NEW YORK LAW SCHOOL

NYLS Law Review

Volume 36 | Issue 1 Article 17

January 1991

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JUSTICE HARLAN'S LEGAL PROCESS*

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Justice John M. Harlan's virtues as a proceduralist are so familiar as to be obvious. All of the papers presented at this splendid centennial conference attest to Justice Harlan's qualities of reasoned elaboration and procedural honesty—qualities that seem to set him apart from other judges and Justices. Accordingly, he served as a model of procedural regularity on the Warren Court, acting as the Court's "conservative conscience."[1] He also stressed that judicial restraint, stare decisis, and reasoned elaboration are central to decision making. Harlan was unusual because he genuinely seemed to care more about how a case was decided than about the result reached. Even today—twenty years after his retirement—he serves as the model for these judicial virtues.

Another of Harlan's important contributions was advancing our thinking about federalism and the separation of powers. One focus of Harlan's opinions was explaining and defending the values behind those doctrines, and his opinions helped build a literature concerning the demands and contributions of the federal system that is still much used by the Court today.[2] Harlan believed it absolutely necessary to give wide leeway both to the states and to the other branches of the federal government to work out their own solutions to the nation's problems.[3]

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

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1. Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 250 (1969).

2. *See* J. Harvie Wilkinson III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1186 (1971).

3. For example, Harlan argued frequently against Supreme Court formulation of constitutionally required rules of criminal procedure; he believed that "regard for our system of federalism" required that the choice of proper rules "be left to the States" unless the state policies were arbitrary or denied a defendant fundamental fairness. Griffin v. Illinois, 351 U.S. 12, 39 (1956) (Harlan, J., dissenting); *see also* Spencer v. Texas, 385 U.S. 554, 568-69 (1967) ("It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution . . . ."). Of course, a standard like fundamental fairness on its face could be associated with strong judicial power, because it is so subjective and indefinite, but Harlan clearly contemplated that this judicial power be exercised with the utmost restraint, invalidating state legislation in only the most extreme of cases.

The federal nature of the government left "ample room for governmental and social experimentation"[4] in solving national problems, with the states serving as "experimental social laboratories."[5] For the Supreme Court to dictate national requirements would be to "destroy that opportunity for broad experimentation which is the genius of our federal system."[6] If the states were allowed to try various procedures, the best solution to a given problem could eventually emerge, and the states would be free to adopt it instead of being limited to one imposed by the Supreme Court.[7] Harlan did concede that "'[t]here are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality' of the individual,"[8] but he usually was willing to give the states great leeway in trying different methods to promote their various social policies.

Another rationale Harlan repeatedly put forth in support of federalism, was that the states were more in touch with the practical affairs of the 'real world,' while the Supreme Court had an ivory tower perspective, too far removed from the effects of its own pronouncements.[9] Thus, when the

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One illustration of Harlan's respect for states' rights is his endorsement of a double standard of review for federal and state law enforcement practices, even in areas concerning the Bill of Rights. When, for example, cases came before the Court involving obscenity convictions, Harlan favored upholding state convictions but reversing federal ones, maintaining that two separate standards of review applied. *See* Roth v. United States, 354 U.S. 476, 496 (1957) (Harlan, J., concurring in part and dissenting in part). Harlan concurred in upholding the conviction of Alberts in Alberts v. California, a companion case decided with *Roth*, because the state's determination that obscene material be suppressed was consistent with the Fourteenth Amendment. *See id.* at 502. He would have reversed, however, the conviction of Roth under the federal obscenity statute because the federal government, as opposed to the state governments, has only an incidental interest in regulating sexual morality. *See id.* at 504.

4. Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J., concurring in part and dissenting in part).

5. *Roth*, 354 U.S. at 505.

6. Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting).

7. Sometimes different standards would be appropriate for different states or local communities. Even when a "best" solution did emerge, states were not always required to adopt it; the question remained whether their own procedures were constitutionally adequate. *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 567-68 (1967) ("To say that the two-stage jury trial in the English-Connecticut style is probably the fairest . . . is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.").

8. Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (quoting Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring)).

9. *See* Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545, 550-51 (1982);

Court ruled that states were required to provide jury trials, Harlan dissented, saying that the states were better able to determine if providing a jury was feasible.[10] In Harlan's mind, deference to the states' practical experience was almost always warranted because of the "Court's remoteness from particular state problems."[11]

Similar to Harlan's ideas about federalism were his concerns with the separation of powers. As a Justice, he was particularly concerned with restricting the Court to its proper role within the system. He deplored the Warren Court's activist course and argued that "this Court, ordained as a judicial body, [should not] be thought of as a general haven for reform movements."[12] In failing to defer to the other branches of government, the Court was usurping the legislative role and making decisions based on "its own notions of public policy and judgment"[13] at the expense of established constitutional principles. He believed that the Court, "limited in function in accordance with [the premise of diffusion of governmental authority], does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process."[14] Judicial restraint on the part of the Court was the only correct approach.

Federalism and separation of powers, to Harlan, were often the theoretical underpinning for important procedural rules, but they also were constitutional requirements in their own right—bedrock requirements of our form of government. Harlan did not consider the doctrines antithetical to civil liberties; instead he reasoned that individual rights were better protected in the long run by this governmental structure than by an activist Court. As he put it,

> [c]onstitutionally principled adjudication, high in the process of which is due recognition of the just demands of federalism, leaves ample room for the protection of individual rights. A constitutional democracy which in order to cope with seeming needs of the moment is willing to temporize with its basic

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Wilkinson, *supra* note 2, at 1194-95.

10. *See* Duncan v. Louisiana, 391 U.S. 145, 192-93 (1968) (Harlan, J., dissenting) ("Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.").

11. Mapp v. Ohio, 367 U.S. 643, 682 (1961) (Harlan, J., dissenting).

12. Reynolds v. Sims, 377 U.S. 533, 625 (1964) (Harlan, J., dissenting).

13. Konigsberg v. State Bar, 353 U.S. 252, 312 (1957) (Harlan, J., dissenting).

14. *Reynolds*, 377 U.S. at 624-25.

