# UNFORGETTABLE, TOO: THE (JURIS)PRUDENTIAL LEGACY OF THE SECOND JUSTICE HARLAN

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## I. INTRODUCTION

In his baseball masterpiece *Men at Work*, George F. Will relates an occasional comment by former Oakland Athletics owner Charlie Finley, who said "'[T]he day Custer lost at Little Bighorn the Chicago White Sox beat the Cincinnati Red Legs, 3-2. Both teams wore knickers. And they are still wearing them today.'"[1] While Finley's statement may lack the persuasive power of, say, a biblical parable, it nevertheless resonates with those who appreciate the game's obvious continuity, the timelessness of its traditions. As Will so aptly describes the phenomenon, "[N]o sport matches baseball's passion for its past . . . . [M]any of those who play and manage have ravenous appetites for remembrance. It is how they, and their craft, become better."[2]

This sense of reverence for the customs of days gone by was not lost on John Marshall Harlan, who, after a successful career as a Prohibition prosecutor and corporate lawyer, served as an Associate Justice of the United States Supreme Court from 1955 to 1971.[3] The courtly Justice Harlan, known by the American

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[1] GEORGE F. WILL, MEN AT WORK: THE CRAFT OF BASEBALL 293 (1990). Incidentally, as Will notes, Finley, although he succeeded in fielding some of baseball's best teams of the century, was one of the game's more curious personalities, trying "to inflict upon baseball various innovations, such as designated runners and orange baseballs." *Id.*

[2] *Id.* at 294.

[3] *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 385 (1993). President

Bar Association as a "lawyer's lawyer,"[4] demonstrated a palpable distaste for judicial innovation and confined his decision-making to textual commands and the traditions that Justice Harlan believed informed them. Like Edmund Burke, who resisted rapid change as a means of political reform, preferring instead the guidance of deliberation and established customs,[5] Justice Harlan "believed in the value of not upsetting established ways of doing things"[6] and was "redolent of a distaste for legal adventurism."[7] Justice Harlan's judicial method placed him in particularly stark contrast to the majority of those with whom the Justice served on the Warren Court, which, during Justice Harlan's tenure, expanded the reach of the judicial function, provided greater protection for individual rights, and played a major role in restructuring American legal and political institutions.[8]

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Eisenhower nominated Justice Harlan to the Supreme Court to fill the vacancy left by Justice Jackson's death. *See id.* at 270, 385. Justice Harlan's grandfather, John Marshall Harlan, served as an associate justice from 1877 to 1911, and is best known for his dissenting opinion in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *See id.* at 270, 383.

[4] *Id.* at 271. As Schwartz describes, "[Justice Harlan] was plainly one of the best, if not the best, lawyer on the Court and, next to Frankfurter, the Justice most interested in the technical aspects of the Court's work." *Id.*

[5] *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33-34 (L.G. Mitchell ed., Oxford University Press 1993) (1790). Burke wrote:

> [B]y preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete. By adhering in this manner and on those principles to our forefathers, we are guided not by the superstition of antiquarians, but by the spirit of philosophic analogy.

*Id.* at 34. *See also* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 642-659 (1994) (explaining Burke's regard for tradition and evolutionary reform, and concluding that Justice Harlan's jurisprudence is most consistent with the Burkean model).

[6] Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33, 35 (1991) (Fried served as a law clerk to Justice Harlan during the 1960-61 term).

[7] *Id.* at 36.

[8] *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 72-73 (1990) (cataloguing the Warren Court's decisions positively affecting the rights of criminal defendants and negatively impacting the principles of federalism and majority rule). Judge Bork, unsurprisingly, concludes that the Warren Court's "thick" list of "alterations" to the Constitution is "organized by the theme of egalitarianism." *Id.* at 72. *See also* SCHWARTZ, *supra* note 3, at 270 (explaining the "activist philosophy . . . of the Warren Court's jurisprudence"). *But see* Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 IND. L. REV. 309, 328 (1995) (describ-

Justice Harlan's method thus often left him in dissent, a distant voice resisting the temptation to permit the judiciary to squelch the prerogatives of the political branches of government, indeed resisting the Court's utopian impulses.[9]

This "distance" between Justice Harlan and many of the Warren Court majorities, however, has not left Justice Harlan in oblivion. To the contrary, Justice Harlan's style and method have served as a model for many post-Warren Court decisions and for the Justices who have made them.[10] Thus, because of his unique approach to the judicial function and because of his continuing legacy, it is useful to synthesize and characterize Justice Harlan's jurisprudence. While Justice Harlan often deviated from the markings of conventional labels, the Justice's judicial behavior demonstrated a consistency that at least proves that Justice Harlan, like others on the Warren Court, is not immune to them. Therefore, placing Justice Harlan within a distinct jurisprudential school, while difficult, nonetheless has both descriptive, explanatory, even normative value.[11]

This article, beginning with Part II, posits that Justice Harlan falls into the pragmatist school of contemporary jurisprudence, explaining the development of legal pragmatism and the consistency of Justice Harlan's method with that school. The nature of pragmatism, however, lends itself to subcategories: to further distinctions both of kind and degree within the school itself. The article therefore embraces, at least conceptually, the distinction drawn by Professor Daniel C.K. Chow between the "critical" pragmatists and the "prudential" prag-

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ing the Warren Court as a reflection of American social and political change in the 1950's and 1960's).

[9] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 504-525 (1966) (Harlan, J., dissenting); Wesberry v. Sanders, 376 U.S. 1, 20-49 (1964) (Harlan, J., dissenting); Baker v. Carr, 369 U.S. 186, 330-349 (1962) (Harlan, J., dissenting); Mapp v. Ohio, 367 U.S. 643, 672-686 (1961) (Harlan, J., dissenting); Poe v. Ullman, 367 U.S. 497 (1961) (Harlan, J., dissenting).

Justice Harlan's role in the aforementioned cases, in particular, and on the Warren Court, in general, is recounted in TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992). Yarbrough's excellent biography also examines the influence of Justice Harlan's educational and other life experiences upon his jurisprudence, from his collegiate days at Princeton, to his Rhodes Scholarship at Oxford, and his days as a prosecutor and corporate attorney. *See generally id.*

[10] *See* Fried, *supra* note 6, at 33 (describing David Souter's invocation of Justice Harlan's name during his 1990 confirmation hearings before the Senate Judiciary Committee). *See generally Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 54 (1990) [hereinafter *Confirmation Hearings*].

[11] Placing Justice Harlan within a distinct jurisprudential school has normative value in the sense that it serves as a statement of how judges ought to behave judicially.

matists.[12] Furthermore, the piece concludes that Justice Harlan's traditionalism and rejection of abstract decision-making place him squarely within the "prudential" pragmatist school. To justify this conclusion, Part III examines Justice Harlan's jurisprudence in four distinct areas of constitutional law: constitutional criminal procedure, free speech, equal protection, and substantive due process rights. The article analyzes Justice Harlan's important opinions in these areas, most of them in dissent, to demonstrate Justice Harlan's pragmatic conservatism. Part IV then addresses the important question of Justice Harlan's legacy, evaluating Professor Chow's description of Justice Scalia as the model prudential pragmatist, and considering the place of Justice Souter, who has attempted explicitly to carry Justice Harlan's judicial mantle, in the school. This article argues that Justice Harlan equals, and in some instances, supersedes, Justice Scalia among the prudential pragmatists, and even Justice Souter to a lesser degree. This article will demonstrate that in this sense, Justices Harlan and Scalia are closer jurisprudentially than they may seem on the surface, as both appear to fit Chow's Burkean criteria.

## II. AN OVERVIEW OF LEGAL PRAGMATISM

### A. THE PRAGMATIST SCHOOL

Legal pragmatism finds its ancestry in the broader realm of philosophical pragmatism.[13] Aristotle held that the wise man must be capable of right deliberation about "what is conducive to the good life generally."[14] Therefore, he must exercise that virtue known as *phronesis*,[15] or practical wisdom, so that his understanding of the world and the good life are derived not from abstract theories but from the "practical application of concepts."[16]

As Professors Robert L. Hayman Jr. and Nancy Levit explain, Aristotle's *phronesis* was prevalent in much of the nineteenth and twentieth century phi-

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[12] *See* Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755 (1992). *See also infra* text at Part II and accompanying notes (explaining the various forms of pragmatism).

[13] *See* ROBERT L. HAYMAN JR. & NANCY LEVIT, JURISPRUDENCE 452-455 (1994).

[14] ARISTOTLE, NICOMACHEAN ETHICS 209 (J.A.K. Thomson, trans. 1953).

[15] *Id.* Here, Thomson's translation defines *phronesis* as "practical common-sense" but notes that the term *prudence* is used with *phronesis* interchangeably. *Id.* at n.1.

[16] HAYMAN AND LEVIT, *supra* note 13, at 452.

losophy, thus representing the "more immediate roots of [legal] pragmatism."[17] The legal pragmatists also belong to the broad jurisprudential movement known as legal realism, which, like philosophical pragmatism, challenged the notions of foundationalism and conceptualism that had dominated classical legal theory.[18] Classical theory, which Dean Roscoe Pound characterized as "mechanical jurisprudence,"[19] posited the idea that "correct" legal decisions could be deduced easily from statutory and common law through logical, syllogistic reasoning.[20] It also stressed the "inner essence of concepts," holding that legal truth derived from abstract, natural truths that were knowable and unchangeable.[21] The real-

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[17] *Id.* Hayman and Levit explain that Charles Sanders Pierce and William James helped to develop the move away from foundationalism and toward contextualism in the attempt to determine the meaning of words. *See id.* at 453. John Dewey, who valued the scientific method, then introduced experimentalism into the pragmatist world, believing that "the methods of inquiry could be applied to any endeavor." *Id.* Finally, Richard Rorty sought "successful rules of action" based upon the notion of community solidarity. *Id.* at 454 (quoting RICHARD RORTY, *Pragmatism Without Method*, *in* OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 63, 65 (1991)).

For a greater perspective on Rorty's view, see RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982) and Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993).

[18] *See id.* at 14-15. *See also* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN L. REV. 787, 799 (1989) (stating that "development of the contextualist thesis led the pragmatists to their most profound philosophical innovation: the rejection of philosophical 'foundationalism.'"); Chow, *supra* note 12, at 775-776 (explaining the roots of epistemological foundationalism). While, as Chow asserts, foundationalism may be traced to Plato, its modern strain owes much to Cartesian rationalism. *See id.* In *Meditations*, Descartes attempted to establish the existence of God and the distinction between soul and body, and sought to establish positive beliefs and foundations to reach indubitable truths. *See* RENE DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY 79 (George Hefferman, trans., 1990) (1642). Of course, Descartes' argument suffers from its own circularity (the Cartesian Circle), as he bases his ontological argument for God's existence on the truth of clear and distinct ideas and then proves the existence of God from clear and distinct ideas; his argument thus depends on the truth of clear and distinct ideas, which he assumes. *See id.*

*Cf.* IMMANUAL KANT, CRITIQUE OF PRACTICAL REASON 48 (Thomas K. Abbott trans. Prometheus Books, 1996) (1787) (arguing that the universal principle of morality, the moral law, exists *a priori* and applies to all rational beings with a will).

[19] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908).

[20] *See* HAYMAN AND LEVIT, *supra* note 13, at 11.

[21] *See id.*

ists, however, and more particularly the pragmatists, favored instead the application of concepts to the realties of daily life, arguing that the effort to reduce jurisprudence to the scientific method ultimately lacked determinacy and coherence. In Professor Thomas C. Grey's words, to the pragmatist, "[l]aw is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy."[22]

The pragmatist school, however, has not limited itself to a single political, moral, or philosophical vision.[23] It is inherently non-ideological, and accommodates a variety of sociopolitical perspectives.[24]

### B. THE PRUDENTIAL PRAGMATIST SCHOOL

In some sense, as Professor Chow suggests, we are all pragmatists now, at least in the colloquial sense.[25] In jurisprudential terms, however, as noted above, not all pragmatists are alike, and two particular strains of pragmatism serve to highlight these distinctions (although the truest of pragmatists shuns labels as a matter of principle).[26] Under the Chow model, "critical" pragmatism arose as the initial pragmatist rejection of foundationalism.[27] According to Chow, the critical pragmatics, among them critical legal studies theorists,[28] critical race

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[22] Grey, *supra* note 18, at 814. Grey explains that, to the pragmatist, human inquiry and understanding is practical in two "related" ways: first, thought is contextual and "always embodied in practices;" and second, as held by the Darwinian element of the pragmatist school, thought is instrumental, "an adaptive function of an organism." *Id.* at 798.

