NEW YORK LAW SCHOOL

NYLS Law Review

Volume 36 | Issue 1 Article 19

January 1991

Justice Harlan and Justiciability: Notes on Two Dissents

David L. Shapiro
Harvard Law School

JUSTICE HARLAN AND JUSTICIABILITY: NOTES ON TWO DISSENTS*

DAVID L. SHAPIRO**

The last time I had a few hours to call my own—and an opportunity to think about my remarks today—was just two weeks ago, while the annual Cherry Blossom parade was passing by my window at the Department of Justice. Unfortunately, at that time I had not yet received a copy of the papers delivered today by Martha Field[1] and Charles Nesson.[2] And so I decided to take advantage of my ignorance and to think about what I would like to say on the subject of this panel discussion for the ten minutes or so that I have the floor.

Looking back, I feel blessed that I had this chance, both because it was so enjoyable to think about these issues without constraint, and because now that I have heard what Professors Field and Nesson had to say, I realize it would be folly to try to embellish on their research or their insights. (I might add, though, that while my remarks relate only

---

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

** Professor of Law, Harvard Law School.

At the time these comments were delivered, I was Deputy Solicitor General, United States Department of Justice. Needless to say, the views expressed are my own, and not necessarily those of any of my various employers.

A brief personal note, prompted by the remarks of Tinsley Yarbrough and Charles Nesson about the relationship of Justices Harlan and Frankfurter: Professor Yarbrough reports that, after the retirement of Justice Frankfurter, two Harlan law clerks went to see him, at Justice Harlan's request, and when the two clerks arrived, Justice Frankfurter asked them to take notes on the subject of legislative reapportionment. *See* Tinsley E. Yarbrough, *Mr. Justice Harlan: Reflections of a Biographer*, 36 N.Y.L. SCH. L. REV. 223, 230 (1991). I was one of those clerks, and I vividly recall the visit. Justice Frankfurter, crippled by a stroke that followed hard on the heels of—and some say was caused by—the Court's decision in Baker v. Carr, 369 U.S. 186 (1962), spoke of the decision with both anger and contempt. But despite his anger, and his physical weakness, he found the time and energy to ask about our hopes and plans, and to give us some advice (among other things, he told me not to teach in California because the weather there was too lovely for serious scholarship).

The visit was just one remarkable experience in a very remarkable year—a year that had a profound influence on me. It has surely helped to make me the liberal conservative, or conservative liberal, that I am today.

1. Martha A. Field, *Justice Harlan's Legal Process*, 36 N.Y.L. SCH. L. REV. 155 (1991).

2. Charles Nesson, *The Harlan-Frankfurter Connection: An Aspect of Justice Harlan's Judicial Education*, 36 N.Y.L. SCH. L. REV. 179 (1991).

obliquely to theirs, I hope I can reinforce some of their thoughts about Justice Harlan's deep concern for process and about the extraordinary level of his candor, his analytical ability, and his contribution to the Court's jurisprudence.)

Justiciability, civil procedure, and remedies—of those three, surely the most interesting (and amorphous) is justiciability—the criteria governing whether or not a controversy is appropriate for judicial resolution. As I looked over the list of Justice Harlan's contributions on this subject, I was struck by how many and how valuable they have been. To name just a few, there is his provocative dissent in *Flast v. Cohen*,[3] the case upholding federal taxpayer standing to challenge federal expenditures on First Amendment establishment grounds; his extraordinary dissent in *Poe v. Ullman*,[4] an opinion much discussed at this conference for its view of the merits but, for my purposes, of particular interest because of its eloquent plea to allow adjudication at the instance of one who is deterred from engaging in constitutionally protected activity by a statute that has yet to be enforced; his bold concurrence in *Oestereich v. Selective Service System*,[5] where, in one of the draft cases arising out of the Vietnam War, he insisted that denial of timely relief may raise serious constitutional questions even if a remedy is available at a later stage; his powerful dissent in *Fay v. Noia*,[6] which has since become law in substance if not in form;[7] and his landmark opinion for the Court in *Abbott Laboratories v. Gardner*,[8] still considered the definitive discussion of ripeness in the context of judicial review of administrative action.