> distribution and limitation of governmental powers will sooner or later find itself in trouble.[15]

For many, however, such procedural requirements did not seem value-neutral, and certainly not supportive of individual liberties. During the same period when Harlan was serving on the Court, Australia's Labour Party leader (soon to be Prime Minister) was calling concern for states' rights "constitutional constipation," and claiming "[t]he whole phoney war over States' rights serves to protect private affluence and to promote public squalor."[16] Was Harlan concerned with states' rights just because that position coincided with his views on social issues? This has been a favorite theme of commentators—whether Justice Harlan was process-oriented for its own sake or whether he espoused that approach because the results coincided with his own conservative political views.[17]

Of course it is difficult to separate procedure from substance—or, in this instance, to separate a judge's views on procedural matters from his or her views of substantive justice. Surely Justice Harlan's fidelity to procedural regularity and the respect he accorded states fit with some of his substantive views—his essential satisfaction with the status quo and his disinclination for extending continuing protections to those convicted of crimes. If he had felt very strongly about the existence of social injustices, he might not have been willing so often to put procedural concerns first.[18] Similarly, Harlan's fondness for history and tradition reflects a

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15. Carrington v. Rash, 380 U.S. 89, 99 (1965) (Harlan, J., dissenting); *see also* Dane, *supra* note 9, at 548-49 (discussing Harlan's belief that "the very structure of government itself" protects individual liberty).

16. Gough Whitlam, *A New Federalism*, 43 AUSTL. Q. 6, 7 (1971). Gough Whitlam became leader of the Australian Labour Party in 1967 and was a staunch defender of British-style constitutional conventions. He was elected Prime Minister of Australia in 1972 and was controversially dismissed in 1975 by the Governor of Australia. For further criticism of the principles of federalism, see ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 171, 173,.175 (9th ed. 1939) ("Federal government means weak government . . . . Federalism tends to produce conservatism. . . . Federalism substitutes litigation for legislation.").

17. *See, e.g.*, Dorsen, *supra* note 1, at 257; Wilkinson, *supra* note 2, at 1191-92.

18. Justice Harlan seemed more willing to abandon his staunch adherence to procedural regularity when the cases dealt with privacy and marital relations (areas more of concern to the upper and middle classes) than when they dealt with crime or protections for the poor. *Compare* Poe v. Ullman, 367 U.S. 497, 539 (1961) (Harlan, J., dissenting) (asserting that a statute criminalizing use of contraception by married couples is "an intolerable and unjustifiable invasion of privacy" that violates the Fourteenth Amendment) *with* Griffin v. Illinois, 351 U.S. 12, 29 (1956) (Harlan, J., dissenting) (arguing that states are not constitutionally required to furnish transcripts to indigent defendants in felony cases) *and* Shapiro v. Thompson, 394 U.S. 618, 655-56 (1969) (Harlan, J., dissenting) (stating

Justice raised in privileged circumstances. As Norman Dorsen has noted, Justice Harlan had little "direct exposure to the special problems of the less privileged sector of the community."[19]

There are, however, cases in which Harlan followed procedural rules that led to results he would not favor on the merits. Indeed, that is the central claim of procedural honesty. This is not to say that he did not care about substantive results, but if such cases are typical, he cared *more* about procedural honesty.[20]

And in choosing *which* procedures to follow, Harlan, like other judges, was inevitably influenced by his own substantive judgments, including on occasion reasons he would not articulate in the course of his reasoned elaboration. Habeas corpus is an area in which Justice Harlan always took a strong stand which he justified on grand theories of federal-state jurisprudence. Those of us who were there during the last moments of the Warren Court know that Harlan looked forward to the overruling of *Fay v. Noia*[21] as a neat and easy way to neutralize en masse the Warren Court rulings on criminal procedure. It would be fully effective, and it would avoid the stare decisis problems that repeated overrulings of individual criminal procedure decisions would pose.

Harlan might, I suppose, have confessed to that purpose, had he had the opportunity to write such an opinion. He did confess in two opinions that he had gone along with the Court's adoption of nonretroactivity rules even though he thought they were wrong in principle; he said he had gone along because the effect was to limit the applicability of criminal

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that a residence requirement for receiving welfare benefits is not unconstitutional). Justice Harlan's opinion in Boddie v. Connecticut, 401 U.S. 371 (1971), which dealt with the constitutionality of denying divorces to those who could not pay court fees and costs, implicates both of these areas. Harlan's opinion for the Court relies on due process to hold that states cannot constitutionally deny divorces in these cases. *See id.* at 374-83.

19. Dorsen, *supra* note 1, at 252; *see also* Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 326-27 (discussing factors in Harlan's privileged upbringing that may have influenced his judicial philosophy). Even so, Harlan supported civil rights and civil liberties concerns (although not the rights of criminals) more often than his reputation as a conservative would indicate. *See* Dorsen, *supra* note 1, at 268.

20. Harlan may have differed less with the majority concerning what reforms should be achieved than he did concerning whether it was the Court's role to achieve them. *See* Wilkinson, *supra* note 2, at 1190-91. However, he did seem willing to sacrifice reform in the interests of federalism, or more broadly, constitutionalism, by maintaining that his role as a Justice was not to cure the ills of society. This stance, apparently a neutral principle, in fact favors the status quo.

21. 372 U.S. 391 (1963). In *Fay*, the Court expanded the scope of federal habeas corpus by holding that federal courts could grant relief even on claims the defendant had not previously raised or pursued. *See id.* at 398-99.

procedure decisions with which he disagreed.[22] But whether or not he *always* expressed his reasoning or always put procedural values above substantive ones, certainly within the spectrum of judges, Harlan was extremely process-oriented and, as the commentators have all concluded, possessed an unusual degree of judicial integrity.[23]

There are many ways to illustrate these points about Justice Harlan. I will do so primarily by discussing one case—*Desist v. United States*.[24] Indeed, that is the case cited above in which Justice Harlan announced the ways in which he wanted to alter the Court's approach to retroactivity. *Desist* is also a good vehicle for comparing Justice Harlan's approach with that of the Supreme Courts that followed him.

Desist was decided in 1969 with Justice Harlan writing in dissent.[25] *Desist* illustrates several different facets of Justice Harlan's attention to procedure, including his approach of reasoned elaboration, which, I believe, attests to his concern for the decision-making process. Harlan's usual style was to explain his own reasons, paying attention to points on the other side, making those points well and attempting to meet them. During the process of thinking through the arguments, Harlan sometimes decided that his original inclination was wrong, or even that an opinion he had earlier published was wrong. If so, he would admit his change of heart and explain his prior error.[26] As a law clerk,[27] one of the things I most admired about Justice Harlan was his ability to change his mind, which I associated with a willingness to keep thinking. Some other Justices, by contrast, were more concerned with the consistency of their own jurisprudence and less ready to continue thinking about issues where they had already taken a position.