[23] *See* J.M. Balkin, *The Top Ten Reasons To Be a Legal Pragmatist*, 8 CONST. COMMENTARY 351 (1991). Balkin explains that a pragmatist may also be "(a) civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law and economics type, or (g) anything else." *Id.* Balkin's sarcastic and humorous list begins with number ten: "It works." *Id.*

[24] *See* HAYMAN AND LEVIT, *supra* note 13 at 455.

[25] *See* Chow, *supra* note 12, at 757.

[26] *See supra* text Part II. A. and accompanying notes. Labels tend to identify one with particular dogma or a rigid ideology. Pragmatists, by definition, tend to shun dogma and ideology.

[27] Chow, *supra* note 12, at 768.

[28] The Critical Legal Studies (CLS) School emerged in the 1970's to critique the traditional model of law. *See* HAYMAN AND LEVIT, *supra* note 13 at 213. For the CLS theorists, the traditional model erred by assuming that law could be developed objectively and determinately. *See id.* Instead, law, for those in the CLS school, is inherently political, involving "subjective value judgments," *id.*, and producing "illegitimate hierarchies." Chow, *supra* note

theorists[29] and feminist legal theorists,[30] prefer legal deconstruction and tend to be radical in their criticism of classical legal theory.[31] They thus identify the traditional model of jurisprudence as perpetuating the arbitrary exercise of power.[32] "Prudential" pragmatism, however, while also rejecting the foundationalism of classical, formalist thought, attempts to legitimate law by connecting it to social custom and convention, instead of creating new foundations.[33] As the Second Justice Harlan's tenure on the Court demonstrated a remarkably consistent defer-

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13 at 770. Ultimately, critical scholars seek a greater sense of humanity and community by exposing the problems raised by the traditional legal model. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (asserting that liberal legal theory's adherence to the traditional rule of law perpetuates social alienation); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1 (1984) (rejecting the notion that critical legal studies theory is nihilistic); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L. J. 1515 (1991) (evaluating the future of CLS theory).

[29] The school of Critical Race Theory first met at a Madison, Wisconsin conference in 1989 (interestingly, Madison was also the home of the initial CLS conference in 1977). *See* HAYMAN AND LEVIT, *supra* note 13 at 386 n.2. As Professors Hayman and Levit explain, Critical Race Theory is built on three distinct premises: (1) broadening the scope "of the dialogue on justice;" (2) "modify[ing] the form of jurisprudential dialogue in order to accommodate marginalized voices;" and (3) perpetuating dialogue, *per se*, to provide a forum for differing voices and perspectives. *Id.* at 386-388.

For a further examination of Critical Race Theory, see, e.g., Charles R. Lawrence III, *The Id, The Ego and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).

[30] Feminist legal theory emerged as an effort to challenge the sexual stereotypes and inadequate protections for females embodied in traditional legal theory. While feminist theorists divide philosophically, see HAYMAN AND LEVIT, *supra* note 13, at 330, they generally agree that women have been ignored and subordinated "socially, politically, economically, and legally"; that law continues to operate to the detriment of women; and that the traditional patriarchal system of legal and social order is unjust. *See id.* at 329.

For a further examination of feminist legal theory, see, e.g., CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

[31] *See* Chow, *supra* note 12, at 758.

[32] *See id.* at 775.

[33] *See id.* at 785-86. As Chow explains, even the critical pragmatists recognized the need for an alternative pragmatic model. *See id.* at 785.

ence to habitual and inherited social and political practices, it is this strain of pragmatism that is most relevant for the purposes of this article.[34]

The first principles of prudential pragmatism, or prudentialism, do not merely reject the premises of Cartesian rationalism[35] but seek affirmatively the development of law through sagacity, judiciousness, and cautious change; in one word, of course, prudence, of the kind Aristotle urged in his *Ethics*.[36] The prudentialist, always preferring context, prefers the context provided by time-honored practices.[37] Professor Anthony Kronman urges that this reverence for tradition, respecting the past for its own sake, is essential "because the world of culture that we inherit from [the past] makes us who we are."[38] Burke in particular understood the continuity of generations, and urged a "custodial attitude" toward inherited customs and practices that create intergenerational duties and

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[34] *See infra* text Part III and accompanying notes.

[35] *See* DESCARTES, *supra* note 18, at 79.

[36] *See* ARISTOTLE, *supra* note 14, at 214. Here, Aristotle explains how public affairs are species of prudence:

> Prudence is also especially identified with that form of it which is concerned with the self and the individual, and bears the name, prudence, that rightly belongs to all the forms, the others being called domestic, legislative and political science, and the last-named being divided into deliberative and juridical science.

*Id. See also* Chow, *supra* note 12, at 786. Chow describes prudence thusly:

> Prudence combines both an intellectual capacity and a certain kind of character or temperament. The intellectual capacity associated with prudence is the capacity to discern the complexity of the existing human and institutional setting and to devise successful strategies to advance favored principles. The temperamental quality of prudence refers to the sense of respect, an attitude of reverence or even "wonder," for complex, historically evolved institutions.

*Id.* at 786-87. *See also* RUSSELL KIRK, THE POLITICS OF PRUDENCE 9 (1993) (explaining Plato's and, later, Burke's view that "in the statesman, prudence is the first of the virtues").

[37] *See id.* at 18-19 (explaining that prudent men (in Kirk's view, conservatives) champion "custom, convention, and continuity because they prefer the devil they know to the devil they don't know. Order and justice and freedom, they believe, are the artificial products of a long social experience, the result of centuries of trial and reflection and sacrifice.").

[38] Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L. J. 1029, 1066 (1990).

constrain us in our efforts to alter the civil social order.[39] The prudential jurist is thus faithful to the Burkean notion, as Kronman explicates it, that the past retains "inherent authority" and has a direct claim upon us.[40]

Traditionalism for the prudential pragmatist, however, ought not be synonymous with changelessness. Indeed, the prudentialist recognizes the need for change in the law because human societies, like human beings themselves, decay over time and demand renewal to achieve preservation.[41] This philosophical notion has a prominent historical pedigree, notably in the thought of both Marcus Aurelius and Cicero.[42] In particular, traditions evolve, thus representing the need and ability of human cultures to adapt to alterations in the environment.[43] Still,

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[39] *See* BURKE, REFLECTIONS, *supra* note 5, at 33. *See also* RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 386-87 (3d. ed. 1993) (explaining how Burke's prudence informed his position on American civil liberties).

[40] Kronman, *supra* note 38, at 1048.

[41] *See id.* at 1050-51. *See also* Chow, *supra* note 12 at 787-788 (explaining Kronman's view, based on Burke, that as biological creatures, we inherit a cultural world that is both cumulative and perishable, thus creating the need for a sort of trusteeship toward the past).

[42] *See generally* MARCUS AURELIUS, MEDITATIONS (Maxwell Staniforth, trans., Dorset Press, 1964) (A.D. 179); Marcus Tullius Cicero, *On the Laws*, in CICERO, SELECTED WORKS (Harry M. Hubbell, trans., Walter Black Pub., 1948) (52 B.C.).

[43] *See* Chow, *supra* note 12 at 787. The baseball analogy was inevitable. As Will writes, "Baseball's seasons, coming one after another and comprising a nearly seamless web, are deeply satisfying to one's sense of social transmission. It is the sense of society always changing somewhat but having as its primary business the passing along of slowly accumulated customs, mores, and techniques." WILL, *supra* note 1, at 294. For more on the "seamless web" notion, see *infra* notes 46-47 and accompanying text.

*Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 34-46 (2d. ed. 1986) (discussing the modern problem of judicial review and analyzing James Bradley Thayer's assertion that rational legislative choices are constitutional ones). In evaluating the balance between custom and evolution in constitutional adjudication, Bickel asserts that:

> To the extent that the necessary choice of values is implicit in the constitutional language or in the tradition for which that language is shorthand, and is assumed to be acceptable on that basis, rational analysis may serve as an adequate tool. But as time passes, fewer and fewer relevantly decisive choices are to be divined out of the tradition of our founding.

*Id.* at 39. *See generally* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

as Chow notes, the prudential pragmatist prefers that change "always occur within a framework that emphasizes the value of existing institutions."[44]

In addition to traditionalism, prudentialism, according to Chow, is marked by a method of legal reasoning based on the idea of coherence.[45] Whereas classical legal theory achieved conclusions via deductive, syllogistic reasoning, pragmatism (and prudentialism) proceeds to evaluate the coherence of results within interpretive context, or a "web of beliefs."[46] Within this contextual web, the prudential jurist interprets constitutions, statutes and other legal texts in connection with history, policy, and societal values, as reflected by custom and convention within given political communities.[47] True to the pragmatist tradition, such a jurist thus rejects foundationalism in favor of a coherentist approach that accounts for shifts in social conditions and values.[48]

Finally, Chow's model of prudentialism asserts that, in an effort to construct a viable normative theory based on both the prudentialists' sense of traditionalism and the "web of beliefs" interpretive methodology, prudentialists favor legal norms derived from positive law.[49] This said, the prudentialist rejects transcendental foundations for law, such as the rule of divinity or some form of natural

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[44] Chow, *supra* note 12, at 787.

[45] *See id.* at 790-793 (referring to the work of philosopher Hans Gadamer, who described the creative process of interpretation and insisted that tradition served to restrain the interpreter). *See* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall, trans., 2d rev. ed. 1991).

[46] *See* Chow, *supra* note 12, at 790. Here, Chow explains the "web" approach in the context of statutory interpretation. *See id.* at 794 (citing William N. Eskridge's Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987)). *See id.* at 794. This form of coherentist interpretation emphasizes that "textual interpretation is not archeological, deductive and formalistic like the links of a chain, but *eclectic, appealing simultaneously to a number of different values in a web of beliefs.*" *Id.* at 794-95 (emphasis added). *See also* Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653 (1990) (explaining, with approval, the dynamic interpretational method).

[47] *See* Chow, *supra* note 12, at 791-795. Importantly, this reliance on history and tradition acts as a restraint on judicial or interpretive subjectivism because it limits the interpreter's ability to use mere personal predilections in the face of textual context. *See id.* at 792. *See also* Kronman, *supra* note 38, at 1057 (noting Burke's view that practical governance requires "the collaboration of many generations and impos[es] on all who participate in it a duty to respect and to conserve the achievements of their predecessors").

[48] Chow, *supra* note 12, at 791.

[49] *See id.* at 816.

law as was expounded by Hobbes' absolute sovereign.[50] Rather, because our notions of reason and normative authority are inherited, based upon the "cumulative result of incremental and experimental social practices that, over time, have gained widespread support,"[51] judges ought to defer to those traditions and the institutions (often political ones) within which they develop, so long as no legal text commands the judge to upset these practices.[52] As Chow defines it, the prudentialist thus favors "legal positivism without foundations."[53]

The prudentialist model of law then acts as both a tool for law development and a restraint on authority, particularly judicial authority. The prudential jurist respects and vindicates social practices and customs that have endured but at the same time, recognizes the need for change within the "framework of existing institutions," by interpreting legal texts (the lifeblood of the law) with a view toward coherence within an inherited yet organic set of beliefs. While deferring to the preferences of the majoritarian processes, the prudential jurist remains cognizant of the need for preventing oppression created by certain social practices.[54]

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[50] *See id. See also* THOMAS HOBBES, LEVIATHAN (J.M. Dent & Sons Ltd., 1973) (1651).

