

January 1991

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Recommended Citation

Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991).

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THE COMMON LAW CONSTITUTION OF JOHN MARSHALL HARLAN*

BRUCE ACKERMAN**

I. CONSTITUTIONAL LAW AND COMMON LAW

Our legal heritage is rich, perhaps too rich. The modern judge looks back to two traditions, each layered over with the work of centuries, each intertwined with the other, but nonetheless distinct. The tradition of Anglo-American common law nears its millennium, offering up a tangle of craft and precedent from different eras. Compared to this, the tradition of American constitutional law is adolescent. And yet it provides the modern world's longest continuing judicial project in public law—one with its own narrative structure, decisive precedents, and cautionary tales. Given this embarrassment of riches, each judge, each era, must confront its own task of integration: how to organize common law and constitutional law into a meaningful whole?

Like the rest of his generation, Justice Harlan's quest for an answer began with a negation. The New Deal revolution had repudiated a synthesis that had been the crowning constitutional achievement of the preceding generation. This early twentieth century synthesis affirmed a deep continuity between the two traditions. American constitutional law was but an aspect of a broader and deeper Anglo-Saxon struggle for a distinctive language of liberty. The deep continuity of common and constitutional law was expressed both narratively and substantively.

Narratively, the greatest events of American constitutional history—the Founding and Reconstruction—were not presented as if they represented sharp breaks with the common law tradition. Revolutionary Americans fought the English, it is true, but they were fighting for their common law rights as Englishmen. Similarly, the Civil War was not understood as marking a sharp break in constitutional development. Reconstruction merely served to deepen and universalize common law commitments by guaranteeing “life, liberty and property” for all, not just a privileged few. Rather than emphasizing large differences between the two traditions, the student of constitutional law and common law supposed them mutually complementary.

* Presented at the New York Law School Centennial Conference in Honor of Justice John Marshall Harlan (Apr. 20, 1991).

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This is almost too weak a way of stating the relationship. The senior partnership in the business of preserving Anglo-Saxon liberty was often awarded to the common law. On an intellectual level, the triumph of Darwinism had an enormous impact throughout the culture. Evolution, not revolution; slow and unconscious adaptation, not self-conscious institutional engineering, seemed the proper path of human development. From this perspective, the slow and half-conscious methods of the common law seemed more deeply rooted in the life of the community than the efforts by Enlightenment Founders or Reconstruction Republicans to usher in brave new worlds of constitutional meaning. However different they may have been in other respects, the great constitutionalists of the late nineteenth century—a Cooley or a Tiedemann or a Wilson¹—could agree on this: that the Founders and Reconstructors were far too optimistic about the role of self-conscious constitutional construction in history; that deeper changes occurred through evolutionary processes by which an organic community adapted to imperfectly understood imperatives of growth and development. The challenge was not to understand the intention of the Framers of the original Constitution and its amendments, but to grasp the ways in which these original understandings were transformed by deeper organic imperatives. Holmes's great book, *The Common Law*,² was a model to be followed, not an example of a legal genus radically distinct from constitutional law.

And yet, despite their skepticism about the role of self-conscious legal change in history, most lawyers, judges, and scholars of the period did not find it difficult to detect a telos organizing the meaning of it all.³ Common law and constitutional law were part of a larger saga, describing the success of Northern European civilization in constructing a vibrant alternative to the decadent Latin despotisms of the medieval and early modern world. The story did not begin with the Founding or even the Magna Carta's insistence on the common law writs. It began in the forests of Northern Europe where Germanic tribes first tasted a liberty-loving alternative to Roman despotism; it included the Protestant Reformation no less than the American Revolution. The story often expressed a great deal of ethnic pride in carrying on the Northern European Protestant heritage, sometimes adopting the language of race: the study of the Constitution

1. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (5th ed. 1883); CHRISTOPHER G. TIEDEMANN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES (1890); WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885).

2. OLIVER W. HOLMES, JR., THE COMMON LAW (1881).

3. For all of Holmes's skepticism, his *Common Law* is rich in teleology. See HOLMES, *supra* note 2.

and the common law were but chapters in the great Teutonic or Aryan struggle for human freedom.⁴

This synthesis, long under Progressive attack, dissolved in the cauldron of the Great Depression and World War. After the New Deal, the common law categories of contract and property no longer seemed at the core of the constitutional language of freedom. To the contrary: the beginning of constitutional wisdom was to grasp the ways in which common law rhetoric might conceal oppressive inequality and coercive monopoly. After the War against Hitler, it would be tough to root either common law or constitutional law in a meta-narrative starring the Teutonic race.

So much, at least, was obvious to the lawyers of Harlan's generation as they returned from their exhilarating experience of military victory to take up leadership positions in a transformed American government. But out of these negatives might come many affirmatives—widely different understandings of the proper relationship between constitutional law and common law. When faced with the disintegration of the old synthesis, John Harlan sought to revitalize common law constitutionalism. Most of his colleagues were skeptical, many downright hostile. They thought Harlan was ignoring the verdict of history, as expressed in the constitutional revolution of 1937; even more fundamentally, they thought he was blinding himself to the special character of constitutional law. Rather than repeating the mistake of *Lochner v. New York*,⁵ they sought forms of adjudication that would declare the Constitution independent from common law methods and ideas.

These independent constitutionalists, as I shall call them, differed greatly amongst themselves as to the methods of achieving their great goal. For present purposes it is unnecessary to concern ourselves with those Justices (if such exist) who aimed for independence by trying to liberate themselves from the bonds of history. I am more interested in describing an approach which is no less self-consciously conservative than Justice Harlan's,⁶ but which differs radically in its understanding of the

4. For a remarkably effective reassertion of the relevance of these broad themes, see DAVID HACKETT FISCHER, *ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA* 4-5 (1989). My colleague Paul Kahn is recapturing the texture of late nineteenth century constitutional theory in his forthcoming book. See PAUL KAHN, *THE END OF CONSTITUTIONAL LAW* (forthcoming 1992).

5. 198 U.S. 45 (1905).

6. In terms of Kent Greenawalt's useful trichotomy, the "conservatism" I have in mind has to do with judicial method, not political and social philosophy. See Kent Greenawalt, *Justice Harlan's Conservatism and Alternative Possibilities*, 36 N.Y.L. SCH. L. REV. 53 (1991). Indeed, insofar as the American constitutional system affirms liberal Enlightenment values of individualism and egalitarianism, the effort to conserve *these* values will predictably generate all sorts of problems for the political and social conservatism that

tradition it proposes to conserve. This brand of independent constitutionalism is most familiar in the work of Justice Black, but I will be defining the approach more broadly to include many judicial performances of which Black himself would not have approved.⁷ Similarly, my model of common law constitutionalism hardly exhausts the importance of Harlan's judicial contribution. While Harlan displays his common law sensibility in a bewildering diversity of contexts, there is obviously much more to him, both substantively and methodologically, than my simple model expresses. Rather than aiming for a complete portrait, I hope to explore Harlan's work for help in our own effort to work out a plausible relationship between the two traditions constituting American law.

Which represents the sounder path for the future—constitutional common law or constitutional independence? Obviously, the right answer may not be one or the other. Judges may try to mix modalities in crafty combinations. This article, however, contents itself with some broad orienting remarks. I shall be presenting four reasons for thinking that Harlan deserved to be in dissent—why the next generation should continue down the path of the law marked by independent constitutionalism. I leave to another time whether, consistently with this large conclusion, independent constitutionalists might “selectively incorporate” some Harlanesque techniques into their juridical repertoire, and if so, when and how.

II. CONSTITUTIONAL INDEPENDENCE OR CONSTITUTIONAL COMMON LAW?

My models will be comparing two approaches along three dimensions. The first axis of comparison investigates alternative narratives through which constitutionalists might seek to locate particular problems within historical time. The partisans of independence emphasize a distinctively American narrative whose high points are the Founding, Reconstruction, and other historical exercises in popular sovereignty. The common law narrative is more capacious: it does not begin with 1776 or 1787, but

Greenawalt describes. When political or social conservatives are appointed to the bench, they will have to choose the kind of conservatism that is most important—do they want to be judicial conservatives, and preserve the Enlightenment tradition of American constitutionalism, or do they wish to be judicial activists, and repudiate Enlightenment constitutional values to further their conservative political and social ideals? It is not clear whether Professor Greenawalt recognizes the existence of this dilemma within conservative thought.