Desist was one of the cases during the 1968 Term in which Justice Harlan changed his position. The issue in *Desist* was whether the rule of

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22. *See* Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part) ("I . . . initially grasped [nonretroactivity] as a way of limiting the reach of decisions that seemed . . . fundamentally unsound."); Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting) ("I have in the past joined in some of [the Court's opinions on nonretroactivity] . . . . because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle.").

23. *See, e.g.*, Bourguignon, *supra* note 19, at 327; Dorsen, *supra* note 1, at 270; Wilkinson, *supra* note 2, at 1192.

24. 394 U.S. 244 (1969).

25. *See id.* at 256 (Harlan, J., dissenting).

26. *See, e.g., id.* at 258-59.

27. Unlike most of the participants in this conference, I did not clerk for Justice Harlan. I knew him only at a distance, when I clerked for another Justice during the 1968 Term.

Katz v. United States,[28] that electronic surveillance was a search within the protection of the Fourth Amendment, should apply retroactively. The Court held it should apply only to cases in which wiretaps took place subsequent to the *Katz* opinion.[29] It would not apply to other cases, even if they had not yet been tried or were on direct appeal when the rule was adopted.

Justice Harlan dissented, saying all so-called "new" constitutional rules must at a minimum apply to all cases still on direct review when the decision is handed down, because it is unprincipled and unjudicial to distinguish between criminal defendants still on direct review.[30] In Harlan's words,

> [s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from [our] model of judicial review.
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> . . . We apply and definitively interpret the Constitution, under [the Court's] view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.[31]

But, according to Harlan, very different considerations apply to retroactive application of "new constitutional principles" on habeas corpus. Applying new rules in this context would seriously upset finality and furthermore is

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28. 389 U.S. 347 (1967).

29. *See Desist*, 394 U.S. at 254.

30. *See id.* at 258.

31. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part). Similarly, he had explained in *Desist*:

> In the classical view of constitutional adjudication, which I share, criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits. We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

Desist, 394 U.S. at 258-59 (Harlan, J., dissenting) (citations omitted).

not required to deter unconstitutional conduct.[32] Accordingly, Harlan concluded that new decisions generally should not apply on habeas.[33]

Desist thus illustrates Harlan's attention to procedural principle—his objection to distinguishing between criminal defendants on direct appeal, even though the effect of that objection was to free the defendant and to extend the application of constitutional holdings with which Harlan often disagreed.[34] *Desist* also shows Harlan's concern for separation of powers, in his objections to judges deciding in a prospective, legislative manner.

Justice Harlan was not always a dissenter. Some of the cutbacks in federal jurisdiction that he suggested and promoted were put into effect while he sat on the Court. Most notably, Harlan was able in 1971 to join the Court's opinion in *Younger v. Harris*,[35] making into law the position he had urged as a dissenter in *Dombrowski v. Pfister*,[36] six years earlier. This victory for Harlan made it much more difficult for federal courts to pass upon the constitutionality of state criminal laws—a position that Justice Harlan maintained was required by principles of federalism.[37]

On retroactivity and habeas corpus, in contrast, Harlan remained a dissenter through his lifetime. Two years ago, however, in *Teague v. Lane*,[38] the Supreme Court picked up Justice Harlan's *Desist* approach and wrote it into law with what it claimed were only minor modifications. The Court at least purported to use Harlan's scheme, which had been rejected during his lifetime, to modify habeas after his death.[39] This in itself attests to Harlan's abiding influence. It is most unusual for a Justice to have his opinions written into law in this fashion after he has retired.

Teague, a 1989 case, held that new constitutional rules should not normally apply on habeas corpus.[40] The other part of Harlan's approach, requiring that all court decisions be fully applicable to all cases on direct appeal, had already been adopted by the Supreme Court.[41] *Teague*'s

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32. *See Mackey*, 401 U.S. at 690-91 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 262-63 (Harlan, J., dissenting).

33. Harlan did make two exceptions for when new rules should apply on habeas. *See infra* notes 62-66 and accompanying text.

34. Harlan had, however, concurred in the Court's opinion in Katz v. United States, 389 U.S. 347 (1967), which was at issue in *Desist*.

35. 401 U.S. 37 (1971).

36. 380 U.S. 479 (1965).

37. *See id.* at 498 (Harlan, J., dissenting).

38. 489 U.S. 288 (1989).

39. *See id.* at 306 (citing Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

40. *See id.* at 310.

41. *See* Griffith v. Kentucky, 479 U.S. 314, 321-25 (1987); United States v. Johnson,

holding was necessarily important to habeas corpus and its scope, but *how* important it would be would depend on how certain subissues were resolved—in particular, what would be considered a "new rule" and also what scope the *Teague* exceptions would be given. When we look at these factors we find ourselves asking whether the Court did pick up Harlan's position after all. Instead, it seems the Court has used Justice Harlan's *language* to justify *its* position, which is in fact significantly more far-reaching and difficult to defend than Harlan's, and which also is almost fatal to habeas corpus—all but eradicating the writ for state prisoners challenging their convictions. Harlan never had proposed going so far.

There are several ways in which the current Court has altered Harlan's approach. Justice Harlan believed that all rules, no matter how new, were to be applied retroactively on direct appeal but that "new constitutional rules" (a phrase he put in quotation marks) should not be applied on habeas unless the rule was "implicit in the concept of ordered liberty," as Justice Harlan saw it.[42] But even then, he was limiting his nonretroactivity concept to a fairly exceptional situation—one involving a "new constitutional rule." He stressed that the *usual* situation is for a rule to develop out of past precedent and not be the kind of clear break with the past that is sometimes prospective only.[43] Indeed, in *Desist*, Harlan criticized the majority for reading "new rule" too broadly; he implied that if a ruling is clearly *foreshadowed* by precedent it should not be considered the kind of clear break with the past that can be nonretroactive.[44] The kind of rule Harlan had in mind for nonretroactive application was the per se rule that did not grow out of the usual process of common law development—the Fourth Amendment exclusionary rule, *Miranda*, per se rules requiring the presence of an attorney at lineups, and so forth. Harlan described new rules as rules where "one can say with assurance that there was a time at which this Court would have ruled differently,"[45] using the term to refer to cases that overruled earlier Supreme Court decisions.[46]

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457 U.S. 537, 545-550 (1982).

42. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part).

43. *See Desist*, 394 U.S. at 263 (Harlan, J., dissenting) ("[M]any . . . of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation.").

44. *See id.* at 264-65.

45. *Id.* at 264.

46. In one case that did overturn a Supreme Court decision that Harlan believed was wrong, Harlan thought it was a close question whether that was the kind of new rule that should not apply on habeas, although he did go along with nonretroactivity. *See Mackey*,

The current Court, in contrast, wants to make *all developments* in the law prospective only for purposes of habeas corpus; nonretroactivity becomes the norm, instead of an exceptional situation. Justice Scalia has argued that the concept of a "new rule" *has* to include not only one that overturns a previous rule but also one that fills a vacuum, one that replaces palpable uncertainty as to what the law is. Otherwise, he says, *Teague* would add little to preexisting nonretroactivity law.[47] Scalia may be correct that it would add little, but Justice Harlan's concern was not in trying to add to nonretroactivity law. Justice Harlan's quarrel with the Warren Court really concerned only what was the appropriate *date* for nonretroactivity; he had no quarrel about *which* rules were retroactive, and was not attempting to increase the number of rules that were prospective only.[48] His primary quarrel was with the notion of prospectivity *at all* for judicial decisions, pointing out that such decisions were essentially legislative in nature and encouraged the Court to continue to act in this inappropriate fashion.[49] This is not the approach used by the current Court, which seems bent upon broadening the concept of the nonretroactive new rule.

Two Terms ago, Justice Kennedy, writing for the majority in *Sawyer v. Smith*[50] and declining to apply a rule he deemed a "new" one, said the purpose of *Teague* was "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered."[51] The Court has moved a long way from the "clear break with the past" that used to identify a new rule for possible prospective treatment.

One indication from *Teague* itself that it would be broadly applied and that nonretroactivity was to become the norm came when Justice

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401 U.S. at 700-01 (Harlan, J., concurring in part and dissenting in part).

47. *See* Penry v. Lynaugh, 492 U.S. 302, 353 (1989) (Scalia, J., dissenting).

48. *See Desist*, 394 U.S. at 257-59 (Harlan, J., dissenting). The Court had held that whether a new rule should be nonretroactive depended upon the purpose of the rule, the reliance of police and other law enforcement officials on the old standard, and the effect on the administration of justice that retroactive application would have. *See* Stovall v. Denno, 388 U.S. 293, 297 (1967). The prototype rule for nonretroactive application under this test was a new rule whose purpose was to deter illegal police behavior, such as most rules concerning illegal searches and arrests.

49. This was a favorite theme of Harlan's, as it involved the separation of powers, a cornerstone of his judicial philosophy. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in part and dissenting in part) ("What emerges from today's decisions is that . . . the Court is free to act, in effect, like a legislature . . . . [and] I completely disagree with this point of view.").

50. 110 S. Ct. 2822 (1990).

51. *Id.* at 2827.

O'Connor, writing for the Court, turned nonretroactivity into a threshold question.[52] The petitioner in *Teague* argued that he, a black man, was unconstitutionally tried by a jury from which all blacks had been excluded. Justice O'Connor declined to decide whether such an exclusion would violate the Constitution, claiming that any ruling of unconstitutionality would be a nonretroactive "new rule."[53] Criticizing O'Connor's conclusion that she did not even have to formulate the rule in order to know that it would not be retroactive, Justice Stevens pointed out that you cannot know whether a rule is a new one or not until you know what the rule is.[54] The majority's approach, however, was to decline to decide what the rule would require on the ground that any rule under which he would prevail would necessarily be "new."[55] That approach, as well as preventing persons like Teague from gaining release on habeas, had the important consequence of preventing habeas corpus from serving as the occasion for the announcement of any new rules of constitutional law. When coupled with the broad definition of "new rule" that the Court adopted, the approach sharply constricts federal courts' habeas jurisdiction and also effectively prevents federal district courts from developing constitutional principles in state criminal cases.

Nothing in Harlan's writings would support nonretroactivity as a threshold question, but he did use language that could lend support to other facets of the current Court's approach. In particular, he said as a dissenter that habeas claims should be decided in accordance with the law in existence at the time of conviction and not the law prevailing at the time of the habeas proceeding.[56] But Harlan would certainly not have interpreted the standard the way the Court does today. *Teague* said the rules to apply on habeas are those "*dictated* by precedent existing at the time the defendant's conviction became final," with Justice O'Connor, writing for the Court, emphasizing "dictated."[57] Two Terms ago the

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52. *See Teague*, 489 U.S. at 300.

53. *Id.* at 315. Fourteen years earlier the Supreme Court had held that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community, but it did not require that petit juries actually chosen must reflect the whole community. *See* Taylor v. Louisiana, 419 U.S. 522 (1975). The prosecutor in *Teague* had used all of his ten preemptory challenges to exclude blacks, with the result that it was an all-white jury that tried and convicted Teague. The petitioner in *Teague* argued that the rationale of the earlier case prohibited deliberate exclusion of blacks from the petit jury. The Court said: "Because we hold that the rule urged by petitioner should not be applied retroactively to cases on collateral review, we decline to address petitioner's contention." *Teague*, 489 U.S. at 299.

54. *See Teague*, 489 U.S. at 319 n.2 (Stevens, J., concurring in part).

55. *Id.* at 315-16.

56. *See Desist*, 394 U.S. at 263 (Harlan, J., dissenting).

57. *Teague*, 489 U.S. at 301. Justice Brennan in his dissent pointed out that few

Court, in an opinion by Chief Justice Rehnquist, reiterated this as the test to determine which rules are not new and emphasized that a decision was "new" enough not to apply on habeas even though it represented only an extension of the reasoning of previous cases.[58] This makes the proper course for a judge deciding a habeas petition to go back to the law that existed when the petitioner was convicted and to apply the law as restrictively and narrowly as she possibly can, not the way she would normally apply it.[59] And Rehnquist went further, stating that "[t]he 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[60] If the rightness of a rule that was adopted would have been "susceptible to debate among reasonable minds," its adoption constitutes a "new rule" within the meaning of *Teague*.[61] The result is that habeas is left only to redress bad faith applications of law by state court judges, and then, only when the bad faith is obvious. It is no longer available to review whether state judges decided federal claims *correctly*. The inquiry now is whether they decided them *reasonably*.