[51] Chow, *supra* note 12, at 817.

[52] *See id.* Chow explains that this is the position that Justice Scalia has adopted, preferring a "version of classical liberalism that emphasizes majoritarian preferences over libertarian interests." *Id.*

[53] *See id.* at 816.

[54] *See id.* at 787. Of course, the prudential model that Chow outlines is not without its critics. Indeed, Chow himself accounts for one of the more problematic aspects of prudentialism, its reverence for tradition, explaining that some traditions may prove oppressive and thus offensive to a pluralistic society's sensibilities for justice and equity. *See id.* at 819-822. Chow thus suggests an alternative prudential model that reconciles the perpetuation of tradition with the need for progress, justice, and equality in an increasingly pluralistic legal and political culture. *See id.* at 822. *See also* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO. L. REV. 1613, 1618 (1990) (criticizing the use of tradition both by Justice Scalia and Justice Brennan in the *Michael H. v. Gerald D.* "footnote six" debate, and arguing that "[t]radition never speaks with one voice, although, to be sure, persons of particular predilections may hear only one").

Perhaps in the jurisprudence of the second Justice Harlan, however, we see something of an answer to the critics of traditionalism and to the problem of reconciliation they describe. *See id.* (conceding that Justice Harlan's was a more "realistic approach" to tradition). That is, if the prudentialist also recognizes tradition as an evolutionary concept, as more than merely backward-looking, he may thus account for the concerns of a pluralistic society. In other words, respect for the achievements and lessons of the past need not be synonymous with ignorance of current social conditions. Indeed, for the prudentialist, traditions, even if changed, may be instructive in managing the affairs of a pluralistic culture. *See infra* Part III and accompanying notes regarding Justice Harlan's prudential methodology.

As the next section explains, this model represents the essence of Harlanian jurisprudence.

## III. THE SECOND JUSTICE HARLAN AS PRUDENTIAL PRAGMATIST

The body of jurisprudence that the Second Justice Harlan developed embodies of all the necessary elements of prudential pragmatism: traditionalism, coherence, and legal positivism. As this section explains, by analyzing some of Justice Harlan's opinions in important cases from distinct areas of constitutional law (it is beyond the scope of this article to cover Justice Harlan's opinions in these areas *in toto*), the Justice's judicial method demonstrates a firm adherence to traditionalism, a rejection of judicial sophistry, abstract theorizing, and deference to the social and political practices and experiences of the body politic, the state, *writ* large. For Justice Harlan, the Court, cannot appropriately exercise its law development function without the light provided by the lamp of experience. Moreover, the Court is dangerously misguided when it attempts to establish constitutional and political utopia through the exercise of judicial will, a method more apt to produce, as Dr. Kirk describes, "Terrestrial Hell" rather than earthly Paradise.[55]

### A. CONSTITUTIONAL CRIMINAL PROCEDURE

Justice Harlan's opinions in the area of constitutional criminal procedure illustrate the point well. During the 1960's, the Warren Court gained much notoriety for its willingness to expand the reach of the Bill of Rights farther than had ever been done before to protect criminal defendants. The Court, *inter alia*, mandated the right to counsel in all state and federal cases, it developed new standards for determining the reach of the Fourth Amendment's prohibition of unreasonable searches and seizures, and it placed greater limitations on the investigative techniques of law enforcement officials.[56] Justice Harlan, however, often rejected the Court's revolutionary posture, expressing, in his concurring opinions, the Justice's view that the Constitution required restraint by the Court and deference to the practices that the political branches felt best produced a livable civil social order.

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[55] *See* KIRK, *supra* note 36, at 29. Terrestrial Hell simply refers to the condition that results when we attempt to achieve perfection in political society. *See id.*

[56] *See* Katz v. United States, 589 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).

In *Mapp v. Ohio*,[57] for example, the Court considered the appeal of an Ohio woman who the state convicted for possessing obscene materials in violation of a state statute.[58] In *Mapp*, Cleveland police arrived, without a warrant, at Dollree Mapp's home in search of an individual whom they wanted to question in connection with a recent bombing.[59] After Mapp refused entrance to the police, they later returned with a paper that the officers claimed was a warrant.[60] A struggle ensued and Mapp was handcuffed while police searched the dual-family home.[61] Once in the basement, the officers searched a trunk wherein they discovered the obscene materials.[62] Pursuant to the exclusionary rule rationale established for federal cases in *Weeks v. United States*,[63] Mapp challenged the search and subsequent conviction, arguing that the illegally seized evidence ought to have been excluded from the trial.[64] The government argued, however, that exclusion of the evidence would conflict with the Court's ruling in *Wolf v. Colorado*,[65] which refused to make the exclusionary rule applicable against the states.[66]

The Supreme Court, in an opinion by Justice Clark, agreed with *Mapp* and overruled the *Wolf* decision.[67] The Court concluded that the Constitution's effort to safeguard liberty and, more specifically, privacy, lacked force unless the pro-

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[57] 367 U.S. 643 (1961).

[58] *See id.* The statute involved prohibited the knowing possession or control of "an obscene, lewd, or lascivious book (or) . . . picture." OHIO REV. CODE ANN. § 2905.34 (Anderson 1954). Justice Harlan briefly addressed in his dissent the fact that the Ohio statute raised serious First Amendment questions. *See Mapp*, 367 U.S. at 673-76 (Harlan J., dissenting).

[59] *See id.* at 644.

[60] *See id.* at 644-45. *Mapp* actually grabbed the warrant and "placed it in her bosom." *Id.* at 644. At trial, however, the prosecution could not account for any such document. *See id.* at 645.

[61] *See id.* at 644-45.

[62] *See id.* at 645.

[63] 232 U.S. 383 (1914).

[64] *See Mapp*, 367 U.S. at 645-46.

[65] 338 U.S. 25 (1949).

[66] *See Mapp*, 367 U.S. at 645-46.

[67] *See id.*

hibition of using evidence obtained from an unreasonable search or seizure applied to all criminal prosecutions in America.[68] This conclusion, the Court found, was logically consistent with both the rationale of previous cases, that recognized the application of the Fourth Amendment to the states and with what the Court described as "good sense."[69] Applying the exclusionary rule in state trials not only enhances federal-state cooperation, but breeds respect for the law within the government itself and serves as an essential component of ordered liberty, even if criminals escape prosecution as a result.[70] As Justice Clark noted, "[t]he criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[71]

Justice Harlan, in dissent, responded in kind. The Court, Justice Harlan said, "has forgotten the sense of judicial restraint which, *with due regard for stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled."[72] Already we notice Justice Harlan's respect for the past and his uneasiness about departing from established judicial practices. In Justice Harlan's view, the question of *Wolf's* vitality was not properly at issue before the Court, as neither party briefed the question and argued it "only extremely tangentially."[73] Instead, Justice Harlan preferred to fulfill the Court's obligation to the states with "orderly adherence" to the Court's procedures.[74] In addition, Justice Harlan argued that the Constitution imposes no uniform sched-

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[68] *See id.* at 656.

[69] *See id.* at 657.

[70] *See id.* at 658-659. Clark argued, despite Justice Harlan's protest on the point, that federal-state relations would be enhanced because both entities would recognize a "mutual obligation to respect the same fundamental criteria in their approaches." *Id.* at 658.

[71] *Id.* at 659. Clark went on to quote Justice Brandeis: "'If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'" *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

[72] *Mapp*, 367 U.S. at 672 (Harlan, J., dissenting).

[73] *See id.* at 676 (Harlan, J., dissenting). Justice Harlan noted that counsel for Mapp had not argued the overruling of *Wolf*, and, in fact, had at oral argument "expressly disavowed any such purpose." *Id.* at 674 n.6 (Harlan, J., dissenting). Justice Clark, however, justified the Court's action on the ground that the *amicus curiae*, permitted to participate in oral argument, had expressed such a position. *See id.* at 646 n.3.

[74] *See id.* at 677 (Harlan, J., dissenting).

ule on the states that would require each of them to adopt the exclusionary rule simultaneously.[75] Rather, the proper state-federal balance that the majority sought would be better served through the exercise of patience, allowing states to experiment, based both on their historical practices and the fitness for change that their respective criminal justice systems may permit.[76] Justice Harlan rejected the premise that the Court could "mould state remedies" such as the exclusionary rule merely for "procedural symmetry" or "administrative convenience."[77] Justice Harlan concluded, "I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes."[78]

*Miranda v. Arizona*[79] presents another example of Justice Harlan's prudentialism. There, Phoenix police arrested Ernesto Miranda on charges of kidnapping and rape.[80] Two hours after his questioning began in a police interrogation room, the officers obtained a written confession, which Miranda signed, indicating that his confession was made voluntarily, without threat or promise, and with "full knowledge" of his legal rights.[81] The confession was admitted during Miranda's jury trial, at the conclusion of which he was convicted and sentenced to twenty to thirty years in prison.[82] The United States Supreme Court, however, reversed Miranda's conviction.[83] In one of the Warren Court's most controversial decisions, it held that police, upon custodial interrogation, must inform criminal defendants of their right to remain silent; that if the defendant waives this right, anything he says may be used against him; that he has the right to counsel prior to any questioning; and that if he cannot afford counsel, the court

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[75] *See id.* at 680-81 (Harlan, J., dissenting).

[76] *See id.* at 681 (Harlan, J., dissenting).

[77] *See id.* at 682 (Harlan, J., dissenting).

[78] *Mapp*, 367 U.S. 686 (Harlan, J., dissenting).

[79] 384 U.S. 436 (1966).

[80] *See id.* at 492.

[81] *See id.* at 491-92.

[82] *See id.* at 492.

[83] *See id.*

will appoint a lawyer for him at no cost.[84] Chief Justice Warren's lengthy opinion, replete with historical examples of law enforcement investigation and interrogation tactics, conceded that, based on the facts of *Miranda* and the companion cases, the statements elicited from defendants by the police may not have been "involuntary in traditional terms."[85] For Chief Justice Warren and the majority, however, more was required to ensure that those statements, and those of future criminal defendants, were indeed borne of free will.[86]

Justice Harlan's dissent and his self-styled "reasoned examination," was worded strongly and again appealed to two themes: deference to traditional practices and restraint in the development of new law.[87] Indeed, Justice Harlan tips his jurisprudential hand early in the opinion when the Justice explains that incorporating into the Constitution the majority's "utopian" effort to negate pressure on criminal defendants and to discourage confession "requires a strained reading of history and precedent and a disregard of the very *pragmatic concerns* that alone may on occasion justify such strains."[88]

Justice Harlan first concluded that the majority relied on misapplied constitutional premises and therefore, the Justice offered his conventional appeal to precedent.[89] For Justice Harlan, neither the Fifth Amendment cases nor the Sixth Amendment cases provided sufficient justification for extending the Due Process, Self-incrimination, or Right to Counsel Clauses in the instant cases.[90] Second, regarding policy, Justice Harlan rejected the idea that the majority's ruling

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[84] *See id.* at 478-79.

[85] *See Miranda*, 384 U.S. at 457.

[86] *See id.* at 457-58. Chief Justice Warren wrote, "in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Id.* at 457.

[87] *See id.* at 504-05 (Harlan, J., dissenting).

[88] *Id.* at 505 (Harlan, J., dissenting) (emphasis added).

[89] *See id.* at 506-513 (Harlan, J., dissenting).