7. As we shall see, Justice Douglas's majority opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), satisfies the model of independence no less than Justice Black's dissent in that case. See *infra* text accompanying notes 50-53.

traces a social practice deeper into time, glimpsing the mythic realm I shall call "time immemorial." Nor does it focus intensively upon a few magic moments of constitutional creativity—the Founding or Reconstruction or whenever. It is more concerned with a practice's gradual evolution through long periods of time. Is marriage a fundamental institution of our society? Don't ask the Framers. Consider that we have lived with the practice since time immemorial and it continues to have deep meaning for us today. Is fair criminal procedure a fundamental value? Don't ask the Reconstruction Republicans. Governments have been punishing people since time immemorial and judges have continually strived for fairness against the repressive passions of the day. And so forth. To summarize this first contrast, I shall say that the independent constitutionalist's time frame has a *definite* beginning and emphasizes crucial *turning points*, while the common lawyer's time frame has an *indefinite* beginning and emphasizes *evolutionary* development.

Second, and not unrelated, are competing orientations to rationality. For the independent constitutionalist, one cannot understand the Founders or their great successors without recognizing that they were great gamblers on the power of untested abstractions. Thus, the Founding Federalists believed that Enlightenment political science allowed them to construct a republic of unprecedented size and diversity; the Reconstruction Republicans gambled on the federal courts making an unprecedented effort to protect the fundamental rights of previously enslaved and subordinated groups.

The common lawyer, in contrast, is deeply suspicious of comprehensive efforts at institutional redesign. When put to the practical test, these abstract projects are meaningless without the exercise of practical wisdom by practical men and women steeped in the evolving mores of social life. A thoughtful judicial decision will not be full of so-called theories of fairness or equality or democracy. It will be accompanied by a sober enumeration of the particular factors that particular decisions bring into play.

Once the judge gets down to the facts of a case, only one thing will be clear: it will be a miracle if substantial things cannot be said on *both* sides of the dispute. This does not mean that a judge can't learn from others in making up his mind. But the best place to look is in the books of judicial opinions written by hard-headed common law lawyers, not in the speculative excesses of constitutional lawmakers. Of course, no common law case is like another. But judicious effort to respond rationally to particulars will slowly add up to patterns of rational response. The more these patterns are detectable across different times and places, the more reasonable they will seem.

This leads to a third crucial difference between the independent and common law constitutionalist: the identity of the model decision maker. The independent constitutionalist focuses on people like the Founders who,

after a generation of sacrifice and political effort, have gained the consent of their fellow citizens to new principles of constitutional legitimacy. The task of the judge is, first and foremost, to master these basic constitutional principles and make them his guide in concrete cases.

For the common lawyer, this is to put the cart before the horse. After all is said on both sides of the case, there will be no decisional algorithm that can serve as a reliable guide. We should rely instead on the seasoned judge with a sense of decency to sort the wheat from the chaff. It is he, and not some group of politicians who have earned the popular authority to speak for We the People, who is the true hero of our constitutional order.

So much, then, for our competing models—of time, of rationality, of paradigmatic decision maker. Whatever else they fail to capture, surely they demonstrate that Justice Harlan exemplifies the type of judicial character that the common law model places at the center of the constitutional stage. He did not, like Justices Black or Warren, gain office by succeeding in electoral politics; nor did he win his seat, like Frankfurter or Douglas, in reward for academic or intellectual services rendered to a victorious President; nor was his selection attributable, in the manner of Justice Brennan, to a President's humdrum effort to fasten marginal groups more firmly into his electoral coalition.⁸ Like Justices Blackmun, Powell, and Souter, he comes from the residual category of judicial appointments: men (and hopefully, in the future, women⁹) who are "leaders of the bar," masters of good judgment and interstitial adaptation of established norms.

In Harlan's case, the President and the Senate got what they paid for. Harlan was a patrician in the Roman sense, combining blood and breeding in a way that Cicero would have envied. The first Harlan in the New World had served as Governor of Delaware in the year of our Lord, 1695.¹⁰ Marked out by his very name for service on the Supreme Court, John Marshall Harlan did not let his family heritage transform him into a social dinosaur. A man of great personal charm, he couldn't care less about matters of social standing of importance to *arrivistes*. He reached out for human contact with all who crossed his path.

But his immediate warmth and humanity only served as an introduction. I myself worked as the Justice's law clerk during his later years—at a time when he was sorely taxed by physical and family

8. For a more elaborate theory of judicial appointment, see Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164 (1988).

9. Sandra Day O'Connor's selection was of the Brennan type. *See id.* at 1169.

10. *See* David L. Shapiro, *Biographical Note to THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN* xvii, xvii (David L. Shapiro ed., 1969).

difficulties that would have conquered lesser men. Harlan's response to adversity was an eye opener for me. His courtesy and kindness were admirable in themselves; but the better I got to know him, the more remarkable his character seemed. To glimpse part of the picture, reread Marcus Aurelius's *Meditations*.¹¹ But there was another part of Harlan that eluded Marcus: a genuine concern with the personal destiny of each human being that had no analogue in classical stoicism. If there was a judge capable of redeeming the common law model during an age of constitutional independence, fate could not have selected a better man.

III. COMMON LAW FOUNDATIONS?

So much for Harlan the man; the question remains whether he took the right turn at the crossroads of legal method. Here are four reasons for doubt.

A. *Democracy*

The common law method, when elevated to constitutional heights, runs headlong into a legitimacy crisis. The familiar charge: common law constitutionalism is antidemocratic. It is one thing to allow the common law a subsidiary role in a system superintended by popularly elected legislatures; quite another to support the common law judge when he attempts to invalidate democratic legislation. And it doesn't help much to hear the judge brag about his special situational sensitivities or the wisdom of previous generations of ermined elitists stretching back in the mists of Westminster Hall.

Constitutional independents like Hugo Black were right to keep this basic legitimacy problem at the forefront of judicial consciousness. Rather than mastering the elite mysteries of common law adaptation, the independent judge squarely confronts the problem of democratic legitimacy. Only by reflecting on the distinctive character of American democracy can he hope to carve out a conception of judicial review compatible with its democratic aspirations.

Black was also right in pointing out how independents might build a democratic foundation for judicial review. The key was to keep distinct two ideas that are too often jumbled together: rule by the People and rule by a smallish number of politicians sitting in the halls of power in Washington, D.C. and the state capitols. While our elected politicians always pretend to speak in the name of the People, this is a trick accomplished only rarely—by constitutional movements of the type exemplified by the Founding Federalists and Reconstruction Republicans.

11. MARCUS AURELIUS ANTONIUS, *THE MEDITATIONS* (G.M.A. Grube trans., 1963).

Before gaining the authority to make supreme law in the name of the People, movements like these first convinced an extraordinary number of their fellow citizens to take their initiatives with a seriousness they do not normally accord to politics; second, they allowed their opponents a fair opportunity to organize their own political forces; third, they convinced a majority of their fellow Americans to support their initiatives time and again in a host of deliberative fora. Black was right to insist that the distinctive feature of American democracy was its award of superlegitimacy to spokesmen for popular movements that satisfy all three of these demanding criteria. They, and only they, are granted the authority to make supreme law in the name of the People—an authority not to be confused with the normal legitimacy gained by ordinary politicians most of the time.

It follows that courts do not act undemocratically when they test normal statutes against higher lawmaking principles elaborated in the name of the People at America's constitutional turning points. Instead, judges are right to insist that normal politicians must earn the democratic authority to transform the constitutional baseline by winning the kind of mobilized and sustained consent achieved by the most notable constitutional lawmakers of the past. It is Black's concern with preserving these popular historical achievements that motivated his advocacy of the independent constitutionalism sketched in my model.

