Black's forceful claim that Harlan's approach necessarily devolves into subjective decision making continues to be the central challenge to anyone, including the present writer, who substantially agrees with Harlan.

It is unclear to me if American judges and lawyers in the early twenty-first century are capable of sustaining this tradition. Our divisions are so deep, and so rooted in far-reaching ideological conflicts, that they often overwhelm any sense that those who disagree with us can be anything but enemies, at least when we are discussing constitutional issues. Perhaps the most important thing Harlan has to teach us, fifty years after he left the Court, is the possibility and vital importance of regaining our sense that the practice of American constitutional law can unite those who disagree, not simply determine winners and losers in political wars.

See H. Jefferson Powell, *Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles*, 72 S.C. L. REV. 917 (2021).