[90] *See id.* Justice Harlan writes that the majority's rule does harm to precedent because the cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position. *See id.* at 506 (Harlan, J., dissenting). *See e.g.*, Griffin v. California, 380 U.S. 609 (1965); Gideon v. Wainwright, 372 U. S. 335 (1963).

is desirable in the American political and legal culture.[91] Minor pressures on, and disadvantages against, criminal defendants are inherent in the work of American law enforcement officials.[92] The new rule, however, will "impair, if they will not eventually serve to wholly frustrate," tolerable police practices designed to elicit confessions.[93] Justice Harlan wrote, "[s]ociety has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."[94] Finally, the good prudentialist Justice Harlan recognizes that traditions evolve to meet new circumstances.[95] Here, Justice Harlan explained that state legislatures, in his view the proper forum for criminal law reform, had been moving cautiously toward reform in this area. Those reforms, however, would likely be frustrated by the Court's holding.[96]

Thus, in *Miranda*, we see Justice Harlan's prudential pragmatism at work. Justice Harlan's traditionalism informs Justice Harlan's reliance on precedent

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[91] *Miranda*, 384 U.S. at 515 (Harlan, J., dissenting). Specifically, Justice Harlan noted that, "legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every state and county in the land." *Id.*

Justice Harlan thus attempts to restrain the Court's law development function by referring to social context. In Justice Harlan's view, and the pragmatic view generally, social context must inform the evolution of law, particularly when, in the prudentialist view specifically, that evolution produces a significant break with the past. *See* Chow, *supra* note 12, at 787. The policy considerations of which Justice Harlan speaks, then, help to ensure that those breaks with the past will not be too abrupt.

For an eloquent explanation of the way in which American law remains conservative, resisting radical change so as to protect an established rule of law, see generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (George Lawrence, trans., Harper Perennial Books 1969) (1841).

[92] *See Miranda*, 384 U.S. at 516-17 (Harlan, J., dissenting).

[93] *Id.* at 516 (Harlan, J., dissenting).

[94] *Id.* at 517 (Harlan, J., dissenting).

[95] *See id.* at 524 (Harlan, J., dissenting).

[96] *See id.* Justice Harlan noted the advantages of state legislative reform, including "empirical data and comprehensive study . . . open experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs." *Id.*

and history. The Justice's judiciousness informs his preference for restraint and for deference to the sensible, ever-evolving practices of the body politic. Justice Harlan's dissent concedes the importance of personal rights in the American constitutional scheme but rejects the notion that the Court may extend those rights and hamstring republican processes, merely by exercise of will rather than by sound constitutional and political judgment.

Finally, Justice Harlan's concurrence in *Gideon v. Wainwright* [97] represents yet another strain of the Justice's prudential pragmatism: the recognition that these evolving traditions, in one word "change," while it must be done cautiously and deliberately, is necessary for the survival of both the political and constitutional order. Clarence Earl Gideon was charged in Florida state court with intent to commit a misdemeanor, a felony in Florida.[98] Lacking funds for legal representation, Gideon asked for appointed counsel, which the court refused, citing the Florida law that only capital defendants were entitled to court-appointed attorneys.[99] A jury subsequently convicted Gideon and the court sentenced him to five years in state prison.[100] After granting Gideon's *in forma pauperis* petition, the United States Supreme Court reversed.[101] The Court overruled its 1942 decision in *Betts v. Brady*,[102] which held that the Sixth Amendment's guarantee of counsel was not a right that must be applied to the states.[103] Justice Black's

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[97] 372 U.S. 335 (1963).

[98] *See id.* 336-37. Specifically, Gideon was accused of breaking into and entering a poolroom with intent to commit a misdemeanor.

[99] *See id.* at 337. The colloquy between the trial court and Gideon proceeded thusly:

> COURT: Mr. Gideon, I am sorry, but I cannot appoint counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> GIDEON: The United States Supreme Court says I am entitled to be represented by Counsel.

*Id.*

[100] *See id.*

[101] *See id.* at 345.

[102] 316 U.S. 455 (1942).

opinion for the Court emphasized that the "noble ideal" of assuring fair trials in both federal and state court "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[104]

Concurring in the Court's opinion, Justice Harlan agreed that *Betts* should have been overruled but preferred that it be given a "more respectful burial."[105] Again, Justice Harlan emphasized the importance of precedent, arguing that *Betts* was not significantly out of the step with previous holdings in the right to counsel area.[106] Nevertheless, the Justice held firm to the view that bad legal habits ought to be abandoned when judgment and good sense demonstrate that they are incompatible with constitutional dictates; in short, the *Betts* rule had become unrealistic and pragmatic constitutional concerns commanded its departure.[107] As Justice Harlan wrote, "[t]o continue a rule which is honored by the Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system."[108]

The Justice's concurrence thus demonstrates the importance of moderate evolution in prudentialism. Bad constitutional law, for the prudentialist judge, is bad precisely because it often ignores the realities of daily social and political life—realities envisioned by the Constitution itself. Thus, if the Constitution is truly to be a prudential document, its provisions must embrace and reflect the actual tensions between liberty and authority that mark the civil social order, while preserving the integrity of established customs and institutions that help perpetuate those valuable tensions.

### B. LEGISLATIVE REAPPORTIONMENT

As we have seen, Justice Harlan proved reluctant to follow the Warren Court's effort to effectuate an earthly political Paradise. But this reluctance was perhaps no more clear than in the area of equal protection jurisprudence, particularly in the reapportionment cases. Guided as usual by deference to rational political actors and a grounded sense of restraint, Justice Harlan inveighed against the decisions of the Court's majorities in expanding equal protection

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[103] *See Gideon*, 372 U.S. at 345.

[104] *Id.* at 344.

[105] *Id.* at 349 (Harlan, J., concurring).

[106] *See id.* at 349-50 (Harlan, J., concurring).

[107] *See id.* at 351 (Harlan, J., concurring).

[108] *Id.*

rights at the expense of traditional state political authority.[109] The constitutional consequences of these decisions, as Justice Harlan saw it, produced instead a "Terrestrial Hell."[110]

*Baker v. Carr*[111] proved to be a landmark opinion by the Warren Court, as it effectuated the "one man, one vote" principle and placed it firmly into the Fourteenth Amendment.[112] Justice Brennan's opinion for the Court struck down a Tennessee reapportionment statute, concluding that the appellants' claim that the reapportionment deprived them of equal protection of the law was within the reach of judicial protection.[113] As Justice Brennan stated, "[a] citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution."[114] The majority thus found that the appellants had not presented nonjusticiable political questions, which would have been outside the reach of the federal courts.[115] The case also proved, however, to be an ideal opportunity for Justice Harlan to explicate his prudentialism in this area of the law.

True to that prudentialism, Justice Harlan argued that the Court's decision was inconsistent with constitutional text, precedent and history, as well as the traditional judicial function.[116] Finding nothing in the text of the Fourteenth

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[109] For a cogent expression of a position that Justice Harlan shared, see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1937) (stating that "the day is gone when this Court uses the . . . Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought"). *But see* Poe v. Ullman, 367 U.S. 497, 523 (1961) (Harlan, J., dissenting) (expressing the view that the Fourteenth Amendment encompasses a right of marital privacy, requiring invalidation of a Connecticut anti-contraception statute). For more on the *Poe* opinion, see *infra* Part III. D.

[110] *See* Wesberry v. Sanders, 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

[111] 369 U.S. 186 (1962).

[112] *See id.* 208.

[113] *See id.* at 209-10.

[114] *Id.* at 208.

[115] *See id.* at 209.

[116] *See id.* at 332 (Harlan, J., dissenting). Justice Harlan also joined Justice Frankfurter's dissent, which provided a thorough, historical critique of apportionment in America and which, in Justice Harlan's view, demonstrated that the majority's decision was historically unjustified. *See id.* at 333 (Harlan, J., dissenting). *See also id.* at 308-317 (Frankfurter, J., dissenting) (explaining Justice Frankfurter's historical research).

Amendment to vindicate the "one man, one vote" principle as a matter of constitutional law, Justice Harlan also concluded that the principle of federalism precluded the assertion of the right proposed by appellants and acknowledged by the *Baker* Court.[117] Rather, as Justice Harlan put the issue, "what lies at the core of this controversy is a difference of opinion as to the function of representative government."[118]

Where such a conflict involves the choice of competing political philosophies by a state government, in Justice Harlan's view, judicial intervention is unwarranted and unnecessary.[119] As the Justice wrote, "the federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State's internal political conflict is desirable or undesirable, wise or unwise."[120] So long as a state government proceeds rationally, it is not precluded from selecting among various legislative structures that best fit "*the interests, temper, and customs of its people.*"[121] Moreover, as Justice Harlan explained, the appellants here had not shown irrational or capricious action by the Tennessee Legislature.[122] Justice Harlan conceded that the Tennessee plan produced inequality to some extent (i.e., to the extent that there existed an imbalance between the rural and urban populations of the state).[123] The Justice urged, however, mere inequality is insufficient to implicate the power of judicial review.[124] Rather, the inequality must be based on an "impermissible standard" (i.e., unreasonableness or caprice).[125] Here, the appellants only alleged that Tennessee refused to alter a reapportionment scheme that was "reasonable when conceived."[126] Justice Harlan saw no constitutional claim in the allegation; only the

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[117] *See id.* at 332 (Harlan, J., dissenting).

[118] *Baker*, 369 U.S. at 333 (Harlan, J., dissenting).

[119] *See id.*

[120] *Id.*

[121] *Id.* at 334 (Harlan, J., dissenting) (emphasis added).

[122] *See id.* at 335 (Harlan, J., dissenting).

[123] *See id.* at 336 (Harlan, J., dissenting).

[124] *See Baker*, 369 U.S. at 335.

[125] *Id.*

[126] *Id.* at 336 (Harlan, J., dissenting).

disagreement with a "classic legislative judgment."[127] Judicial intervention thus was not justified merely because the appellants could not obtain from the political branches what they were seeking from the judicial branch: "[t]hose observers of the Court who see it primarily as the last refuge for the correction of all inequality or injustice, no matter what its nature or source, will no doubt applaud this decision *and its break with the past.*"[128] Justice Harlan continued, "[t]hose who consider that continuing national respect for the Court's authority depends in large measure upon its *wise exercise of self-restraint and discipline in constitutional adjudication* will view the decision with deep concern."[129] Justice Harlan's portent of the Terrestrial Hell[130] produced by zealous and revolutionary adjudication and by ignorance of its consequences thus became clear.

Justice Harlan's view became ever more stark in *Wesberry v. Sanders*.[131] In *Wesberry*, voters from Georgia's Fifth Congressional District filed suit, claiming that their Representative in Congress had to represent from two to three times as many people as Representatives from other Georgia congressional districts.[132] This circumstance and the 1931 Georgia reapportionment statute that produced it,[133] they argued, violated both Article I of the Constitution and the Fourteenth

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[127] *Id.* at 336 (Harlan, J., dissenting). Justice Harlan followed:

> Surely it lies within the province of a state legislature to conclude that an existing allocation of senators and representatives constitutes a desirable balance of geographical and demographical representation, or that in the interest of stability of government it would be best to defer for some further time the redistribution of seats in the state legislature.

*Id.*

[128] *Id.* at 339-40 (Harlan, J., dissenting) (emphasis added).

[129] *Id.* at 340 (Harlan, J., dissenting) (emphasis added). As Yarbrough explains, Justice Harlan immediately saw *Baker v. Carr* as a potential threat to the Court's legitimacy. *See* YARBROUGH, *supra* note 9, at 275. After reargument but prior to a second conference on the case, Justice Harlan wrote to his Brothers Stewart and Whittaker that *Baker* was supremely important because of its "implications for the Court's independence and 'alooofness from political vicissitudes.'" *Id.* "*Baker*, he warned, 'threaten[ed] the preservation' of that independence." *Id* (internal citations omitted).

[130] *See supra* note 55, and accompanying text.

[131] 376 U.S. 1 (1964).

[132] *See id.* at 2 (1964).