Now there is, transparently, much to be said both for and against a Blackian two track theory of American democracy.¹² The crucial point here is that John Harlan was entirely uninterested in contributing to this conversation. He did not try to respond to Hugo Black's theory of democracy with a competing theory of democracy; he thought that judges could make do without any self-conscious theory of American democracy as they sought to make sense of the Constitution.

*Wesberry v. Sanders*¹³ provided a revealing exchange between Black and Harlan on these matters. The case, as Black understood it, involved the meaning of the requirement, found in Section 2 of Article I, that the "House of Representatives shall be . . . chosen by the People of the Several States."¹⁴ For Black, this language could not be interpreted without reflecting on the meaning of popular sovereignty, and the importance of prohibiting our governors from insulating themselves from the People by malapportioning the House of Representatives.¹⁵

12. For efforts to defend such a theory, see BRUCE ACKERMAN, *WE THE PEOPLE* (1981).

13. 376 U.S. 1 (1964).

14. U.S. CONST. art. I, § 2, cl. 1.

15. See *Wesberry*, 376 U.S. at 17.

Harlan reacted to this suggestion with shocked disbelief, filing “the most strongly worded”¹⁶ dissent he ever wrote.¹⁷ He refused to accept the idea that matters of democratic principle were at stake in the construction of Section 2. For him, Black’s chosen text should be read with all the emphasis falling on the concluding words: “the People of *the Several States*.” Interpreting the phrase as if it only involved a commitment to federalism, not democracy, Harlan concluded that “the People” of each State selected their Representatives regardless of how malapportioned their voting districts might be.¹⁸

With some reluctance, Harlan recognized that Black was right in pointing out that many Founders objected to malapportionment in principle.¹⁹ Rather than countering Black by developing a different conception of democratic principles from these (and other) sources,²⁰ Harlan excused himself from the task by pointing out that the Framers had provided an explicit remedy for malapportionment: the grant to Congress, in Section 4 of Article I, of the power to regulate state electoral practices.²¹

16. This is the assessment of David Shapiro in *THE EVOLUTION OF A JUDICIAL PHILOSOPHY*, *supra* note 10, at 265.

17. *See Wesberry*, 376 U.S. at 20 (Harlan, J., dissenting).

18. *See id.* at 24.

19. *See id.* at 27 (admitting that “many, perhaps most, of [the Founders] also believed generally . . . that within the States representation should be based on population”).

20. Given Professor Greenawalt’s uncertainty on this score, *see Greenawalt, supra* note 6, at 58-59, I should say that I think Black was quite mistaken in relying exclusively on the language of Section 2, without integrating into his analysis other fundamental principles brought into our higher law during Reconstruction. *See Wesberry*, 376 U.S. at 8 & n.10.

Black’s narrow emphasis did not, I think, justify Harlan in taking an even narrower approach in dissent:

Since I believe that the Constitution expressly provides that state legislatures and the Congress shall have exclusive jurisdiction over problems of congressional apportionment [in Art. I, § 4], there is no occasion for me to consider whether, in the absence of such provision, other provisions of the Constitution, relied on by appellants, confer on them the rights which they assert.

Id. at 24 n.6 (Harlan, J., dissenting).

Harlan’s reading of the Founding materials was no less narrow. While Black’s understanding of “chosen by the People” was informed by many sources, Harlan refused to move beyond the formal text in order to understand its terms. He asserted that since the text itself does not explicitly secure the right to vote, “*so far as Art. I, § 2, is concerned*,” the state could set voting qualifications in any way it wished. *Id.* at 26 (Harlan, J., dissenting).

21. *See U.S. CONST. art. I, § 4, cl. 1.*

Harlan was right in noting that Article I, Section 4 expressly grants Congress power over state election laws, and does not authorize judicial intervention with equal explicitness. But Section 4 is no different from the rest of the Constitution in this regard, which *nowhere* explicitly authorizes judicial review. Harlan, of course, was perfectly aware of this, and given his common law tendency to downplay such facts about the Founding, was generally untroubled by the absence of an explicit textual base for judicial intervention. In cases like *Wesberry*, however, he plays a very different tune.²² He insists that, unless he can find *explicit* evidence that the

22. Harlan's literalist and intentionalist approach in *Wesberry* is characteristic of the approach he took to cases involving the malapportionment of state legislatures. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). Of course, the particular *text* relevant here is quite different: it is the Fourteenth Amendment, not Article I, that is decisive. Harlan's approach, however, is identical. As in *Wesberry*, he claimed that the declaration of fundamental principles announced by the Amendment—here expressed through the language of "equal protection"—simply did not apply to legislative reapportionment because the Framers took the extraordinary effort, in a subsequent section of the Amendment, to fashion special remedies for denial of voting rights. For an excellent opinion that explicitly lays bare the parallelisms in Harlan's approach to federal and state problems, see *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).

Harlan's approach to the Fourteenth Amendment in *Reynolds* is, of course, on far stronger intentionalist ground than his stand in *Wesberry*. While there is no evidence that the Founding Federalists explicitly considered and rejected the application of constitutional norms to reapportionment, there is plenteous evidence that the Republican Framers of the Fourteenth Amendment were trying to be very cagey indeed about the application of equal protection doctrine to black voting. Although Harlan tends to read this evidence with the advocate's zeal to eliminate ambiguity, he is on much stronger ground here.

Even granting his (uncharacteristic) fealty to intentionalism, there remains a very large problem with Harlan's analysis. This is posed by the existence of the Fifteenth Amendment, which eliminates earlier ambiguities by explicitly granting voting rights to blacks. Given this later explicit resolution, it is unclear why the earlier uncertainties surrounding the Fourteenth Amendment's application to black suffrage should constrain our understanding of the Equal Protection Clause.

Indeed, despite his general refusal to scrutinize reapportionment questions, even Harlan made an exception for racially motivated malapportionments under the Fifteenth Amendment. Thus, he joined the Court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and repeatedly stated that racially motivated cases of vote dilution should be governed "by entirely different constitutional considerations." *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964) (Harlan, J., concurring); *see also Baker v. Carr*, 369 U.S. 186, 335 (1962) (Harlan, J., dissenting) ("It is not inequality alone that calls for a holding of unconstitutionality; only if the inequality is based on an impermissible standard may this Court condemn it."). Harlan does not, however, explain what these standards should be or how dilution might be measured in terms other than "one person, one vote." Even more fundamentally, his willingness to tolerate this exception for blacks threatens to undermine his entire intentionalist argument against judicial application of "equal protection" to reapportionment. Speaking historically, the reason the Framers of the Fourteenth Amendment were anxious

Framers *specifically* endorsed judicial intervention on the malapportionment question, he would read Section 4 as if it explicitly barred judicial review over such "political questions."²³

It is odd to see Harlan playing the part of originalist in a dissent against Black. It is odder still to see him play the game in its most uninspiring form. It is one thing to say, with Black, that the Framers' invocation of "the People" requires the thoughtful judge to reflect on the democratic aspect of the Founding achievement and to bring these reflections to bear in his assessment of the House of Representatives. It is quite another thing to say, with Harlan, that merely because there is no evidence (either way) on the Framers' intentions on a particular issue, we should read a negative about the Courts into a positive grant of power to Congress.²⁴

At the very least, one would have expected Harlan to reflect upon the structural flaw involved in assigning Congress principal remedial responsibilities. The House, after all, will predictably be composed of legislators who owe their positions to the practice of malapportionment.²⁵

about extending "equal protection" to voting rights had to do with their uncertainty whether most Americans in 1866 were prepared to grant the suffrage to blacks. These anxieties did not prove lasting, and two years later the Republicans were indeed successful in gaining explicit approval for black suffrage in the Fifteenth Amendment. Why, then, should the Republicans' passing anxieties about black suffrage in 1866 authorize judges to cut back the scope of "equal protection" they would otherwise afford to *non-blacks* in the electoral process?