What also struck me in this survey was that Justice Harlan's approach to questions of justiciability appeared in the main not to spring from a desire either to find an excuse for avoiding the merits when the merits seemed unworthy, or to get rid of a pesky stumbling block to considering the merits when they seemed especially alluring. The Justice was only mortal, of course, and at times even acknowledged that notions of justiciability might serve (as Alexander Bickel alarmingly thought they should[9]) as a convenient technique for avoiding unpleasant issues, or

---

3. 392 U.S. 83, 116 (1968) (Harlan, J., dissenting).

4. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

5. 393 U.S. 233, 239 (1968) (Harlan, J., concurring).

6. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

7. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). Since these comments were delivered, the decision in *Fay v. Noia* has been explicitly overruled. *See* Coleman v. Thompson, 111 S. Ct. 2546, 2565 (1991).

8. 387 U.S. 136 (1967).

9. *See, e.g.*, Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). Bickel's thesis—that at the Supreme Court

undesirable results.[10] But in general, I am convinced that for him, notions of justiciability had a life and a justification of their own, and served significant structural purposes—purposes closely tied to preserving the principles of federalism and separation of powers that he prized so greatly.[11] Two examples may illustrate this point, and at the same time reveal a certain radicalism in Justice Harlan's thought that has perhaps been too little recognized—at least until this conference.

First, there is Justice Harlan's dissent in *Fay v. Noia*.[12] This case involved a state criminal defendant whose claim that he had been convicted on the basis of a coerced confession could not have been reviewed directly by the Supreme Court because he failed to take a timely appeal to a higher state court; his conviction, in other words, rested on an independent and adequate state ground.[13] Yet the majority held that in the absence of a deliberate waiver of his federal claim in the course of the state proceedings, the defendant could raise that federal claim in a federal district court in an action for habeas corpus.[14] Justice Harlan's dissent took issue with almost every aspect of the majority's treatment of history and every step in its rationale. It is most interesting to me because it suggests—indeed insists—that there is a constitutional barrier, arising out of the nature of our federal system, to a federal court action effectively invalidating a conviction that rests on an adequate and independent state procedural ground.[15] And he invoked some of the early judicial rumblings against the rule of *Swift v. Tyson*[16] in support of that position.[17]

---

level, notions of justiciability and jurisdiction are matters wholly within the Court's discretion—has been roundly criticized by a number of commentators. *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 577-79 (1985).

10. Professor Field reports a few such instances in her paper. *See* Field, *supra* note 1. And I recall one occasion as a law clerk when the Justice said to me, perhaps only partly in jest, that if the majority was going to take a certain tack on the merits, he would have to dissent on the ground that justiciability was lacking.

11. I might note here my agreement with Professor Strossen that Justice Harlan saw these principles as safeguards against excessive concentration of governmental power, and thus as fundamental protections of the interests of the individual. *See* Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model for How a Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 133 (1991). And I think he was right.

12. 372 U.S. 391, 448 (1963) (Harlan, J., dissenting).

13. *See id.* at 397-98.

14. *See id.* at 434.

15. *See id.* at 463-70 (Harlan, J., dissenting).

16. 41 U.S. 1 (1842).

17. In particular, Justice Harlan quoted at length from Justice Field's dissent in

This, I submit, is a radical view, since it would impose constitutional constraints on the writ of post-conviction habeas corpus that exceed the admitted federal power to authorize removal of a state criminal case to federal court when a federal defense is raised. It suggests, in other words, that once the state criminal process is completed, interests of federalism *require* that the procedures employed by the state to bring the case to a close, if not themselves unconstitutional or an unreasonable hindrance to the assertion of a federal claim, be respected in any subsequent federal challenge to the conviction. And they must be respected even if the price of doing so is not to decide the prisoner's underlying claim of unconstitutional treatment.