[133] The statute, GA. CODE § 34-2301 (1931), placed Fulton, DeKalb, and Rockdale coun-

Amendment.[134] Relying on the "one man, one vote" principle vindicated in *Baker*, as well as the concept of American democracy,[135] the Court, in an opinion written by Justice Black, agreed with the appellants and found that the scheme of representation diminished the value of some votes and increased the value of other votes.[136] This, Justice Black wrote, proved to be inconsistent with Article I, Section Two of the Constitution, which mandates that Representatives be chosen "by the People of the several States,"[137] meaning "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[138]

In *Wesberry*, Justice Harlan produced perhaps his most incredulous dissent of all, but one carefully crafted to emphasize his methodology of caution and judicious deference to the judgment of the political branches.[139] Justice Harlan first attacked the logic of the majority's opinion as fatally question-begging.[140] The

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ties in the Fifth District. *Wesberry*, 376 U.S. at 2. As of 1960, the district's population was 823,680, while the average population of Georgia's congressional districts was 394,312. *See id.*

[134] *Id.* at 3.

[135] *Id.* at 8 (holding "[t]o say that a vote is worth more in one district than in another would . . . run counter to *our* fundamental ideas of democratic government") (emphasis added).

[136] *See id.* at 7.

[137] U.S. CONST. art. I, § 2.

[138] *Wesberry*, 376 U.S. at 7-8. After canvassing the constitutional history, and concluding that history made clear that the Constitutional Convention intended that the number of each state's Representatives be determined "solely by the number of the State's inhabitants," *id.* at 13, Black stated that:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

*Id.* at 17-18.

[139] *See id.* at 21 n.4 (Harlan, J., dissenting) (noting the "impropriety of the Court's whole-hearted but heavy-footed entrance into the political arena").

[140] *See id.* at 25 (Harlan, J., dissenting).

Court assumed its ultimate holding on the ground that Article I, Section Two effectuated the *ipse dixit* "one man, one vote," but never proved that principle's existence in the Constitution.[141] Rather, in Justice Harlan's view, the provision only required what the text actually stated: that the Representative of the Fifth District, and those of other districts in Georgia, be elected by the people thereof.[142] And there was no claim in the instant case that they had not been.[143] Moreover, the Court, Justice Harlan said, erred by focusing solely on numbers; it gave no weight to such factors as area, shape, or political party affiliations related to the district.[144] Justice Harlan thus flexed his prudential muscles, accusing the majority of giving great weight to "abstractions" that "have little relevance to the *realities of political life.*"[145]

Next, Justice Harlan chastised the majority for its ignorance of constitutional history—history which, he said, makes even more clear what the text already proves to be unambiguous.[146] The Justice's dissent, in response to Justice Black's historical adventure through colonial America, scoured the history of the Constitutional Convention in Philadelphia, as well as the ratifying conventions of various states.[147] Nowhere in this history could Justice Harlan find allegiance to the "one man, one vote" dogma.[148] Nor did *The Federalist* support the majority's view.[149] Rather, Justice Harlan's reading of the history and text compelled

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[141] *See id.* at 26-27 (Harlan, J., dissenting).

[142] *See id.* at 25 (Harlan, J. dissenting).

[143] *See id.*

[144] *See Wesburry*, 376 U.S. at 25 (Harlan, J., dissenting).

[145] *Id.* (emphasis added).

[146] *See id.* at 30 (Harlan, J., dissenting).

[147] *See id.* at 30-39 (Harlan, J., dissenting). Specifically, Justice Harlan's research examined the equal districting debate in Massachusetts, South Carolina, New York, Virginia, North Carolina, and Pennsylvania, as well as during the Constitutional Convention in Philadelphia. *See id.*

[148] *Id.* at 31 (Harlan, J., dissenting).

[149] *See id.* at 39 (Harlan, J., dissenting). Specifically, Justice Harlan explained that *Federalist* No. 59 "unequivocally stated that the state legislatures have plenary power over the conduct of congressional elections subject only to such regulations as Congress itself might provide." *Id.* at 41. *See also* THE FEDERALIST NO. 54 (James Madison) (Clinton Rossiter, ed. 1961) (discussing the inclusion of slaves in apportionment schemes) and NO. 59 (Alexander Hamilton) (discussing the regulation of elections).

his view, buttressed by Justice Frankfurter's statement in *Colegrove v. Green*,[150] that the Constitution vests the legislative branch with the power to conduct and regulate elections; "[t]he constitutional right which the Court creates is manufactured out of whole cloth."[151] Thus, Justice Harlan again warned of the dangers that the *Wesberry* Court, like other Warren Court majorities, had wrought for the nation in its attempt to secure an Earthly Zion[152] by way of constitutional adjudication: "[I]n upholding [the appellants'] claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process . . . . What is done today saps the political process."[153] The Justice continued, "[t]he promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process itself is weakened."[154] Ultimately, Justice Harlan stated "[b]y yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government."[155]

Justice Harlan's methodology in *Baker* and *Wesberry* thus demonstrates his adherence to the important values of prudentialism. First, as both dissents indicate, Justice Harlan remains true to tradition by reaffirming precedent and precept, as expressed in his adherence to Justice Frankfurter's *Colegrove* opinion; Justice Harlan refuses to dash wildly toward political objectives without weighing the consequences.[156] Second, the Justice's reasoning coheres within the "web" of political and juridical values he identifies: the institutional values of federalism and judicial restraint, and the social values associated with the cus-

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[150] 328 U.S. 549 (1946). Justice Harlan stated that the Court should follow Justice Frankfurter's "eminently correct statement in *Colegrove* that 'the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House . . . . If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people.'" *Wesberry*, 376 U.S. at 47 (Harlan, J., dissenting). Justice Harlan argued that Justice Frankfurter's views could be given "appropriate attention" even if he did not speak for a majority in *Colegrove*. *See id.*

[151] *Wesberry*, 376 U.S. at 42 (Harlan, J., dissenting).

[152] *See* KIRK, *supra* note 55 and accompanying text.

[153] *See Wesberry*, 376 U.S. at 48 (Harlan, J., dissenting).

[154] *Id.*

[155] *Id.*

[156] *See id.*

toms and practices of the body politic.[157] Finally, again with a long view toward the dangers of dismantling federalism, Justice Harlan stays the course of legal positivism, deferring consistently to the judgments of legislators and to their capacity for renewal of the body social.[158]

### C. FREE SPEECH

Publius[159] informs us that the American Constitution sought to effectuate a healthy tension between the claims of authority and order and the claims of freedom and liberty.[160] As we have seen, prudentialists embrace this theory of the Constitution because it accounts for our inherited customs and sociopolitical continuity, and it reflects the realities of a culture that must restrain passion and appetite without stifling unduly the human spirit.[161] The second Justice Harlan's free speech jurisprudence demonstrates a continuing effort to reaffirm this prudential constitutional precept, to reconcile in a system of dual sovereignty the values of free and open communication of ideas with the need for reasonable restraints on communication where it presents a threat to a tolerable civil social order.

*Roth v. United States*[162] presents a compelling example. In *Roth*, a jury convicted Samuel Roth for violating the federal obscenity statute after he had placed "obscene" circulars and advertisements in the United States mail.[163] The Supreme Court affirmed.[164] In an opinion written by Justice Brennan, who is no

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[157] *See Baker*, 369 U.S. at 333-34 (Harlan, J., dissenting).

[158] *See id.*; *Wesberry*, 376 U.S. at 48 (Harlan, J., dissenting).

[159] "Publius" is the pen name given to the authors of The Federalist.

[160] *See* THE FEDERALIST NO. 26, at 168 (Alexander Hamilton) and NO. 37, at 226 (James Madison) (Clinton Rossiter, ed. 1961).

[161] *See* BURKE, REFLECTIONS, *supra* note 5, at 34. *See also* KIRK, THE POLITICS OF PRUDENCE, *supra* note 36, at 9 (explaining the virtue of prudence and the conservative's desire to follow it).

[162] 354 U.S. 476 (1957). *Roth's* companion case, *Alberts v. California*, involved a challenge to a California statute prohibiting the sale of obscene books and the obscene advertisement of such books. *See id.* at 481. Alberts, the defendant, was convicted under the statute in municipal court and his conviction was affirmed in the Appellate Department of the Superior Court of California. *See id.* The United States Supreme Court affirmed. *See id.* at 494.

[163] *See id.* at 480.

[164] *See id.* at 494.

foe of First Amendment rights, the Court held that "obscenity" is not speech because it is "utterly without redeeming social importance," and thus remains unprotected by the First Amendment.[165] The Court defined obscene material as that "which deals with sex in a manner appealing to prurient interest," and distinguished such material from "sex," which is within the protections of the Free Speech Clause.[166] The federal obscenity statute thus passed constitutional muster.[167]

Dissenting in the *Roth* case, Justice Harlan criticized the majority's obsession with abstract theorizing, in ignorance of reality, as well as the question-begging nature of its analysis.[168] The Court, Justice Harlan wrote, assumed that "obscenity" was a recognizable "genus" of speech and, on the basis of this generalized abstraction, questioned whether the First Amendment protects it.[169] In answering the question, however, the Court failed to demonstrate that all "obscenity" lacks redeeming social importance.[170] Justice Harlan noted that the consequences of the Court's generalization might be the conviction of an individual for distributing either *Ulysses* or *Decameron*, neither of which could be said, as a realistic matter, to lack social importance.[171] The Court's opinion thus lacked a certain degree of judicial candor and courage, because it reduced questions regarding the suppression of free expression—questions of constitutional importance, which require "constitutional judgment"—to questions merely of fact to be resolved by the triers thereof.[172]

In the context of Roth's conviction specifically, Justice Harlan, recognizing the need in all cases to "balance the interest in free expression against other [state] interests,"[173] argued that the federal government possesses authority to

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[165] *Id.* at 484.

[166] *Id.* at 487.

[167] *See id.* at 492.

[168] *See Roth*, 354 U.S. at 497 (Harlan, J., concurring in part and dissenting in part).

[169] *See id.*

[170] *See id.* Justice Harlan wrote here that "[e]very communication has an individuality and 'value' of its own." *Id.*

[171] *See id.* at 497-98 (Harlan, J., concurring in part and dissenting in part).

[172] *Id.* at 498 (Harlan, J., concurring in part and dissenting in part).

[173] *See id.* at 504 (Harlan, J., concurring in part and dissenting in part).

censor speech that is significantly restricted in comparison to the states' restriction authority.[174] Justice Harlan argued that while the federal government may restrict speech that threatens revolution against it, obscene speech poses no such dangers; rather, the concerns raised by obscene speech are of the type traditionally left to the state governments, as "Congress has no substantive power over sexual morality."[175] The states, however, as laboratories of social experimentation, "bear direct responsibility for the protection of the local moral fabric."[176] Moreover, the dangers of national, as opposed to local, censorship are greater.[177] Appealing again to principles of federalism, Justice Harlan argued that a national censorship standard would deprive states of their ability to differ as to questions of morality, resulting in the real consequence that no one in the nation would be permitted to read certain works, even in states that would otherwise be willing to permit such books to be read.[178] This consequence is particularly intolerable when, again as a realistic matter, not all books that "lead to sexually impure thoughts necessarily [are] 'utterly without redeeming social importance.'"[179]

Justice Harlan's *Roth* opinion thus effectuated the prudential purpose of rec-

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[174] *See Roth*, 354 U.S. at 504 (Harlan, J., concurring in part and dissenting in part). On this basis, Justice Harlan concurred in the Court's affirmance of Alberts' conviction, which raised, for Justice Harlan, a due process question rather than a free speech question. *See id.* at 500. Justice Harlan asserted that the question of whether the state's interest in preventing corruption of readers was wise or legitimate was not for the Court to decide. *See id.* at 501. The Justice wrote,

> it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which *a State may deem obnoxious to the very moral fabric of society.* In fact, the very division of opinion on the subject counsels us to respect the choice made by the State . . . . [Moreover] the State has a legitimate interest in protecting the privacy of the home against invasion of unsolicited obscenity . . . . *Since the domain of sexual morality is pre-eminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality.*

*Id.* at 501-02 (Harlan, J., concurring in part and dissenting in part) (emphasis added).

[175] *Id.* at 504 (Harlan, J., concurring in part and dissenting in part).

[176] *Id.*

[177] *See id.* at 505 (Harlan, J., concurring in part and dissenting in part).