But Justice Harlan was not particularly interested in integrating the Fifteenth Amendment into his understanding of the meaning of the Fourteenth. Indeed, as the years passed, he increasingly tended to think of the two Amendments as if they had nothing much to do with one another. In *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), he argued that since Congress rested the Voting Rights Act on the Fifteenth rather than the Fourteenth Amendment, the key "case is not *Reynolds v. Sims*, but *Gomillion v. Lightfoot*." *Id.* at 589 (Harlan, J., dissenting). He then asserted, however, that the Fifteenth Amendment did not reach cases of racially motivated vote dilution, for *Gomillion* "maintains the distinction between an attempt to exclude Negroes totally from the relevant constituency, and a statute that permits Negroes to vote but which uses the gerrymander to contain the impact of Negro suffrage." *Id.* This narrow reading is not only inconsistent with Harlan's prior interpretations, but those of *Gomillion's* author, Justice Frankfurter: "This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. That was *Gomillion v. Lightfoot*." *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) (citation omitted).

23. *Wesberry*, 376 U.S. at 30 (Harlan, J., dissenting).

24. To use Paul Brest's helpful typology, this is not only originalism, but intentionalism; and intentionalism of the least reflective kind. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980).

25. Harlan himself noted that the Court's equal-districts standard called into question

Granting Congress exclusive remedial responsibility, then, puts the fox in charge of the chicken coop.²⁶ Even as a matter of remedial policy, Harlan does not seem to have chosen the best place for a *principled* refusal to grant judicial relief. One might, of course, try to support Harlan's resistance on the grounds of prudence, not principle: the fear that judicial intervention will be effectively resisted by the politicians normally in charge of Congress and the state legislatures. This prudential judgment, however, has proved incorrect, and in any event cannot account for the bitterness of Harlan's opposition.

The *Wesberry* dissent provides evidence, in short, of an almost Pavlovian aversion to encounters with the democratic aspect of our constitutional tradition. Harlan's narrow and question-begging use of originalist techniques—techniques that he characteristically disdained—suggests the desperate lengths he would go to deny that popular sovereignty is one of our Constitution's foundational commitments.²⁷ His effort to peripheralize matters of democratic principle

the elections of all but thirty-seven of the then-sitting representatives. *See Wesberry*, 376 U.S. at 21 (Harlan, J., dissenting); *see also id.* at 49-50 (appendix to Harlan's opinion showing the wide disparities in district size in the states).

26. It is thus no accident that the principle of equal districts was repealed in 1929 by the most malapportioned Congress in history—whose unrepresentative character was the result of the unconstitutional refusal of Congress to reapportion seats in response to the 1920 census. *See generally* CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND THE URBAN-RURAL CONFLICT IN THE 1920S* (1990) (asserting that Congress's failure to reapportion was in part a result of the urban-rural division in the nation in the 1920s). While repealing this principle might have been part of a necessary inducement to the Congress to go along with the need for a reallocation of seats after the 1930 census, it is odd to find Harlan treating this repeal by the malapportioned Congress of 1929 as if it were deserving of deep judicial deference: "[T]he Court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment." *Wesberry*, 376 U.S. at 42 (Harlan, J., dissenting).

Harlan also made odd use of the existence of slavery at the time of the Founding. He admitted that Publius stated that "[i]t is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation." *Id.* at 39 (quoting *THE FEDERALIST*, NO. 54, at 368 (James Madison) (Clinton Rossiter ed., 1961)). But according to Harlan, the "three-fifths compromise" showed that the Constitution did not require representation based on population. It did so not by failing to count all men equally, but by adding weight to the votes of those citizens living in slave states. *Id.* at 40. Viewed in Harlan's way, the provision is not an ugly compromise abolished by the Fourteenth Amendment, but is an expression of a practical understanding of representation to which the Court owes fidelity.

27. Harlan's approach to questions of free speech and free association serves as a useful foil here. In contrast to the narrow literalism of his reapportionment dissents, there is a persistent insistence that the First Amendment "always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). In contrast to his blanket

rule against any intervention in the most egregious cases of malapportionment, see, for example, *Baker v. Carr*, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting), there is a pervasive emphasis on the imperative need for sensitivity to factual nuance. This particularistic thread runs through his First Amendment opinions regardless of subject. The appellants may be Communists or black activists or Vietnam protesters, the doctrines may involve libel or obscenity, freedom of association or freedom of speech, but Harlan's response is the same: "Every communication has an individuality and 'value' of its own [I]n the nature of things every such suppression raises an individual constitutional problem" *Roth v. United States*, 354 U.S. 476, 497 (1957) (Harlan, J., concurring in part and dissenting in part).

When we explore the way Harlan set the balance in these cases, a recurring pattern emerges which broadly supports the theme developed in the text: the relatively low value he placed on the role of the courts in supporting the process of democratic self-government. While Harlan recognized this value in his approach to the First Amendment, it tends to be subordinated to other governmental interests; indeed, he often conceived free speech or free association as if it were a *private* interest in liberty that should be balanced against the public interest in other values. He further skewed the balance by refusing to scrutinize skeptically the governmental interests offered by the state to justify suppressions. Thus, while he wrote an opinion for a unanimous Court barring Alabama's use of its corporation laws to require the NAACP to reveal its membership lists, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), he reached a different result where other state laws seem to have the same purpose and effect of suppressing civil rights activists. See *Gibson v. Florida Legislative Investig. Comm.*, 372 U.S. 539, 576 (1963) (Harlan, J., dissenting) (voting to uphold demand for membership lists by a state committee investigating possible communist infiltration of NAACP); *Shelton v. Tucker*, 364 U.S. 479, 496 (1960) (Harlan, J., dissenting) (supporting a state law requiring public school teachers to disclose memberships in organizations in a case brought by a teacher who lost his job after disclosing membership in the NAACP); see also *In re Stolar*, 401 U.S. 23, 34 (1971) (Harlan, J., concurring in part and dissenting in part) (arguing that the state's interest in "orderly processes of law" justified bar inquiry into an applicant's prior associations); *NAACP v. Button*, 371 U.S. 415, 463 (1963) (Harlan, J., dissenting) (arguing that the state's interest in "maintaining high professional standards of those who practice law" justified laws severely limiting the NAACP's ability to bring suits in state court).

A similar pattern is discernible in Harlan's responses to classic political dissenters. While his opinion in *Cohen v. California*, 403 U.S. 15 (1971), is a fine appreciation of First Amendment values, see also *Street v. New York*, 394 U.S. 576, 590 (1969), there are many more cases in which he allowed political expression to be outweighed by other governmental values he considered more pressing. See *Tinker v. Des Moines School District*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting) (arguing that interest in "discipline and good order" justified schools in restricting nondisruptive expression of students); *United States v. O'Brien*, 391 U.S. 367, 388 (1968) (Harlan, J., concurring) (arguing that Selective Service interests in administration justified "incidental" suppression of First Amendment rights of draft-card burners); *Flemming v. Nestor*, 363 U.S. 603 (1960) (upholding selective termination of Social Security payments to aliens deported for prior participation in "subversive activities").

While Harlan tended to slight private interests when the public interest was on the side of suppression, he sought to protect private interests when the public interest was on the side of expression. Thus, while he joined the majority's revolutionary redefinition of the

is even more striking when we compare it to the lofty place Harlan accorded the common law in the constitutional scheme. Contrast, for these purposes, the Justice's opinions in *Harper v. Board of Elections*²⁸ and *Boddie v. Connecticut*.²⁹ *Harper* involved an effort by Virginia to impose a poll tax of \$1.50 on any citizen who wanted to vote in a state election; *Boddie* involved an effort by Connecticut to impose a filing fee of \$60 on any married couple who wanted a divorce. Harlan dissented in *Harper*. Although he recognized that the justifications for the poll tax "ring hollow on most contemporary ears," he excoriated the majority for "impos[ing] upon America an ideology of unrestrained egalitarianism" by refusing to allow money to ration democratic participation.³⁰

Compare this with his opinion for the Court in *Boddie*. This time Harlan was unimpressed with the fact that filing fees have a much deeper history than poll taxes, going back to the practice of purchasing common law writs in the early middle ages.³¹ Moreover, if we expose these poll taxes and filing fees to the test of reflective critique, the latter have far more to be said for them than the former. As Harlan's opinion in *Boddie* explains, it is perfectly "rational" for a state to "use . . . court fees and process costs to allocate scarce resources."³² In contrast, the use of poll taxes is a lot less rational from a resource allocation point of view: while each extra lawsuit does impose measurable marginal costs on the judicial

First Amendment's limitations on common law libel in *New York Times v. Sullivan*, 376 U.S. 254 (1964), Harlan then took the lead in limiting the opinion's thrust when it came to protecting private interests. See *Rosenblatt v. Baer*, 383 U.S. 75, 96 (1966) (Harlan, J., concurring in part and dissenting in part) (distinguishing *Sullivan* on the grounds that it did not involve the infringement of any private interest protected by libel law); *Time, Inc. v. Hill*, 385 U.S. 374, 402 (1967) (Harlan, J., dissenting) (lowering *Sullivan* standard when plaintiff has not voluntarily assumed the risks of public life); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (lowering *Sullivan* standard for public figures who are not "public officials"); *Rosenbloom v. Metromedia*, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting) (reiterating his approach in *Hill*).