Although the Court has since rejected much of the majority's rationale in *Noia* and accepted much of Justice Harlan's thesis,[18] it has never embraced his view that recognition of an adequate state ground in habeas corpus is constitutionally required. Yet that view has much to commend it; it has never, to my mind, been convincingly rebutted; and it may well have been one of the driving forces behind the retrenchment of federal habeas corpus that has taken place in recent years.

My second illustration involves another dissent—this one in *Flast v. Cohen*.[19] The majority in this case held that a federal taxpayer has standing to bring a federal court challenge to federal expenditures on the ground that those expenditures violate the First Amendment prohibition of any laws "respecting an establishment of religion."[20] The majority carved out this area from the Court's traditional rule that federal taxpayers have no standing to object to federal expenditures,[21] and did so in a way that yielded without too much difficulty to total annihilation in Justice Harlan's dissent. Indeed, the annihilation was sufficiently effective that Justice Douglas, concurring, conceded that the majority's test was not a "durable one for the reasons stated by my Brother Harlan," and opted for a much broader rule of citizen standing.[22] But for me, the most interesting aspect of the dissent is its emphasis on the importance of standing limitations in preserving the proper boundary between the judiciary and the other branches of the federal government—a point later

---

Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting). *See Noia*, 372 U.S. at 466. In that case, Justice Field, in objecting to the extension of the *Swift* doctrine to the applicability of the fellow-servant defense in a diversity tort action, spoke eloquently of the constitutional necessity of recognizing the independence of the states in both their legislative and judicial departments. *See Baltimore & O.R.R.*, 149 U.S. at 401 (Field, J., dissenting).

18. *See supra* note 7.

19. 392 U.S. 83, 116 (Harlan, J., dissenting).

20. *Id.* at 87.

21. *See id.* at 83.

22. *Id.* at 107 (Douglas, J., concurring).

developed by the majority in several opinions.[23] This perspective led Justice Harlan, naturally and logically, to an expansive view about standing to bring a public action—that is, an action in which the plaintiff cannot fairly claim any personal injury, or at least any injury greater than that suffered by anybody else, and in which the only true stake of the plaintiff in the outcome is his desire to see the law properly enforced. Harlan's view, clearly expressed in *Flast*, was that such standing may be conferred on citizen plaintiffs by Congress.[24] As he put it, "[a]ny hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President."[25]

This is a radical notion—one that has not been, and may never be, squarely endorsed by the Supreme Court.[26] And it can be regarded as an exercise of judicial restraint only in its willingness to abide by the legislature's decision—not in its unwillingness to embark on a broad course of adjudication if the legislature wills it. Yet how compelling his thesis is when you think about it. If the legislature can define and create rights, what is to prevent it from conferring on every citizen an enforceable right to see that certain laws are effectively observed? Who is to gainsay the legislative judgment, whether it is expressed or only implicit in its grant of standing, that a very large class of people—maybe everyone—has a legal right to enforce a particular legal obligation or prohibition?

In both *Noia* and *Flast*, I submit that Justice Harlan thought deeply and boldly about questions of justiciability and their relationship to some very basic principles. We are in his debt for that, as we are for so much of what he has done.

---

23. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750-52 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-76 (1982).

24. *See Flast*, 392 U.S. at 131 (Harlan, J., dissenting).

25. *Id.* at 131-32 (Harlan, J., dissenting). Although Justice Harlan suggested that there was Supreme Court authority for his view, the only case he cited for this proposition, Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127, 137-39 (1947), does not help much, if at all. And while a footnote in the Justice's dissent at this point suggests that Congress's power to authorize suits is not unlimited, the footnote makes clear his view that constitutional standing is not limited to "Hohfeldian" plaintiffs (i.e., plaintiffs who can claim a personal or proprietary stake in the outcome). *See Flast*, 392 U.S. at 131 n.21; *see also id.* at 119 n.5 (defining "Hohfeldian" and "non-Hohfeldian" plaintiffs).

26. Several of the Court's decisions after *Flast*, however, have recognized the significance of a broad statutory grant of standing. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972). *See generally* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 135-37 (3d ed. 1988) (discussing congressional grants of standing).