[178] *See id.* at 506 (Harlan, J., concurring in part and dissenting in part).

[179] *Id.* at 507 (Harlan, J., concurring in part and dissenting in part).

onciling the claims of liberty and authority with a view toward the practical constitutional effects of statutes restricting speech and press.[180] Not only did the federal obscenity statute reach to materials that might actually retain social importance,[181] it restricted the power of state and local lawmakers to develop a moral order based on the customs and practices of their people as refined through social and political trial and error.[182] Justice Harlan reaffirmed this view six years later in *Bantam Books, Inc. v. Sullivan.*[183] In *Bantam Books*, four New York book publishers challenged a Rhode Island law that created the Rhode Island Commission to Encourage Morality in Youth.[184] The Commission sent notices to these publishers, and others, indicating that some of their books were "objectionable for sale, distribution, or display" to those under age eighteen.[185] The Court, in an opinion by Justice Brennan, held that the Commission's practices were unconstitutional.[186] In dissent, Justice Harlan argued that the state had a strong enough reason for creating the law, and the Commission had strong enough reasons for carrying out its mandate because the state interests outweighed those of the publishers.[187] Appealing to principles of federalism and judicial restraint, Justice Harlan wrote that, with regard to the problem of juvenile delinquency, "[t]he States should have a wide range of choice in dealing with such problems, and this Court should not interfere with state legislative judgments on them except upon the clearest showing of unconstitutionality."[188] Justice Harlan offered similar guidance the next term in *Jacobellis v. Ohio.*[189] In

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[180] *See Roth*, 354 U.S. at 504 (Harlan, J., concurring in part and dissenting in part).

[181] *See id.* at 507 (Harlan, J., concurring in part and dissenting in part) ("as far as I can see, much of the great literature of the world could lead to a conviction under such a view of the [federal] statute.").

[182] *See id.* at 506-07 (Harlan, J., concurring in part and dissenting in part).

[183] 372 U.S. 58 (1963).

[184] *See id.* at 59.

[185] *Id.* at 61. These determinations were made by a majority of the Commission's members. *See id.*

[186] *See id.* at 71.

[187] *See id.* at 81 (Harlan, J., dissenting).

[188] *Id.* at 77 (Harlan, J., dissenting).

[189] 378 U.S. 184 (1964). Justice Harlan's views concerning the balance between order and liberty, and the respective roles of the state and federal governments, was furthered in

*Jacobellis*, a three-judge panel convicted a motion picture theater manager for possessing and exhibiting an obscene film in violation of an Ohio statute.[190] A plurality of the Supreme Court reversed, with Justice Brennan announcing the judgment.[191] According to Justice Brennan, joined by Justices Goldberg and Stewart,[192] the film at issue was not obscene and thus Jacobellis found protection under the First Amendment.[193] Justices Black and Douglas agreed with reversal but on the grounds that exhibiting a motion picture was protected by the free press clause of the First Amendment.[194] Justice Harlan dissented, adhering to his view that the states were permitted greater deference in defining and banning obscenity, requiring for them only a test of rationality.[195] The Justice's characteristically prudential method appealed to the need for a "sensible accommodation between the public interest sought to be served by obscenity laws and protection of genuine rights of free expression."[196] Having watched the film at issue, Jus-

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*Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962).

In *Manual Enters.*, Justice Harlan announced the Court's judgment in holding that certain magazine publishers could not be held liable under a Post Office Department Order that had declared the magazines obscene and unmailable. *See Manual Enters.*, 370 U.S. at 479-80. There, Justice Harlan wrote that the proper obscenity test under federal statute included a national standard of decency and that the magazines at issue were, at most, "dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.'" *Id.* at 490.

Justice Harlan's approach in these cases thus reaffirms his view that states are entitled to much greater constitutional latitude in combating perceived moral ills in society.

[190] *See Jacobellis*, 378 U.S. at 185-86.

[191] *See id.*

[192] Justice Stewart, in his concurrence, explained famously,

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.

*Id.* at 197 (Stewart, J., concurring) (emphasis added).

[193] *See Jacobellis*, 378 U.S. at 196.

[194] *See id.* at 196 (Black, J., concurring).

[195] *See id.* at 203-04 (Harlan, J., dissenting).

tice Harlan concluded that Ohio had a rational basis for banning it.[197]

Justice Harlan's prudential deference to the states, however, was tested during his last term on the Court. So too, then, was his prudentialism in the free speech arena. In *Cohen v. California*,[198] Justice Harlan, writing for a five-member majority, again faced the task of reconciling the competing interests he identified in such cases as *Roth*, *Bantam Books*, and *Jacobellis*.[199] In 1968, at the height of the war in Vietnam, Paul Robert Cohen was seen in a Los Angeles County Courthouse corridor wearing a jacket that bore the phrase "Fuck the Draft."[200] After his arrest for violating a California statute prohibiting the malicious or willful disturbance of the peace by offensive conduct,[201] Cohen testified that his purpose in wearing the jacket was to express his opposition to the Vietnam War.[202] Cohen's bench trial resulted in a conviction and thirty days in prison.[203] The Supreme Court, however, reversed the conviction, and Justice Harlan noted from the outset that the case, while seemingly inconsequential given the nature of the statute and the short jail time given to Cohen, presented important constitutional issues that required the Court's judgment.[204]

Justice Harlan's effort to gauge and balance the tension between California's broader societal interest and Cohen's individual liberty interest began with the proposition that the content of Cohen's jacket could not be suppressed unless the state could show that Cohen intended to "incite disobedience to or disruption of the draft."[205] The state clearly could not rely upon the argument that it was pun-

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[196] *Id.*

[197] *See id.* at 204 (Harlan, J., dissenting).

[198] 403 U.S. 15 (1971).

[199] *See* Roth v. United States, 354 U.S. 476, 504 (1957); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 76 (1963); *Jacobellis*, 378 U.S. at 203-04.

[200] *See Cohen*, 403 U.S. at 16.

[201] The statute provided, in pertinent part, "Every person who . . . willfully disturbs the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor." CAL. PENAL CODE § 415 (West 1968).

[202] *See Cohen*, 403 U.S. at 16.

[203] *See id.*

[204] *See id.* at 15.

[205] *Id.* at 18.

ishing "conduct" and not "speech" because, as Justice Harlan noted, the only "conduct" it sought to deter here was "the fact of communication."[206] Justice Harlan then noted that the case did not fit any exceptions to the protection of free speech, because the case did not involve obscenity, because it did not reflect erotic expression, nor did it involve "fighting words," pursuant to *Chaplinsky v. New Hampshire* and its progeny, because the jacket could not have been regarded as a "direct personal insult," nor did Cohen intend to provoke a hostile reaction.[207] Finally, Justice Harlan explained that the mere offensiveness of Cohen's jacket did not justify suppression.[208] To do so, Justice Harlan said, the state must show that "substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of the authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."[209] Justice Harlan thus acknowledged the authority of the states to regulate speech consistent with its interest in preserving good order and rational political discourse, where speech that offends these interests is discernible.[210] In the instant case, however, no evidence existed to show that those state interests were jeopardized in any significant way.[211] Justice Harlan wrote, "[t]hat the air may at times seem filled with verbal cacophony is, in this sense, not a sign of weakness but of strength."[212] As long as those like Cohen engaged in peaceful dissent, their words may not be punished merely because they fall below "standards of acceptability."[213] Justice Harlan concluded, "[s]urely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below."[214]

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[206] *See id.*

[207] *Id.* at 20. *See also* Roth v. United States, 354 U.S. 476 (1957) (attempting to establish guidelines for defining obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (establishing the "fighting words" doctrine as an exception to the protection of free speech); and Feiner v. New York, 340 U.S. 315 (1951) (refining the *Chaplinsky* "fighting words" doctrine).

[208] *See Cohen*, 403 U.S. at 21.

[209] *Id.*

[210] *See id.* at 22-23.

[211] *See id.* at 23.

[212] *Id.* at 25.

[213] *See id.*

[214] *Cohen*, 403 U.S. at 25.

The Justice continued, "[f]or, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that *one man's vulgarity is another's lyric.*"[215] Cohen's speech clearly fell within this significant domain, where, although distasteful, it nonetheless conveyed a political message in a manner that did not endanger state interests.[216]

The second Justice Harlan's free speech jurisprudence, even as viewed merely in these limited cases, thus demonstrates again that the prudentialist need not always favor majoritarian preferences and interests, so as long as he accounts for them significantly. Justice Harlan's approach in these cases reflects the prudential recognition of the tension between liberty and authority that Publius described—sometimes liberty must prevail to effectuate the political values of a free and just society.[217] Moreover, the *phronesis*[218] of his approach appreciates the tradition of peaceable political dissent that had developed in America from the colonial period and afforded sufficient deference to that tradition where, as realistic and not abstract matter, other significant interests were not endangered.[219] Justice Harlan's approach also accounts for a distinct interpretive "web" that appreciates the continuity both of the values of social order and of the values of free expression; Justice Harlan's decisionmaking coheres with those values.[220]

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[215] *Id.* (emphasis added).

[216] *See id.* at 26.

[217] *See supra* Section III. B.

[218] *See* ARISTOTLE, *supra* note 14, at 209 n.1.

[219] *See Cohen*, 403 U.S. at 26 ("governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results."). *See also* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 82 (1963) (Harlan, J., dissenting) (explaining the state's significant interest in addressing the problem of juvenile delinquency).

[220] *See, e.g., id.* at 76 (Harlan, J., dissenting) (explaining that the issue that must be addressed was "the accommodation that must be made between Rhode Island's concern with the problem of juvenile delinquency and the right of freedom of expression assured by the Fourteenth Amendment").

Despite the consistency in his method, in some sense the final conclusions Justice Harlan reached in *Jacobellis* and *Cohen* appear inconsistent. If the test is rationality, and deference is to be given to the states, California's interest in suppressing Cohen's jacket seems no less significant than Ohio's interest in suppressing Jacobellis' "*Les Amants.*" For Justice Harlan, however, the distinction is most plausible when viewed in context. Cohen's speech was clearly political (even if immature and underdeveloped) and thus fell within a recognizable

### D. SUBSTANTIVE DUE PROCESS

The Second Justice Harlan is well-known for his dissenting opinion in the case of *Poe v. Ullman*.[221] That opinion, however, in which Justice Harlan explains his vision for giving greater substance to the protections of "liberty" in the Fourteenth Amendment's Due Process Clause, reveals much more about Justice Harlan than a mere desire to expand the Constitution's protections for individual rights. Rather, it represents a prudential effort to reconcile and vindicate seemingly conflicting traditions: on the one hand, America's tradition of majoritarian republicanism in matters of mores; and on the other hand, America's tradition of preserving the sanctity of the marital relationship. Ultimately, Justice Harlan's opinion, while troubling to some judicial conservatives,[222] nonetheless adds the final necessary touches to the portrait of Harlan as a prudential pragmatist.

In *Poe*, the plaintiffs, Paul and Pauline Poe, brought an action in Connecticut state court attacking the validity of the state's law prohibiting the use of contraceptives.[223] After three consecutive pregnancies resulting in children with abnormalities, Mrs. Poe desired advice concerning contraception. Mrs. Poe's obstetrician informed her that subsequent pregnancies might cause serious psychological and emotional strain.[224] The Poes, however, were unable to obtain such advice because of the anti-contraception statute.[225] The Supreme Court,

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tradition of tolerated speech; the film Jacobellis displayed, however, fell outside such a tradition.

[221] 367 U.S. 497 (1961).

[222] *See* BORK, *supra* note 8, at 231-35. Here, Bork criticizes Justice Harlan's *Poe* dissent, taking no solace in Justice Harlan's reference to tradition: "[Justice] Harlan's arguments were entirely legislative . . . . [Justice] Harlan's methodology, often admired by advocates of judicial restraint, turns out to offer no protection against judicial imperialism." *Id.* at 234-35.

[223] *See Poe*, 367 U.S. at 498-500.