Under the Court's approach, since all developments are new rules, the only developments that will be applied on habeas are those that fall within the Court's exceptions. Justice Harlan and the current Court agree on one exception: if the substance of the offense for which a prisoner was convicted is held unconstitutional, that holding must apply fully on habeas.[62] Persons convicted of obtaining abortions or burning flags must

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decisions on appeal or collateral review are dictated by what came before; most involve questions of law that are at least debatable. *See id.* at 333 (Brennan, J., dissenting).

58. *See* Butler v. McKellar, 110 S. Ct. 1212 (1990). Rehnquist stated that

> the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts.

Id. at 1217.

59. As Justice Brennan pointed out in his dissent in *Butler*, "[a] federal court may no longer consider the merits of the petitioner's claim based on its best interpretation and application of the law prevailing at the time her conviction became final; rather, it must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable." *Id.* at 1221 (Brennan, J., dissenting).

60. *Id.* at 1217.

61. *Id.* at 1214.

62. Harlan made an explicit exception for new substantive rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J.,

therefore be freed when their offenses are ruled unconstitutional. But starting in *Teague*, O'Connor disagreed with Harlan's second exception to nonretroactivity on habeas. When a prisoner objects to procedures that were used to convict him and that have subsequently been held unconstitutional, Justice O'Connor would apply the current constitutional interpretation only for those new procedures without which the likelihood of an accurate conviction is seriously diminished.[63] Justice Harlan, by contrast, would apply on habeas the broader standard of all "procedures . . . implicit in the concept of ordered liberty."[64] Harlan originally had suggested a formulation more like that of the current Court,[65] but he rejected it partly because he found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values."[66]

In other respects as well, the current Court has attempted to limit habeas corpus to prisoners who can make a colorable claim of factual innocence and has lessened its availability as a device to keep courts and prosecutors faithful to constitutional law. Of course, the prototype rule for full retroactivity had always been one that affected the reliability of the fact-finding process; the new development is that this is now the *only* basis for retroactive application of rules of criminal procedure. And even the exception for rules that go to guilt or innocence is very strictly applied, not extending to petitioners like Teague himself, a black man objecting to systematic exclusion of blacks from the jury that tried him.[67]

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concurring in part and dissenting in part). Justice O'Connor incorporated this exception into her test in *Teague*. *See Teague*, 489 U.S. at 312.

63. *See id.* at 299-301.

64. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

65. *See Desist*, 394 U.S. at 262 (Harlan, J., dissenting) ("[A]ll 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.").

66. *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in part and dissenting in part). In his concurring opinion in *Teague*, Justice Stevens indicated that he favored Harlan's later formulation over the standard adopted by Justice O'Connor. *See Teague*, 489 U.S. at 320-21 (Stevens, J., concurring).

67. Another harsh aspect of the *Teague* result is that Teague had raised his objection at all stages of the trial and appellate process. On direct appeal the courts had either refused to hear it or decided it erroneously. The case therefore does not involve any issue of waiver by the petitioner, which has been the troublesome issue in many habeas cases. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977). Even before Fay v. Noia, 372 U.S. 391 (1963), a case like *Teague*, where the defendant had pursued his claim in the state courts, led to release on habeas. *See* Brown v. Allen, 344 U.S. 443 (1953).

There are other ways as well in which the present Court's approach differs from Harlan's, but enough has been said to illustrate that the Court has gone well beyond any plans Harlan announced for cutting back habeas corpus.[68] It is somewhat interesting to speculate whether Justice Harlan might not have joined such decisions, given the opportunity, or whether he would have resisted them. In fact, this question is fun to muse about with respect to many opinions of the more conservative Court that followed Justice Harlan.

Partly because Justice Harlan's positions were more moderate, we think of them as positions of principle. In contrast, after his retirement the Burger and Rehnquist Courts often blatantly manipulated procedural rules to achieve substantive results. They purported to follow in Justice Harlan's conservative tradition, justifying their proceduralism as embodying judicial values and often invoking Harlan's language in their support, but the Court's application of doctrines like federalism and separation of powers is often obviously result-oriented.[69]

Many cases could serve to illustrate this point. I will briefly discuss three examples: *Duke Power v. Carolina Environmental Study Group, Inc.*,[70] *Michigan v. Long*,[71] and *Arizona v. Fulminante*.[72]

Duke Power was decided in 1978, seven years after Harlan's retirement. It involved a challenge to the constitutionality of a provision of the federal Price-Anderson Act limiting liability for nuclear accidents resulting from the operation of nuclear power plants. When the case came to the Supreme Court, the district court had decided it on the merits, holding the limitation of liability unconstitutional.[73] There were at least two reasons why the case did not appear justiciable. First, under existing Supreme Court precedents,[74] the controversy did not seem to be ripe and the plaintiffs did not appear to have standing. No nuclear accident had

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68. The Court's restrictions on habeas corpus go beyond problems of retroactivity. For example, last Term in McCleskey v. Zant, 111 S. Ct. 1454 (1991), the Court adopted a "cause and prejudice" standard for repeat habeas corpus petitions, making it more difficult for a petitioner to raise issues omitted from the first habeas petition than it had been under the previous standard, articulated in Sanders v. United States, 373 U.S. 1 (1963).

69. Similarly, the Supreme Court's recent treatment of stare decisis has been remarkable, and out of keeping with Harlan's philosophy. *Compare* Payne v. Tennessee, 111 S. Ct. 2597, 2611 (1991) *with* Williams v. Florida, 399 U.S. 78, 122-29 (1970) (Harlan, J., dissenting).

70. 438 U.S. 59 (1978).

71. 463 U.S. 1032 (1983).

72. 111 S. Ct. 1246 (1991).

73. *See Duke Power*, 438 U.S. at 68.

74. *See, e.g.*, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Flast v. Cohen, 392 U.S. 83 (1968).

occurred and no property had been lost. Why then should neighbors be permitted to challenge the limitation, which had no present effect on them and would affect them only if the unforeseeable contingency of a nuclear accident occurred? Second, the case did not fall within established requirements for federal question jurisdiction; within existing rules it could be commenced only in state and not federal court. True, the point had not been raised in the district court, but objections to subject matter jurisdiction cannot be waived and must be considered whenever they arise.