28. 383 U.S. 663, 680 (1966) (Harlan, J., dissenting).

29. 401 U.S. 371 (1971).

30. *Harper*, 383 U.S. at 685-86 (Harlan, J., dissenting).

31. "Filing fees" date back before 1200, as receipt of the first royal writs of right was predicated on a payment made to the King. See RAOUL C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 26-27 (2d ed. 1988). The poll tax, on the other hand, had virtually disappeared during the years leading up to the Civil War. By 1868, only Delaware, Pennsylvania, and Rhode Island seem to have retained this exclusionary technique. See Note, *Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 647 n.11 (1940). The modern tax came into its own only as a response by Southern states to the passage of the Fifteenth Amendment. See FREDERIC D. OGDEN, *THE POLL TAX IN THE SOUTH* 2 (1958); Note, *supra*, at 647.

32. *Boddie*, 401 U.S. at 381.

system, the marginal costs of processing an extra ballot are just about zero.

Nonetheless, Harlan was perfectly willing to uproot historic practices and require Connecticut to provide free access to the courts in *Boddie*. The opinion, I should add, is one of the finest examples of Harlan's common law methods, and one of the few that gained majority support. For the present, it will suffice to contrast his dissent from the Court's decision in *Harper* to "adopt the political doctrines popularly accepted at a particular moment of our history"³³ with *Boddie*'s quite different understanding:

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement.³⁴

Perhaps the most striking aspect of this remarkable passage is the casual way Harlan dropped his "of course." This "of course" cannot but shock any democrat, who "bottoms" the "systematic definition of individual rights and duties" on the *political*, not judicial, process. Given Harlan's view of the matter, can it be any surprise that he failed to confront the antidemocratic character of his common law constitutionalism?

This question gains more force from the perspective of a quarter of a century. Of all the Warren Court's initiatives, its egalitarian reform of the electoral process has best stood the test of time. For all of Harlan's dissents, the result has not been to "sap[] the political process,"³⁵ but to renew popular confidence in it. Thanks to these decisions, citizens will not see their legislators respond to the 1990 census by cynically ignoring the need to update constituencies in line with the ever changing patterns of American mobility. Rather than tolerating malapportionment to safeguard their hold on their preexisting constituencies, legislators will feel themselves obligated to redraw district lines to keep them responsive to the democratic will. I predict, moreover, that legislators will generally discharge their democratic obligation voluntarily, without great need for judicial intervention—suggesting how deeply these norms have been internalized by the American polity.

33. *Harper*, 383 U.S. at 680 (Harlan, J., dissenting).

34. *Boddie*, 401 U.S. at 375.

35. *Wesberry v. Sanders*, 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

Given this fact, any thoughtful proponent of common law constitutionalism will have to grapple with the countermajoritarian difficulty far more seriously than did Justice Harlan. It will not be enough in the future to dismiss fundamental principles of democratic theory as if they raised "political questions" for optional consideration by legislators. Judges are under a constitutional obligation to interpret the requirements of democratic principles in their ongoing assessments of the House and other popularly elected institutions. But if democratic theory must inform the Justices' ongoing relationship to the House of Representatives, shouldn't it also be central when the Justices come back home and assess the appropriate role of the Supreme Court? Harlan's untroubled confidence in common law method seems a relic of the times when *Colegrove v. Green*³⁶ was the law of the land; if common law constitutionalism is to be credible today, it can only be after a candid acknowledgement of, and *troubled* response to, its antidemocratic premises.

B. Liberty

It is no big surprise to learn that a common law constitutionalist has turned a deaf ear to the problem of democracy. At least since the age of Jefferson and Jackson, the professional judge has had a hard time convincing his fellow Americans that he was just one of the boys, a humble servant of democracy. In what other country in the world are so many judges elected rather than appointed?

Instead of democracy, the common law's appeal has largely been framed in terms of other values. From Joseph Story to Richard Posner, economic efficiency has been an intermittent favorite. But by far the most important boast of the common law has been liberty—the promise of a sphere of freedom within which each of us might insulate ourselves, to some extent at least, from the oppressions of political control by the dominant faction.

As we have seen, this promise became a major problem for John Harlan. The common law had wrapped up its language of liberty in Lochnerian concepts of property and contract—and had thereby discredited itself during the 1930s. Harlan, moreover, had absolutely no inclination to refight the Roosevelt Revolution. His opinion for the Court in *Sabbatino*³⁷ took anti-Lochnerism to new frontiers by refusing to protect Americans whose property had been seized without compensation by the

36. 328 U.S. 549 (1946). This case held that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States" as it "is hostile to a democratic system to involve the judiciary in the politics of the people." *Id.* at 553-54.

37. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

Cuban Communists. Moving closer to home, Harlan showed elaborate deference to the new constitutional powers won by the national government during the New Deal—too much respect. Over the powerful protest of Justice Black and three other dissenters, he refused to shield victims of McCarthyism from transparently punitive efforts by Congress to deprive them of their Social Security pensions.³⁸ He was unwilling to accord the “new property” even the modest kinds of protection that owners of the “old property” had reason to expect from the post-Lochnerian constitutional order.³⁹

Nonetheless, it is wrong to think of Harlan as abandoning the common law’s tradition of liberty. Rather, he redirected it: away from its tradition of market freedom, toward other social contexts less obviously transformed by the New Deal revolution in constitutional law. His greatest effort at reorientation was *Poe v. Ullman*,⁴⁰ where he dissented from the majority’s decision to dismiss a challenge to Connecticut’s birth control statutes.

This opinion bears all the markings of the common law model I have identified. By placing the problem in historical context, Harlan downplayed the crucial turning points in American history—the Founding, Reconstruction. His historical narrative is more open-ended and diffuse—beginning with the Magna Carta, our law ripened, “long before the adoption of that [Fourteenth] Amendment” into a tradition which sought to defend rights “which are . . . fundamental.”⁴¹ The heroes of this tradition are judges, not constitutional lawmakers. The means by which the tradition is to be defined is not abstract principle, but the concrete weighing of particular interests by mature judges immersed in the folkways of their society. Thus, Harlan went through great pains to reject the idea that Connecticut’s prohibition on the use of birth control devices violated some abstract principle of liberty that protects each of us against

38. See *Flemming v. Nestor*, 363 U.S. 603 (1960). See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (comparing the Court’s philosophy in *Flemming* to the philosophy of feudal tenure). For other cases in which Justice Harlan elaborately deferred to the discretionary powers of the welfare state, see *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting).

39. See, for example, the modest protections afforded to the holders of “older” property after Harlan’s departure from the Court in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down a statute expanding the pension obligations of private employers); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (invalidating an attempt by a state to repeal a covenant with state bondholders).

40. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

41. *Id.* at 541.

majoritarian moralisms.⁴² Such an approach, as Harlan was perfectly aware, would call into question a host of state interventions regarding “[a]dultery, homosexuality, and the like.”⁴³ Although he was willing to afford protection to married couples, he was quite unwilling to expose his decision to Wechslerian tests of neutral principle: if married couples have the right to sexual freedom in the privacy of their bedroom, why don’t homosexuals?