[224] *See id.* at 498-99. Each of the three children died shortly after birth. *See id.* at 498. Dr. Buxton, the physician that the Poes consulted, said that the "mechanism" for the infants' abnormalities was unclear; thus, he indicated that severe psychological and emotional strain was "probable" in connection with future pregnancy. *See id.*

[225] *See id.* at 499. The statute provided, in pertinent part, "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. GEN. STAT. § 53-32 (1958).

As the Court noted, Connecticut had no statute prohibiting the giving of information concerning contraception, although such action likely would have fallen under the state's criminal accessory statute. *See Poe*, 367 U.S. at 499 (citing CONN. GEN. STAT. § 54-196 (1958)).

however, dismissed the petition.[226] In an opinion written by Justice Frankfurter,[227] the Court held that the case lacked justiciability, as the state had not yet prosecuted the Poes, nor was there imminent risk that the state would do so in this case.[228] As Justice Frankfurter opined, "we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced."[229]

Justice Harlan's dissent tracked his well-established sense of tradition but advocated its evolutionary nature. In his view, the freedom to allow "liberty" to evolve means that states should be free to experiment with the concept of liberty.[230] This, however, requires the judgment of the judiciary, which, in determining the meaning of "liberty," must necessarily contemplate social and political tradition.[231] In *Poe*, Justice Harlan faced two important strains of social and political tradition, which he recognized as, on the one hand, the tradition of state police power in matters of health, morals, safety, and welfare,[232] and on the other hand, the tradition of protecting individual liberty (and marital privacy in particular)[233] from unreasonable governmental intrusion.[234] As Justice Harlan

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[226] *See id.* at 509.

[227] Chief Justice Warren, Justice Clark, and Justice Whittaker joined Justice Frankfurter's opinion. *See id.* at 498.

[228] *See id.* at 508-509.

[229] *Id.* at 508. Justice Frankfurter insisted that Connecticut's refusal to enforce the statute seriously impeded the Poes' claim, arguing that the "Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality." *Id.*

[230] *See Poe*, 367 U.S. at 555 (Harlan, J., dissenting). Here Justice Harlan asserted that, although such behavior by the state is limited, "undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies." *Id. Cf.* Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting) (arguing that the states were capable of devising alternatives to the jury trial requirement in administering their criminal justice systems).

[231] *See Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (noting that any decision that "radically departs from [American tradition] could not long survive").

[232] *See id.* at 539 (Harlan, J., dissenting).

[233] *See id.* at 553 (Harlan, J., dissenting) (arguing that the marital relationship retains unique status, and thus deserves special protection, in American culture).

opined, the Court has "represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[235] Striking that balance, as Justice Harlan viewed it, required reference to both strains of American social tradition, those "from which it developed as well as the traditions from which it broke."[236] What follows is classic Harlanesque prudentialism: "*[t]hat tradition is a living thing.* A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."[237]

The prudentialism of Justice Harlan's dissent is evident in his treatment of the specific constitutional claim at issue, lest the Justice's words be viewed as mere abstract theorizing, which no good pragmatist could countenance.[238] True to the pragmatic aversion to abstractions, Justice Harlan examined the concrete basis for the state's position, that is, its assertion of the right to enforce its own moral judgment.[239] In other contexts, as we have seen, Justice Harlan proved sympa-

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[234] *See id.* at 542 (Harlan, J., dissenting).

[235] *Id.*

[236] *Id.*

[237] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (emphasis added).

[238] *See id.* at 547 (Harlan, J., dissenting). Here, Justice Harlan combines two important aspects of his prudentialism: his aversion to abstractions and his respect for majoritarian preferences. As the Justice writes:

> [i]f we had a case before us which required us to decide simply, *and in abstraction*, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views [on sexual morality]. But, as might be expected, *we are not presented simply with this moral judgment to be passed on as an abstract proposition.* The secular state is not an examiner of consciences: *it must operate in the realm of behavior, of overt actions,* and where it does so operate, not only the underlying, moral purpose of its operations, but also the choice of means becomes relevant to any Constitutional judgment on what is done.

*Id.* (emphasis added) (citations omitted).

[239] *See id.* at 547-48 (Harlan, J., dissenting).

thetic to such claims by state governments.[240] Here, however, his primary concern was the invasion of marital intimacy, of the very concept of privacy around which a legitimate social and political, and hence, constitutional, tradition developed, as we see in the Third and Fourth Amendments.[241] Although, as the Justice recognized, the privacy at stake here was not privacy of the home such as is protected by the Third and Fourth Amendments,[242] and that the "current of opinion" favoring the "considered use of contraceptives by married couples" did not exist as such in recent history,[243] the state's action was nonetheless "grossly offensive" to the very notions of privacy that sustain those provisions.[244] Precedent and constitutional tradition—the "rational purposes, historical roots, and subsequent developments of the relevant provisions."[245]—required for protection of the home against all unreasonable intrusion of whatever character, as the home "derives its preeminence as the seat of family life."[246] Justice Harlan thus concluded that Connecticut had failed to demonstrate a strong enough justification for the law.[247]

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[240] *See, e.g.*, Bantam Books Inc. v. Sullivan, 372 U.S. 58 (1963) (Harlan, J., dissenting).

[241] *See Poe*, 367 U.S. at 549 (Harlan, J. dissenting). The Third Amendment provides that "[n]o soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. The Fourth Amendment provides:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[242] *See Poe*, 367 U.S. at 549 (Harlan, J., dissenting).

[243] *Id.* at 546 (Harlan, J., dissenting). Here, Justice Harlan cited the "Comstock Law" and similar early statutes that prohibited the use of birth control. *See id.* at 546 n.12 (Harlan, J., dissenting).

[244] *See id.* at 549 (Harlan, J., dissenting).

[245] *Id.*

[246] *Id.* at 551 (Harlan, J. dissenting).

[247] *See id.* at 554 ("[a] closer scrutiny and stronger justification than [rational basis] are required").

Of course, Justice Harlan's substantive position was of course vindicated in *Griswold v. Connecticut*,[248] where the Court finally invalidated the Connecticut law prohibiting contraception and in which the Court first enunciated the notion of a general "right to privacy." Justice Douglas, another *Poe* dissenter, argued for the Court that this privacy right emanated from the penumbras of the Bill of Rights.[249] As such, Connecticut could not to show more than mere rationality to sustain the law. In Justice Douglas's view, the state had to show necessity—and, for the majority, could not do so.[250]

Justice Harlan's concurrence in *Griswold*, however, reiterates the prudential preference for sagacity. Whereas Justice Douglas' privacy right proved virtually revolutionary by comparison, relying on the radiation demonstrated by the Bill of Rights as a whole, Justice Harlan's *Poe* dissent and *Griswold* concurrence urged a narrow right of privacy that derived from the text and tradition of the Constitution and the Due Process Clause in particular,[251] from the values "'implicit in the concept of ordered liberty.'"[252] Moreover, in addressing Justice Black's contention that the Bill of Rights was incorporated entirely into the Due Process Clause of the Fourteenth Amendment,[253] and that such incorporation serves to prevent judges from roaming afield in the area of constitutional adjudication,[254] Justice Harlan responded with his own patented appeal to judicial restraint stating, "[j]udicial self-restraint . . . will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the basic teachings of history, solid recognition of the basic values that underlie our soci-

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[248] 381 U.S. 479 (1965). Here, Griswold, executive director of the Planned Parenthood League of Connecticut, and Dr. Buxton, a physician, professor at the Yale Medical School, and medical director of the League, were arrested, charged, and convicted as accessories for providing information, instruction and advice to married couples concerning contraception. *See id.* at 480. Note that Dr. Buxton was the same physician with whom the Poes consulted in *Poe v. Ullman*. *See Poe*, 367 U.S. at 498.

[249] *See Griswold*, 381 U.S. at 484-85.

[250] *See id.* at 485.

[251] *See id.* at 500 (Harlan, J., concurring).

[252] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[253] *See id.* at 514 (Black, J., dissenting). *See also* Duncan v. Louisiana, 391 U.S. 145, 163 (1968) (Black, J., concurring) (advocating the "total" incorporation position); Rochin v. California, 342 U.S. 165, 177 (1952) (Black, J., concurring) (arguing same); Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (arguing same).

[254] *See Griswold*, 381 U.S. at 500-501 (Harlan, J., concurring).

ety . . . ."[255] The Justice continued, "and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."[256] Thus for Justice Harlan, the text of the Due Process Clause itself is sufficient both to ensure protection for freedoms established and developed over time through trial and practice and, if read correctly, to prevent the self-interested judge from placing the imprimatur of his own political preferences on the constitutional slate.[257]

In one sense, Justice Harlan's *Poe* dissent and *Griswold* concurrence may prove disheartening to some in the prudentialist camp. The result Justice Harlan reaches arguably affords the judge sweeping authority in determining the content of the term "liberty."[258] Moreover, while Justice Harlan clearly values federalism and the prerogatives of state legislatures, his result affords greater weight to the mere *concept* of privacy—the concept that, as used by Justice Harlan, has questionable legitimacy as part of constitutional text and history—than to the moral sensibilities of Connecticut's people.[259] One could argue that Justice Harlan's privacy right is closer to an abstraction than the product of American legal custom and convention as expressed in the constitutional text.

Nevertheless, Justice Harlan's methodology remains true to the elemental aspects of prudentialism: traditionalism, coherence, and positivism.[260] Justice

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[255] *Id.* at 501 (Harlan, J., concurring).

[256] *Id.* (citing Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring)).

[257] *See id.* at 501-502 (Harlan, J., concurring).

[258] *See* BORK, *supra* note 9, at 235. Again, though, Justice Harlan was careful to circumscribe the right, arguing that homosexuality, fornication, and incest are not immune from the reach of criminal law. *See Poe*, 367 U.S. at 552-53 (Harlan, J., dissenting). This is because the marital relationship has long been protected by the state and thus, a tradition has evolved to secure marital intimacy. *See id.* at 553 (Harlan, J., dissenting).

[259] *See Griswold*, 381 U.S. at 530-31 (Stewart, J., dissenting). Here Justice Stewart wrote:

> it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not.

*Id.*

[260] *But see* BORK, *supra* note 8, at 235 (arguing that, in criticism of Justice Harlan's writing, "not all traditions are admirable, and none of them confines judges to any particular

Harlan's writing values the role of time-honored practices and their cultural development in establishing a substantive right within the Due Process Clause.[261] In addition, the right that Justice Harlan posits exists within a "web of beliefs," coheres with society's respect for the marital relationship—the intimacies associated with it, and with the community's evolving sense of sexual reason.[262] Finally, Justice Harlan seeks in fact, to protect the majoritarian prerogative by enabling states to experiment with liberty, properly understood.[263]

## IV. THE PRUDENTIAL LEGACY OF THE SECOND JUSTICE HARLAN

One cannot underestimate the influence of the second Justice Harlan's judicial writing, particularly on the current Supreme Court. The Justice's style and methodology, however, are relevant to two members of the Court, in particular: Justice Scalia and Justice Souter. Justice Scalia has been described as a model of prudentialism[264] and appears to share Justice Harlan's penchant for tradition and legal positivism, although his textualism distinguishes him from Justice Harlan.[265] Justice Souter, on the other hand, has indicated explicitly his desire to follow Justice Harlan's model,[266] and many of his decisions, faithful to a certain brand of common law constitutionalism, appear to be consistent with the elements of prudentialism that Chow described and that Justice Harlan generally followed.[267] Thus, while Justice Harlan represents the better model of prudentialism, both Justices may be said to fall generally into the prudentialist school

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range of results").

[261] *See Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[262] *See id.* at 553 (Harlan, J., dissenting).

[263] *See id.* at 555 (Harlan, J., dissenting); *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

[264] *See* Chow, *supra* note 12, at 795.

[265] *See* Maryland v. Craig, 497 U.S. 836, 860-870 (1990) (Scalia, J., dissenting) (arguing that the Confrontation Clause prohibits the use of child's closed-circuit television testimony). *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 711-712 (1988) (Scalia, J., dissenting) (arguing that the text of Article II—that "[t]he executive power" shall be vested in a President of the United States—precludes Congress from exercising any executive authority).