The problem was that the structure of the suit was exactly that of the famous *Louisville & Nashville Railroad v. Mottley*,[75] in which Justice Holmes held that a suit arises only under the law that creates the cause of action and that a plaintiff cannot acquire federal jurisdiction by anticipating a federal defense. Under the *Mottley* reasoning, the *Duke Power* case arises under North Carolina tort law:[76] the claim (when and if the accident actually occurs) is that the company has tortiously deprived the plaintiffs of their property in excess of the damages the company is paying; the defense is that the Price-Anderson Act limits the company's liability; the reply is that the Act is unconstitutional.

It would make perfect sense for federal jurisdiction to exist in cases like *Duke Power* and *Mottley* that concern primarily the meaning of federal law, and there are ways that the Court could have used *Duke Power* to craft needed reforms in the law of federal jurisdiction.[77] Instead, however, the Court, in an opinion by Chief Justice Burger, imaginatively created an approach good for this case and this case alone. First, the Chief Justice read the complaint to say that the plaintiffs were asserting a cause of action arising directly under the Fifth Amendment of the United States Constitution, although the complaint did not so state.[78] Another serious difficulty with this theory was the absence of either a government defendant or unconstitutional state action. Next, the Chief Justice reminded us that even if no cause of action exists, a colorable claim of a cause of action is sufficient to create federal question jurisdiction, under the doctrine of *Bell v. Hood*.[79] Therefore, said Burger, it was not necessary to decide whether or not there actually was

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75. 211 U.S. 149 (1908).

76. The suit was for a declaratory judgment. It is settled that jurisdiction in declaratory judgment actions depends upon the old form of action that would have been pursued before a declaratory judgment action was available. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

77. *See* Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 693 (1981).

78. *See Duke Power*, 438 U.S. at 69.

79. 327 U.S. 678 (1946); *see also Duke Power*, 438 U.S. at 70-71.

a federal cause of action, because in any event the Court could decide the issues as pendent to the (nonexistent) federal claim.[80]

Justice Rehnquist, in concurrence, forcefully refuted this reasoning and demonstrated that exactly the same approach could have applied in *Mottley* as well.[81] Justice Stewart, also concurring, similarly demonstrated that the Court's case or controversy holding did not square with Supreme Court precedents.[82] But Chief Justice Burger, writing for the majority, managed, by ignoring the precedents, to reach the merits of the limitation of liability and held that it was constitutional.[83]

These applications of case or controversy doctrine and the rules of federal question jurisdiction did not spell out new approaches that the Court would continue to follow in the future. The purpose was simply to avoid a politically inexpedient result in a particular case; if the Court had allowed existing law to govern, it would never have reached the merits of the case. Although the district court also would have been held to have lacked jurisdiction, its opinion would have been left as the only one that had reached the merits. It could have cast doubt on the validity of the limitation of liability and thereby deterred nuclear power companies from proceeding. It is these practicalities that guided the Supreme Court's decision to put aside procedural concerns and reach the merits in this case.

Michigan v. Long[84] was another startling decision in which the Court's ruling on important procedural matters seemed driven by the Court's political agenda. The case came to the Supreme Court from the Michigan Supreme Court and involved the scope of the adequate state ground doctrine—the rule that the Supreme Court lacks jurisdiction to review a decision coming to it from a state court when the state court's result rests independently and adequately upon state law. Even if the state court relied upon federal as well as state law and expounded upon federal law in its opinion, the adequate state ground rule does not permit the Supreme Court to review such pronouncements unless altering the ruling on federal law would change the result in the case. Justice Harlan was a firm believer in the adequate state ground rule, even to the point of considering it constitutionally required.[85]

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80. *See Duke Power*, 438 U.S. at 71-72.

81. *See id.* at 95 (Rehnquist, J., concurring).

82. *See id.* at 94 (Stewart, J., concurring).

83. *See id.* at 86-87.

84. 463 U.S. 1032 (1983).

85. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967) (Harlan, J., dissenting); Henry v. Mississippi, 379 U.S. 443 (1965) (Harlan, J., dissenting); Fay v. Noia, 372 U.S. 391 (1963) (Harlan, J., dissenting).

Michigan v. Long involved the application of the *Terry v. Ohio*[86] rule—that police could search for weapons without probable cause if they had an "articulable suspicion" that a person was armed and dangerous—to searches of the car the suspect was driving. The defendant had been convicted of possession of marihuana based on such a search, but the Michigan Supreme Court, citing both the Michigan and the United States Constitutions, held the search impermissible.[87] A classic application of the adequate state ground rule in this situation would preclude U.S. Supreme Court review; even if the Court reversed the ruling that the federal Constitution prohibited the search, the result would not change since it was also mandated by Michigan's constitutional law.

But the U.S. Supreme Court, in an opinion by Justice O'Connor, did not allow the state law ruling to interfere with the Court's jurisdiction to set the record straight and to make clear that the search was constitutionally permissible. Citing a need "to review an opinion that rests primarily upon federal grounds"[88] in order to promote uniformity, O'Connor created a presumption in favor of federal jurisdiction that existed whenever both state and federal grounds were involved and the state court had not made a "plain statement"[89] that its decision rested upon an independent and adequate state ground.[90] O'Connor "openly admit[ted]"[91] that the Court had not followed this approach in the

86. 392 U.S. 1 (1968).

87. *See* People v. Long, 320 N.W.2d 866, 870 (Mich. 1982).

88. *Long*, 463 U.S. at 1040.

89. *Id.* at 1041.

90. A state court mindful of whether its decision is reviewable can still avoid Supreme Court jurisdiction by making the prescribed plain statement. Adopting this approach, the *Long* rule did not even alter what has always been the most disturbing aspect of the adequate state ground rule—that state courts are given the power to choose whether their opinions are reviewable, because if they do explicitly and independently rest upon state as well as federal law, the United States Supreme Court cannot review the case.

If, on the other hand, the state court *wants* a Supreme Court pronouncement on the particular question it is deciding, it is in the power of the state court to make that possible, and indeed even to retain the option whether to follow a restrictive Supreme Court ruling or on remand to rest the more far-reaching result squarely on state law grounds. A state court can thus make the issue reviewable by deciding the case in the first instance on federal grounds alone, not reaching the state law question. (Indeed, *Long* holds the same result follows if the state court rested on both state and federal grounds without saying clearly that the state ground was independent of the federal one).