Harlan cut off such obvious questions of principle by rooting marriage in a special narrative frame: “[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.”⁴⁴ Note the appeal to “time immemorial” so notable in the common law method at moments of stress. It is this asserted universality of “marriage,” as distinct from other associations of equal intimacy, that allowed Harlan to cast these other relationships beyond the sphere of liberty protected by the common law constitution.

Having limited his field substantively, Harlan next narrowed it procedurally. He conceded the state’s broad power to regulate family intimacies indirectly; it is only when the government invokes the criminal law that the “obnoxious” character of the means, together with the immemorially sacrosanct character of the relationship, requires judges to call a halt. Surely, anyone cognizant of the Anglo-American tradition of liberty should recognize at least this much?

Harlan expressed his judgment here, as in many other opinions, through the constitutional language of “privacy.”⁴⁵ Like its property-contract predecessor in the age of *Lochner*,⁴⁶ “privacy” functions in *Poe* to define a zone within which each individual can defend his personal freedom against state intervention. In Harlan’s hands, the common law’s

42. *See id.* at 545-47.

43. *Id.* at 553.

44. *Id.*

45. *See, e.g.,* *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 408 (1971) (Harlan, J., concurring) (“The personal interests protected by the Fourth Amendment are those we attempt to capture by the notion of ‘privacy’”); *Wiseman v. Massachusetts*, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting from denial of certiorari) (“[T]he individual’s concern with privacy is the key to the dignity which is the promise of civilized society.”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (discussing privacy necessary for preserving the freedom of association); *Roth v. United States*, 354 U.S. 476, 502 (1957) (Harlan, J., concurring in part and dissenting in part) (“[T]he State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity.”).

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

tradition of personal freedom reemerges, Phoenix-like, from its New Deal ordeal, once again to provide a language through which Americans might draw a line against the incursions of state power.

Putting aside my own doubts about his general project, I can only admire Harlan's genius in redirecting this common law tradition of liberty. I have no doubt he is right in suggesting that "privacy," not "property," provides the common law rhetoric that resonates best with the spirit of our age. If we are to rely on common law methods to preserve our constitutional freedoms, judges would be well advised to follow *Poe* and build where the foundations are deepest.

Nonetheless, the manner of Harlan's execution of his privatistic turn does serve to awaken, in me at least, further doubts about the present viability of the common law project. To gain perspective, compare the scope of common law liberty described in *Poe* with its scope in *Lochner*. While I have no inclination to challenge the New Deal Revolution, I nonetheless appreciate the extent to which *Lochnerian* principles of free contract provided some *genuine* freedom for people to club together in ways that their neighbors considered morally suspect or downright diabolical. In contrast, Harlan's conception of common law freedom in *Poe* is far less robust. He is prepared to guarantee privacy only to conventional folk who satisfy the politically dominant view of an acceptable intimate partner.

Perhaps I am judging Harlan too harshly here. While he lived to see the majority heed his dissent in *Poe*, and confront the merits of the Connecticut statute in *Griswold v. Connecticut*,⁴⁷ Harlan left the Court before it began extending the protection of privacy to the sexual intimacies of unmarried people.⁴⁸ It is always possible that, when reflecting upon the possibilities of enduring intimacy in nonmarital relationships, Harlan might have extended his concerns beyond the limited scope suggested by his dicta in *Poe*.⁴⁹ Such is the way of the common law.

Nonetheless, the libertarian growth potential of *Poe* seems modest—at least when compared to the dynamic of "privacy" when it is interpreted through the lens of the independent constitutionalist. To see my point, turn from Harlan's opinions in the birth control cases⁵⁰ to Justice Douglas's effort for the Court in *Griswold*.⁵¹ Like Harlan, Douglas was also

47. 381 U.S. 479 (1965).

48. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

49. Cf. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (post-Harlan decision holding that the definition of "family" for constitutional purposes is not limited to the nuclear family).

50. While Harlan filed a special concurrence in *Griswold*, 381 U.S. at 499 (Harlan, J., concurring), his major effort in this field was his dissent in *Poe*.

51. See *Griswold*, 381 U.S. at 479.

responding to the New Deal's repudiation of *Lochner* by seeking to redirect the libertarian aspect of the constitutional tradition into those zones of life that seem most distant from the economic logic of the modern regulatory state; like Harlan, he too identified privacy as the legal idea that would most credibly allow judges to sustain the libertarian aspect of the constitutional tradition.

They differ only in the way they sought to elaborate this concept: while Harlan's concurring opinion in *Griswold* relied on his earlier common law effort in *Poe*, Douglas's majority opinion was largely written on the model of the independent constitutionalist.⁵² Rather than offering up a diffuse and open-ended vision of Anglo-American legal development, Douglas focused on two of the great turning points of American constitutional history: the Founding and the New Deal. While the Founders undoubtedly relied on a property-oriented ideal of liberty, Douglas tried to convince us that, after the New Deal, it is the concept of privacy, not property, that best serves to organize many of the particular concerns the Founders expressed in the Bill of Rights.⁵³ Rather than following Harlan in focusing concretely upon the expectations surrounding marriage, Douglas's principal aim was to look upon the particulars in the Bill of Rights as grounded on a more abstract principle expressed by the modern legal idea of privacy.

I have defended the merit of Douglas's form of independent constitutionalism elsewhere.⁵⁴ For now, I want to compare its libertarian potential with Harlan's common law approach to "privacy": which method is more likely to yield a robust notion of constitutional liberty—one in which unconventional, no less than conventional, people can enjoy the protection of a constitutional zone of freedom?

52. By describing Douglas's opinion as an example of independent constitutionalism, I do not suggest that it is a pure type, without any admixture of common law elements. In one famous passage, for example, he emphasized that he was dealing "with a right older than the Bill of Rights—older than our political parties, older than our school system." *Griswold*, 381 U.S. at 486. The use of such rhetoric, however, should not disguise the extent to which the opinion's basic argument tracks the model of independent constitutionalism. I am not quite sure that Professor Gunther disagrees, but if he does, the only way for you to resolve our dispute is by rereading the opinion in the light of the competing models I have described.

More importantly, I do not mean to suggest that good opinions should try to strive for "purity" by purging all elements that do not conform with one or another of my models. The point of the models is to describe two very different aspirations, not to deny the possibility of artful efforts to mix these aspirations into methodological wholes that are larger than the sum of their parts.

53. See *Griswold*, 381 U.S. at 482.

54. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 536-45 (1989).

The expansionary thrust of Douglas's approach seems pretty apparent. Given Harlan's particularizing style, it seems a big step for him to move from conventional marriage, hallowed by time immemorial, to other forms of intimate relationship. In contrast, Douglas has generated his privacy norm by isolating an abstract principle from the Founding texts. This search for an abstract principle naturally disposes him to look much more skeptically at ad hoc efforts to draw a strong line between the liberty of conventional folk and the liberty of others.

Of course, no method by itself guarantees the robust protection of liberty⁵⁵—it is even more important to have judges with a sound sense of constitutional values. We are talking about a methodological tendency, not a legal certainty. Nonetheless, given the present drift of jurisprudential thought, it seems especially worthwhile to emphasize the link between abstract reasoning and the protection of unconventional patterns of behavior. While Harlan himself was quite comfortable with the relatively tepid libertarianism generated by his method, particularistic modes of adjudication are now trendy amongst academics who think that trashing abstract styles of legal reasoning is the “progressive” thing to do. I am quite sure, however, that John Harlan had a sounder grasp of the pragmatic implications of a particularizing embrace of “situatedness” than does Mark Kelman or Martha Minow.⁵⁶ In the hands of most judges, contextualism will lead to the sanctification of the conventional at the price of freedom for the unconventional.

We can now put our first two doubts together to build a cumulating question about common law constitutionalism. I shall state my problem by setting it against a commonplace of the conventional wisdom. This is the view that sets our democratic aspirations in head-on conflict with our concerns for the preservation of (private-regarding) liberty—the more democratic we want our Constitution to be, the less we can expect it to protect each individual's freedom to go his or her own way, and vice-versa. In contrast, my claim has been that Harlan's version of common law constitutionalism is inferior to independent constitutionalism on both counts. It is more obviously inconsistent with democratic principle and less robust in its liberty-protective tendencies—Pareto-inferior, as it were,

55. Black's dissent in *Griswold* suggests this much. See *Griswold*, 381 U.S. at 507 (Black, J., dissenting). Since this paper involves a broad contrast between my two models, I shall not discuss the dispute between Black and Douglas—since this involves a (crucial) inter-family dispute between rival conceptions of the model of independence. For some preliminary reflections, see Ackerman, *supra* note 54. This question will be explored further in Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. (forthcoming 1992).

56. See, e.g., Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Martha Minow & Elizabeth Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

in the democracy-liberty space. Is it a mistake, then, to allow the common law tradition to rule the modern Constitution from the grave?

C. *Bureaucracy*

My bill of particulars next proceeds to interrogate the common law method by inquiring into its relationship to another fundamental aspect of the modern American state—its increasingly bureaucratic character.

As I have already suggested, Harlan generally responded to the rise of the activist administrative state with extreme deference, even when the New Deal government used its powers in ways that transparently oppressed unpopular minorities.⁵⁷ In his confrontation with criminal procedure, however, Harlan did squarely address the problem of protecting liberty under bureaucratic conditions. Once again, his confrontation with the problem does not bode well for the future vitality of common law constitutionalism.

I begin my story with the halcyon days of the 1950s, just before the great revolution in criminal procedure. When Harlan came to the Court in 1955, this body of law must have gratified his common law sensibilities. Over the preceding generation, the Court had gradually reinvigorated its constitutional commitments to fundamental fairness in the criminal process—guaranteeing counsel in capital cases, scrutinizing confessions for voluntariness, and so forth.⁵⁸ Moving beyond the most egregious cases, the Justices were developing an intricate fabric of contextualized judgments—even though a confession was not extorted through brute force, the courts were finding that one or another subtler aspect of the interrogation deprived it of the requisite voluntariness; even though the accused was not on trial for a capital crime, the courts were

57. In addition to Harlan's opinion for the Court in *Flemming v. Nestor*, 363 U.S. 603 (1960), see his dissent in *Sherbert v. Verner*, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting).

58. See, e.g., *House v. Mayo*, 324 U.S. 42, 46 (1945) (defendant's right to a fair trial includes the right to assistance by his counsel); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (setting aside a conviction resting upon an involuntary confession as violative of due process); *Betts v. Brady*, 316 U.S. 455 (1942) (requiring states to appoint lawyers for indigent defendants whenever needed to ensure a fair trial); *Chambers v. Florida*, 309 U.S. 227 (1940) (voiding murder convictions obtained by use of coerced confessions); *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding murder convictions resting solely on confessions extorted by a state by torturing the accused void under the Due Process Clause); *Mooney v. Holohan*, 294 U.S. 103 (1935) (announcing in dicta that convictions obtained through the use of testimony known by the prosecution to be perjured violate due process); *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that a state's failure to provide adequate legal representation in a capital case denied defendants' due process right to a fair hearing).

finding that one or another aspect of the situation seemed to make it unfair for the defendant to go to trial without a lawyer; and so forth.

This was constitutional common law at its best: judges keeping traditional frameworks meaningful through contextualized judgments expressive of their culture's commitment to individual liberty. The contemporary meaning of criminal justice could not be fixed by some inspired act of constitutional lawmaking of 1787 or 1868 or whenever. It was the ongoing product of efforts by the judges to deploy their carefully trained intuitions in case after case.

Then came the revolution. In contrast to his root-and-branch opposition to the democratic impulse behind the reapportionment cases, Harlan's dissenting position on criminal procedure was far more discriminating. He had no trouble joining the majority when it rejected "clear" rules of an earlier day that were inconsistent with his situated sense of social meaning. It was obvious to him, for example, that the constitutional status of wiretapping could not be determined by considering whether the police violated the defendant's property rights.⁵⁹ However clear the property line, it was beside the point of assuring constitutional protection—which was to protect each American's "reasonable expectations of privacy."⁶⁰ Such a formulation would, of course, require judges constantly to immerse themselves in particularities to determine when expectations of privacy were "reasonable." For Harlan, this was hardly an objection. It merely suggested the vitality of common law constitutionalism in the post-New Deal age.

In contrast, Harlan protested vigorously at decisions like *Escobedo*⁶¹ and *Miranda*,⁶² which largely eliminated the need for judges to investigate the voluntariness of confessions on a case-by-case basis. While Harlan disagreed with some of the substantive value judgments made by the majority in these cases, we should not ignore a deeper anxiety. I think it is a mistake to call this anxiety "federalism" and chalk up his dissents to his proverbial emphasis on states' rights. After all, the kind of case-by-case investigation of confessions that Harlan supported also involved an intrusion upon states' rights. In many ways, this intrusion was more abrasive because it was more dependent on unpredictable intuitions by federal judges concerning "voluntariness."⁶³ There was a more refined

59. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

60. *Id.* at 360-61.

61. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

62. *Miranda v. Arizona*, 384 U.S. 436 (1966).

63. This was true under the habeas corpus principles announced in *Brown v. Allen*, 344 U.S. 443 (1953), which authorized the federal district courts to review the "voluntariness" decisions of the state courts even after the habeas petitioner had litigated the matter in the state court system. Harlan accepted this fundamental decision in *Brown*

process question at stake: how should state police practices be constitutionalized—by providing the police a set of clear rules or by subjecting them to post hoc judicial supervision?

For Harlan, the answer was clear: the Supreme Court's new "code of police practices"⁶⁴ threatened to peripheralize the common law judge in the process of constitutional development. Judges simply could not design sound rules without immersing themselves in particularities. Harlan would accept abstract rules only when he was convinced that they were based on the concrete experiences of countless judges.⁶⁵ All this is unsurprising enough, given his general methodological commitments. And this is precisely the reason we should ask whether the common law model makes much sense in an increasingly bureaucratized world: won't common law judges simply be overwhelmed by the need to make individualized judgments in the thousands of cases thrown up each year by the modern police state? Isn't it counterproductive, both in terms of effective law enforcement and in terms of constitutional values, to gum up the bureaucratic works with thousands of individualized judicial decisions every year? After reading Harlan's many important dissents in this area, I have not found a serious effort to confront this question—probably because there really isn't any plausible answer. The brute fact is that ex post judicial review of the thousands of fact-specific settings surrounding confessions is a bureaucratic nightmare.

This is, I think, why today's Court—for all its shifts in the conservative direction—has had so little inclination to rethink cases like *Escobedo* and *Miranda* along the common law lines marked out in Harlan's dissents. For all their abstract respect for Harlan, the new conservatives on the bench are all too aware of the tension between the pervasively bureaucratic character of the modern police state and Harlan's vision of law as the custom-made product of judicial *honoratores*. Justice Kennedy, for example, recently reaffirmed and extended the rule-like character of *Miranda* in an opinion that provoked only two dissents.⁶⁶

to expand federal jurisdiction, even as he rejected the further expansion of habeas in *Fay v. Noia*, 372 U.S. 391 (1963). *See id.* at 460-62 (Harlan, J., dissenting).

64. *Miranda*, 384 U.S. at 516 (Harlan, J., dissenting).

65. *See, e.g.,* *Estes v. Texas*, 381 U.S. 532, 594 (1965) (Harlan, J., concurring) (defending the Court's holding by citing documents suggesting that "the judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar in this country"); *Gideon v. Wainwright*, 372 U.S. 335, 349-52 (1963) (Harlan, J., concurring) (justifying the replacement of a "special circumstances" test with a categorical rule by noting the process of "evolution" by which the "Court came to recognize that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial").