It seems strange for state courts to have this power to manipulate Supreme Court jurisdiction. Whatever purposes the adequate state ground rule is designed to serve, giving state supreme courts the choice whether their federal decisions are reviewable is not among them.

91. *Long*, 463 U.S. at 1038.

past—sometimes presuming against the existence of federal jurisdiction when the precise grounds were murky, sometimes asking the state court whether the state ruling was independent of the federal one and sufficient to sustain the result, and sometimes making its own judgment on that question. But, said O'Connor, inconsistency was a bad policy and the new approach she announced would be followed across the board.[92]

O'Connor's assertion that her approach of presuming in favor of federal question jurisdiction would be followed consistently was utterly unbelievable. Under such a presumption, a silent opinion from the highest state court passing upon a matter in which state and federal issues were raised would give rise to Supreme Court jurisdiction. Such a system consistently followed would wreak havoc with the Supreme Court's caseload. Of course, now that the Supreme Court docket is entirely discretionary the *Long* approach is workable—it simply gives the Supreme Court the opportunity, if it wishes, to review any case in which a federal issue was raised and the state court has not taken care to declare explicitly that its state law ruling is sufficient to control the result. But when *Michigan v. Long* was decided, the Court still had a mandatory appellate docket with respect to some of these cases from state courts, and the *Michigan v. Long* rule followed generally would have placed cases within the Supreme Court's appellate jurisdiction that it could not possibly have agreed to hear. Accordingly, the Court was willing to depart from *Michigan v. Long*'s approach whenever it seemed politic to do so.[93] Today, it could follow *Long* consistently, but only because in 1988 the Court's mandatory jurisdiction was abolished in favor of general certiorari jurisdiction;[94] now *Long* simply gives the Court discretion to hear a wide range of cases that it can escape, if it chooses, by denying cert.

Not only was the *Michigan v. Long* approach unworkable when it was devised, it also was an extremely activist doctrine for a Court that was concerned with federalism and states' rights to adopt. This reaching to

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92. *Id.* at 1039.

93. *See, e.g.*, Capital Cities Media, Inc. v. Toole, 466 U.S. 378 (1984). Moreover, after this paper was written, the Supreme Court in Coleman v. Thompson, 111 S. Ct. 2546 (1991), limited the *Michigan v. Long* presumption to cases that "fairly appear to rest primarily on federal law or to be interwoven with federal law." *Id.* at 2557. In a companion case, an exception to the plain statement rule was also created for unexplained orders. *See* Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991). Both these cases dealt with the plain error, adequate state ground rule in terms of collateral relief on habeas, not of Supreme Court review. Without such limitations, the *Michigan v. Long* approach would still impose a large burden on federal courts on habeas, though it has not burdened Supreme Court review since 1988, when appeals from state courts were discontinued. *See infra* note 94.

94. *See* Pub. L. No. 100-352, 102 Stat. 663 (1988).

decide federal issues where state law appears controlling,[95] this assertion of a need for federal uniformity, are odd stances for Justice O'Connor[96] and the Burger Court majority.[97]

Of course the *Long* holding was influenced by the fact that it led to reinstating a criminal conviction. Moreover, it is a rule that allows the Supreme Court to step in to put a lid on liberal constitutional pronouncements by state courts. Indeed, the doctrine of increased Supreme Court jurisdiction to review will only apply when state courts are alleged to have overread constitutional rights and it is not sufficiently clear that their holding rests on state law; when individuals have received *less* protection than the Constitution requires, there never has been any possibility of an adequate state ground, and it never has mattered whether the state decision rested on state or federal law.[98]

A third case in which the Court used procedural doctrines in service of its political agenda is the 1991 decision in *Arizona v. Fulminante*[99] that admission of coerced confessions can constitute harmless error.[100] With

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95. And indeed on remand, state law may prove controlling, so in retrospect, the federal decision seems only advisory. In earlier cases the Court had occasionally decided federal issues that might prove unnecessary upon remand to the state court. *See, e.g.*, California v. Byers, 402 U.S. 424 (1971); Evans v. Newton, 382 U.S. 296 (1966); Standard Oil Co. v. Johnson, 316 U.S. 481 (1942). In those cases, however, the Court examined the opinion below and determined for itself, rightly or wrongly, that federal law in fact had controlled the result. In *Michigan v. Long*, by contrast, the Court declined to make any such determination but instead adopted a presumption, assertedly for all future cases, that federal law was controlling in the absence of a clear statement to the contrary from the state court.

96. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (O'Connor, J., dissenting).

97. Indeed, Justice Harlan's language from *Mackey*, quoted in text at note 31 *supra*, is applicable here:

> We apply and definitively interpret the Constitution, under [the Court's] view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

Mackey v. United States, 401 U.S. 677, 679 (1971) (Harlan, J., concurring in part and dissenting in part).

98. For example, if a state court holds that a defendant's confession was not illegal under state or federal law, and the defendant seeks Supreme Court review of the federal ruling, the Supreme Court has jurisdiction to review, even if the state holding was equally central to the decision, because a reversal on the federal question will require reversal of the verdict. It is only when state law goes further than federal law in protecting individual rights that the adequate state ground rule might apply—for example if the state court found that use of the confession would violate both the state and federal Constitutions and the error claimed is that the U.S. Constitution does not go so far.

99. 111 S. Ct. 1246 (1991).

100. For a penetrating discussion of this decision, see Charles J. Ogletree, Arizona

respect to this decision, there is direct evidence that Harlan would not have agreed. As early as 1967, Justice Harlan had recognized "that particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless," citing the example of confessions.[101]

Decisions like these turn procedural doctrines and rules designed to limit the judiciary into a bag of tricks that can be employed to accomplish any desired substantive result. Ripeness and standing, rules of federal question jurisdiction, adequate state ground, and harmless error are used in new and creative ways when necessary to keep the prisoner in jail or to encourage the building of nuclear power plants.[102] We do not associate such use of procedural doctrines to accomplish substantive results with Justice Harlan, although Harlan might have favored the political results furthered by all of those decisions. Moreover, in *Long* and *Duke Power* the Court used procedural doctrine in a result-oriented fashion in a way that *expanded* the Court's jurisdiction.[103] The procedural doctrines that Justice Harlan supported were much more likely to be doctrines of restraint, cutting back on the Court's jurisdiction, rather than expanding it.

Of course we cannot know for certain that if given the opportunity to institute these more extreme results he would not have done so. Perhaps Harlan would have jumped on the conservative bandwagon.[104] Perhaps it is the luxury of the judge in the position of dissenter to retain his intellectual purity because for the most part he doesn't have the opportunity to effectuate the results he wants. I myself think of Justice

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v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

101. Chapman v. California, 386 U.S. 18, 52 n.7 (1967) (Harlan, J., dissenting).

102. All such decisions are susceptible to the same characterization that Justice Brennan made in *Butler* concerning habeas: "Result, not reason, propels the Court today." Butler v. McKellar, 110 S. Ct. 1212, 1219 (1990) (Brennan, J., dissenting); *see also* Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking.").

103. *Fulminante* also involved an expansion of court power—this time at the expense of the jury.

104. Justice Felix Frankfurter had the reputation of being a principled judicial conservative, but he was not above bending procedures and the principles he espoused in order to put into place desired results. Moreover, he sometimes acted in a very activist manner—for example in reaching for issues he did not have to decide—in order to impose or create rules of restraint. *See, e.g.*, Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); *see also* Martha A. Field, *Abstention in Constitutional Cases: The Scope of the* Pullman *Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1077-78 & nn.22-23 (1974) (discussing Frankfurter's opinion in *Pullman*).

Harlan as principled enough to have resisted the opinions I have just mentioned, but some who knew the man and not merely the man's opinions might have a better basis for judging how he would have operated had his context been changed.

In some ways a more interesting question than whether Harlan actually was motivated by devotion to principles of judicial decision making is whether that attitude is the best one for judges to adopt. *Should* a judge care more about how he decides things than about what he—or she—decides? Harlan's colleagues on the Supreme Court occasionally expressed disbelief that he would fail to rule upon fundamental First Amendment rights, for example, because of remote and abstract interests of federalism.[105] Harlan persisted in favoring "procedural regularity" even in cases in which it appeared that delay was a part of the state's strategy in denying rights to its citizens.[106] Even Justice Clark, himself no crusader for civil rights, criticized Harlan in *Baker v. Carr* for putting abstractions above important rights: "It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time."[107] It is not clear to everyone that it is always appropriate to put procedural concerns over the doing of substantive justice.

It may be that a Supreme Court consisting of nine Justice Harlans would lack some important attributes. An appellate court functions best with some diversity—not only diversity of race, religion, and gender but also diversity of points of view, of passions, of experiences. Our model Court, along with process-oriented judges like Justice Harlan, also would include, for example, judges with social vision, jurists with a passion for

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105. *See, e.g.*, Mills v. Alabama, 384 U.S. 214, 221 (1966) (Douglas, J., concurring) ("[C]onsidering the importance of the First Amendment rights at stake in this litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction . . . ."); *see also* United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) ("[L]aws which actually affect the exercise of these vital rights [to assemble peaceably and to petition for a redress of grievances] cannot be sustained [as Justice Harlan would recommend] merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence . . . .").

106. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966). There the Court overruled the Georgia Supreme Court, which had held that a city could resign as trustee of a racially restricted park without implicating the Fourteenth Amendment. The Court considered the resignation a tactic to circumvent the integration of the park, but Justice Harlan would have dismissed the case as improvidently granted, believing federal law insufficiently relevant to the outcome to support Supreme Court jurisdiction. *See id.* at 315 (Harlan, J., dissenting).

107. Baker v. Carr, 369 U.S. 186, 262 (1962) (Clark, J., concurring).

justice, or Justices who pay attention to and empathize with unrepresented groups. Such judges are also of great importance to a great Court.

Although our model might not be a Court of nine Harlans, it also is true that the Court he was on was *much* the richer for his presence. The questions and objections he raised stimulated better work from his colleagues as well as himself. There was much discussion at this conference about whether Justice Harlan would have fully participated in the Supreme Court's privacy revolution by joining the Court in *Eisenstadt v. Baird*,[108] where the year after Justice Harlan's retirement, the Court extended the principle of privacy about decisions to use birth control from married persons, where *Griswold v. Connecticut*[109] had established it, to single persons as well. Would Harlan have joined the Court's holding? Professor Yarbrough said at the conference that Harlan understood the claims of homosexuals to privacy, an understanding that Yarbrough traced to Harlan's days at Oxford.[110] Could he have understood similar claims on the part of single women, or would he have not gone so far?

Whatever his feelings about the outcome in *Eisenstadt*, Harlan almost certainly would not have approved of the reasoning that the Court used to reach the decision. Justice Brennan's opinion simply states that the holding in *Griswold* applies to unmarried persons without laying out a logical basis for that conclusion.[111] Even if Harlan agreed with the end result, he surely would have been uncomfortable with this lack of reasoned elaboration which he prized so highly.

I do not have a firm view about what position Harlan would ultimately have taken in *Eisenstadt*, but I am convinced that he would have recognized the importance of the issue before him in opening up the scope of privacy doctrine, that he would have thought long and hard about it, and that whether in concurrence or dissent, he would have caused the Court not to settle for the *ipse dixit* that the *Eisenstadt* opinion was, but to focus on the issue and its consequences and to discuss and decide it as the important pronouncement it was. And *Eisenstadt* is but one example.

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108. 405 U.S. 438 (1972).

109. 381 U.S. 479 (1965).

110. *See* Tinsley E. Yarbrough, *Mr. Justice Harlan: Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223, 240 (1991). At least in his opinions, however, Justice Harlan did not indicate much sympathy either for privacy concerns of homosexuals or for unmarried persons who engaged in sex. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) ("I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced.").

111. *See Eisenstadt*, 405 U.S. at 453. Brennan said: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.*

In general, the Supreme Courts that followed Harlan would have benefitted from greater attention to Harlan's example and his contributions, which are relevant also to Justices with firmer substantive agendas—conservative or liberal.

I myself disagreed with many of Justice Harlan's positions but had enormous respect for him, both as a person and as a judge. He was the model of legal process. He taught us all—or reminded us all—of reasoned exposition, and of procedural regularity. Even those of us who were not always convinced by the balance he struck between states' rights and the demands of justice learned about federalism and separation of powers in our disagreement. I am very proud to be able to participate in New York Law School's centennial celebration honoring Justice John Marshall Harlan.