66. *See* *Minnick v. Mississippi*, 111 S. Ct. 486 (1990). The Court's recent decision

Rather than losing themselves and the police in a sea of fact-drenched judicial determinations of "voluntariness," even a very conservative Court is rightly unwilling to abandon the instrumental use of rules to control bureaucratic justice.

Harlan himself kept control over the tension between common law judging and bureaucratic justice by limiting the substantive values he was willing to impose upon the operation of the bureaucratic state. The more broadly one is concerned with harnessing the bureaucracy to fundamental constitutional values, the more doubtful one must be about the virtues of a common law method that insists that norms be generated through a judicial confrontation with particular facts.

In contrast, the methods of independent constitutionalism do not suffer under a similar disability. Rather than immersing herself in particularity to gain a sense of basic value orientation, the independent looks backward to the great principles of the Founding, Reconstruction, and other eras of popular creativity, for enduring values. Having isolated these constitutional principles, she may then proceed to define rules that might productively assist in their implementation within an increasingly bureaucratic society. No easy task, to be sure; but at least it remains credible in a bureaucratic world in which Article III judges cannot hope to function as first-line law-appliers.

D. *From Anglo-Gemeinschaft to Pluralist-Gesellschaft*

My final doubt arises, perhaps paradoxically, when I reflect on the remarkable way in which John Marshall Harlan fulfilled one of the central requirements of the common law model. As we have seen, this model places tremendous normative weight on the figure of the judge. It disdains the hope of the independent constitutionalist, who looks to spokesmen for the People, at rare moments of mobilized political consciousness, to hand down fundamental constitutional principles for subsequent judicial elaboration. Skeptical of the power of such abstractions to decide concrete cases, the common law model places its bets on its ideal judge: sober, thoughtful, immersed in the law of the cases and the folkways of the country. Only such organic characters can be expected to discharge the heavy duties of particularized judgment upon which the common law model places so much weight.

But it is not enough for a judge to have the kind of organic character required for the task of situated judgment; he must be perceived by large

in *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), does not suggest otherwise. While the Court held that the admission of coerced confessions may in some cases be harmless error, it did not take it upon itself to undertake the laborious case-by-case task of determining when confessions qualified as "coerced."

segments of the community as possessing the requisite character. This supposes, not to put too fine a point to it, deeply entrenched patterns of deference—the masses must recognize, and defer to, the “better sorts” trained to exhibit the right kind of organic character.

This is, it should be plain, a formidable job description. Indeed, it is worth reflecting on why Harlan could play the role so effortlessly. His confidence in his capacities as a common law judge flowed from the rhythms of a life very different from that of the modern lawyer. He was the ideal Princetonian of his day: chairman of the *Daily Princetonian*, president of the Ivy Club—who could ask for anything more? After three years at Balliol as a Rhodes Scholar, there was no need to compete with the *arrivistes* at the Harvard Law School. He could move effortlessly to the elite firm of Root, Clark and hone his talents at the New York Law School that he loved throughout his career. He then followed his mentor, Emory Buckner, when the latter was appointed U.S. Attorney of the Southern District of New York by Calvin Coolidge. Through this old-boy network, Harlan had become head of the Office's Prohibition Bureau by the age of twenty-six, gaining an early opportunity to cultivate the distrust of grand abstractions, grounded in the popular will, that marked his mature jurisprudence. After his stint of public service, he could then follow Buckner back to his white shoe firm and gain a rich legal experience during the period most Americans call the Great Depression.⁶⁷

Little wonder this kind of gentleman should find common law constitutionalism so congenial; this kind of gentleman created the common law in the first place. But the truth is that John Marshall Harlan was a throw-back even in his own time. Over the course of this century, the legal elite has been increasingly populated by folks who got there the modern way, taking test after test to get to the top of Harvard Law School. These people would not have names like John Marshall Harlan; nor would they have their buddies in the Ivy Club vouching for their moral character. They became elite lawyers through good grades more than good judgment. The modal character would shift toward analytic smarts and harder work—away from the Anglo-Saxon gentleman and toward the modern professional. Could these new men and women function as organic characters in the traditional—or, at least, neotraditional—way when they rose to the bench?

There are three different questions here. Would these new professionals develop the kind of organic characters presupposed by common law judging? Would they think of themselves as possessing such characters? Would their fellow citizens think of them as possessing such characters?

67. See Shapiro, *supra* note 10, at xviii-xxiii.

Taking the first question first, I suppose one might be cautiously optimistic if the only thing changing about big-time law practice was the manner of recruitment: once Itzhak or Imelda from Harvard Law School got to the real world of legal practice, they would still be obliged to test their mettle in the good old way—giving thoughtful advice to clients. After all, Harlan's right-hand-man during his years in private practice was Henry Friendly—a new professional who was surely Harlan's equal in lawyerly capacity to gain a considered view of a complex set of particulars. I have very real doubts, though, that the bureaucratic mega-firms of the present and future will be good schools for the cultivation of such prudential virtues by the *novo homines*. These places afford ample opportunities for analytic smarts, not to mention sheer drudgery, but they rely too heavily on narrow specialization and the division of labor to yield the kind of generalist good-sense demanded by the common law model.⁶⁸

Even if this were not so, it is emphatically not enough for the new professionals to cultivate the classic generalist sensibilities. They must think of themselves in the good old organic way: when they make a decision, they must think of themselves as representatives of the American tradition of common sense and fair play. This was no problem for John Harlan, President of the Ivy Club. If he didn't speak for America, could you please introduce him to the gentleman who was a better representative? Things stand quite differently for the new professional class. True, they got where they are through smarts and hard work, but isn't it a bit pretentious to suppose that working seventy-hour weeks on mergers and acquisitions somehow qualifies one as privileged spokesperson for the *Volkgeist*?⁶⁹

In the unlikely event that our modern professional doesn't ask herself this question, others surely will. Even the John Marshall Harlans of the world recognize that they cannot count on the old deference in the new American world of aggressive pluralism. If successful WASPS have a tough time gaining general deference for their particularized judgments, there is no reason to suppose that successful professionals of other colors, genders, and creeds will have it any easier.

I do not want to exaggerate. In a country where George Bush is President, and David Souter is one of our most recent Justices, it seems premature to announce the death of the class that has made common law constitutionalism a substantial reality in America. But if we use the

68. See Bruce Ackerman, *In Memoriam: Henry Friendly*, 99 HARV. L. REV. 1709, 1711-13 (1986), for some more speculations about this problem.

69. The German is a backhand way of acknowledging the Weberian inspiration of these remarks. Closer to home, they owe much to many conversations with my friend Tony Kronman, whose forthcoming book speaks to these questions. See ANTHONY T. KRONMAN, *LIVING IN THE LAW* (forthcoming 1992).

occasion of New York Law School's centennial to look forward a hundred years, is it reasonable to expect many men or women like John Harlan on the bench in 2091? Can future professionals be expected to sustain the common law pretention of organic character—both to themselves and their fellow citizens?

IV. TWILIGHT OR DAWN?

The country has come a long way over the past two centuries: from a republic to a democracy, from a government by gentlemen to a government by professionals, from a weak federation to a powerful military-bureaucratic complex, from an Anglo-*gemeinschaft* to a pluralist-*gesellschaft*. Throughout all this, we have largely managed to sustain the rule of law—but only by repeatedly transforming the character of legal method. How, then, to view John Marshall Harlan, that great dissenter? Voice from the twilight or prophet of a new dawn?

While I admire the man, I doubt the method. My doubt, I should emphasize, does not involve the question of ultimate ends. I am entirely persuaded that the basic task of the Supreme Court is conservative, not prophetic—to preserve enduring values, not to invent better ones.⁷⁰ The question remains how this vital work of conservation is to proceed—which of the complex strands of Anglo-American legal method will best serve to define and defend enduring constitutional values in the democratic, professional, bureaucratic, pluralist world of the future.

Of course, I haven't done much more than express some doubts. Maybe common law constitutionalism, for all its faults, is better than the alternatives. But maybe not.⁷¹

70. See ACKERMAN, *supra* note 12, chs. 3-6.

71. For my own best effort at independent constitutionalism, see generally ACKERMAN, *supra* note 12.