[266] *See Confirmation Hearings*, *supra* note 10, at 54.

[267] *See, e.g.*, Washington v. Glucksburg, 117 S. Ct. 2258 (1997) (Souter, J., concurring).

and certainly each has a claim to the Harlan legacy. It is important to note, however, that this section does not attempt to provide comprehensive analyses of either Justice Scalia's or Justice Souter's jurisprudence, as that is a job better fit for an entire article.[268] Rather, as indicated, this section merely attempts to indicate areas of overlap between Justice Harlan's prudentialism and that of the two current justices.

### A. JUSTICE SCALIA AND THE HARLAN LEGACY

Professor Chow, for good reason, uses Justice Scalia as a model of prudentialism.[269] In this sense generally, Justice Scalia thus embodies the Harlan legacy. More specifically, however, Justice Scalia carries the Justice Harlan mantle in two important respects: his sense of tradition and his legal positivism, both of which serve to limit the discretion of judges. The case law bears out this methodology.[270]

For Justice Scalia, like Justice Harlan, tradition informs American constitutional institutions and practices.[271] That tradition also possesses a limiting func-

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[268] For more on Justice Scalia's jurisprudence, see generally ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583-1867 (1991); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

For an interesting analysis of Justice Souter's jurisprudence, see Liang Kan, *A Theory of Justice Souter*, 45 EMORY L.J. 1373 (1996). *See also* Liza Weiman Hanks, *Justice Souter: Defining "Substantive Neutrality" in an Age of Religious Politics*, 48 STAN. L. REV. 903 (1996) (evaluating Justice Souter's Establishment Clause opinions).

[269] *See generally* Chow, *supra* note 12, at 795-809 (explaining how Justice Scalia fits into the pragmatist school).

[270] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 979-1002 (1992) (Scalia, J., concurring in part and dissenting in part). *Cf.* Hadley Arkes, *Scalia Contra Mundum*, 21 HARV. J. L. & PUB. POL'Y 231, 240-41 (1997) (comparing Justice Scalia's First Amendment methodology to Justice Harlan's in light of the Justice Harlan opinion in *Cohen v. California*, 403 U.S. 15 (1971)).

[271] *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting). Here Justice Scalia wrote, dissenting from the Court's decision that gubernatorial hiring practices based on political considerations violate the First Amendment, that:

> when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. *Such a venerable and accepted tradition is not to be laid on the examining table and*

tion where judges are concerned, as these cognizable traditions provide boundaries for judicial decisionmaking.[272] Justice Scalia's approach is evident in *Schad v. Arizona*,[273] where the Court considered the fundamental fairness of a state statute that permitted a jury to convict a first-degree murder defendant of either felony murder or premeditated murder.[274] Concurring in the judgment, but disagreeing that the Court needed to conduct a fundamental fairness inquiry, Justice Scalia wrote that historical practices define due process.[275] "[I]t is impossible," Justice Scalia continued, "that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is 'due.'"[276] Such an approach, as Scalia explained in *Rutan v. Republican Party of Illinois*, properly respects "principles adhered to, over time, by the American people, rather than those favored by the personal . . . philosophical dispositions of a majority of this Court."[277] Moreover, Justice Scalia's traditionalism circumscribes judicial decisionmaking because traditions, for Justice Scalia, must be considered at the most specific identifiable level.[278] Once such traditions are

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*scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves stuff out of which the Court's principles are to be formed.*

*Id.* (emphasis added). *See also* DE TOCQUEVILLE, *supra* note 91, at 243 (explaining the resistance to radical change in American law).

[272] *See, e.g., id.*

[273] 501 U.S. 624 (1991).

[274] *See id.* at 624.

[275] *Id.* at 650 (Scalia, J., concurring).

[276] *Id.* at 651 (Scalia, J., concurring).

[277] *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting).

[278] *See* Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989). Justice Scalia's footnote here explained his view that the consideration of specific traditions as opposed to general traditions is most appropriate, as "general traditions provide such imprecise guidance, [that] they permit judges to dictate rather than to discern society's views." *Id.* at 128. Justice Scalia continued, saying "a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all." *Id.*

Justice Brennan's dissent criticized the footnote, saying that Scalia's method of looking to specific traditions was both arbitrary (why specific as opposed to general?) and provided room for abuses. *See id.* at 137-40 (Brennan, J., dissenting).

discerned, only clear textual commands (constitutional or statutory) prohibit them.[279] Moreover, those specific traditions are relevant in defining the scope of "liberty."[280] This interpretive process thus precludes judges from either ignoring established customs and conventions or from substituting their predilections for those of democratically-elected representatives, who are charged with maintaining those traditions and changing them to fit evolving social values.[281] Justice Scalia's opinion in *Planned Parenthood v. Casey*[282] illustrates the point well. The *Casey* Court upheld several restrictive provisions of the Pennsylvania Abortion Control Act, but declared nonetheless that it reaffirmed the "central holding" of *Roe v. Wade*.[283] Concurring in part and dissenting in part, Justice Scalia inveighed against the Court's reasoning and its turnabout of the argument from tradition.[284] Justice Scalia wrote, "I reach [the conclusion that the Constitution does not protect the right to an abortion] because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) *the longstanding traditions of American society* have permitted [abortion] to be legally proscribed."[285] Justice Scalia then assailed the Court's rhetorical dodge that it would be "'tempting' to acknowledge the authoritativeness of tradition in order to 'cur[b] the discretion of federal judges,'" saying that, in reality, the Court here sought no such restraints; rather, the only "temptation" to which the Court succumbed was the aggrandizement of its own authority.[286] Like Justice Harlan's strongly-worded

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For a criticism of both Justice Scalia's and Justice Brennan's positions, see Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, *supra* note 54, at 1613-30.

[279] *See Rutan*, 497 U.S. at 95 (Scalia, J., dissenting).

[280] *See Michael H.*, 491 U.S. at 127 n.6.

[281] *See id.* at 128 (finding that "general traditions . . . permit judges to dictate rather than discern the society's views").

[282] 505 U.S. 833 (1992).

[283] 410 U.S. 113 (1973).

[284] *See Casey*, 505 U.S. at 981 (Scalia, J., concurring in part and dissenting in part). *See* Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy established in *Griswold* was broad enough to encompass a woman's right to terminate her pregnancy).

[285] *Casey*, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

[286] *Id.* at 981 (Scalia, J., concurring in part and dissenting in part).

criticisms of the Court, particularly in the legislative reapportionment cases,[287] Justice Scalia offered an ominous flourish of his own: "[w]e should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[288] Properly considered traditionalism, then, as we saw in Justice Harlan's jurisprudence, helps keep judges in their place.[289]

Justice Scalia's method of deferring to traditions, and the direct relationship of that methodology to his sense of positivism and restraint, is further evinced in *Thompson v. Oklahoma*.[290] In *Thompson*, the Court reversed the death sentence of a defendant who committed murder at age fifteen, holding that such a sentence amounted to "cruel and unusual punishment" pursuant to the Eighth Amendment.[291] In a strong dissent, Justice Scalia argued that the Court's Eighth Amendment jurisprudence should be informed both by historical practices that retain continuing validity and by deference to the judgments of legislators who perpetuate those practices.[292] Justice Scalia noted that modern jurisdictions adhered to the common law view, explained by Blackstone and adopted as a practice in colonial America, that juveniles under age fifteen were not immune from committing capital crimes.[293] Oklahoma chose to follow this tradition and should not be prohibited from continuing it merely because it is philosophically

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[287] *See* Baker v. Carr, 369 U.S. 186, 339-40 (1962) (Harlan, J., dissenting); Wesberry v. Sanders, 376 U.S. 1, 48 (1964) (Harlan, J., dissenting).

[288] *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in part and dissenting in part).

[289] *See, e.g., id.* at 980-81 n.1 (Scalia, J., concurring in part and dissenting in part) (chastising the Court's failure to properly consider the specific tradition at issue—of disallowing a woman to abort her child—which failure led to an unrestrained and ill-reasoned decision). Justice Scalia further stated that:

> [t]he Court's contention . . . that the only way to protect childbirth is to protect abortion shows *the utter bankruptcy of a constitutional analysis deprived of tradition as a validating factor.* It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.

*Id.* (emphasis added).

[290] 487 U.S. 815 (1988).

[291] *See id. See also* U.S. CONST. amend. VIII.

[292] *See Thompson*, 487 U.S. at 863-65 (Scalia, J., dissenting).

[293] *See id.* at 864 (Scalia, J., dissenting).

objectionable to the consciences of five members of the Supreme Court.[294] Justice Scalia stated, "I know of no authority whatever for our specifying the precise form that state legislation must take, as opposed to its constitutionally required content. We have in the past studiously avoided that sort of interference in the States' legislative processes, the heart of their sovereignty."[295] Justice Scalia continued, "[p]lacing restraint upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment, may well be a good idea, as perhaps is the abolition of capital punishment entirely. It is not, however, an idea it is ours to impose."[296]

Justice Scalia's position took even greater importance the next term in *Stanford v. Kentucky*, where the Court, per Justice Scalia, rejected the Eighth Amendment challenge of a capital defendant who committed a brutal murder at age seventeen.[297] After asserting that, pursuant to the "cruel and unusual" language of the Eighth Amendment,[298] Stanford had established no national consensus against imposing capital punishment on seventeen-year-olds, Justice Scalia rejected the invitation to consider abstractions and instead looked to real practices.[299] Justice Scalia thus concluded that the Court's duty was not to dictate what "evolving standards of decency" *should be* but what they *are*.[300] To avoid the reality that at the time of adoption of the Eighth Amendment, and well after, American jurisdictions imposed capital punishment upon seventeen-year-olds, and the reality that the democratic process may prefer this circumstance, in favor of the mere philosophical views of the justices themselves, would be "to replace judges of the law with a committee of philosopher-kings."[301]

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[294] *See id.* at 874 (Scalia, J., dissenting).

[295] *Id.* at 876-77 (Scalia, J., dissenting).

[296] *Id.* at 877 (Scalia, J., dissenting).

[297] 492 U.S. 361 (1989).

[298] *See* U.S. CONST. amend VIII.

[299] *See Stanford*, 492 U.S. at 373-76.

[300] *See id.* at 378.

[301] *Id.* at 379. Compare Justice Scalia's position with Bickel's admonition that "it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government; and in this world at least, it would not work." BICKEL, *supra* note 43, at 200.

To better appreciate Plato's concept of the philosopher kings, see Plato, *The Republic*, *in* PLATO, THE REPUBLIC AND OTHER WORKS 7-316 (B. Jowett, trans., Anchor Books, 1989).

Of course, this is not to say that Justice Scalia's methodology is indistinguishable from that of Justice Harlan. In fact, quite the contrary is true. Unlike Justice Harlan, Justice Scalia rejects the notion of "substantive due process," arguing that the Constitution's plain language of "process," by definition, precludes internal substance.[302] Justice Scalia thus rejects the methodology Justice Harlan employed in the *Poe* dissent and *Griswold* concurrence as improper judicial roaming in the legislative field.[303] Also unlike Justice Harlan, who proved, at times, willing to look beyond the text of legal documents[304] (though not to the same degree as many of his Warren Court colleagues), Justice Scalia requires strict adherence to the text itself and its "dated" meaning.[305] As Justice Scalia

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[302] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 268, at 24-25. Justice Scalia explained his opposition to "substantive" due process this way:

> it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require—notably, a validly enacted law and fair trial. To say otherwise is to abandon textualism and to render democratically adopted texts mere springboards for judicial lawmaking.

*Id.*

Compare this with Justice Harlan's *Poe* dissent. *See* Poe v. Ullman, 367 U.S. 497, 548-551 (1961) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

*Cf.* Anthony C. Cicia, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241, 2250 (1996) (arguing that the distinctions between Justice Harlan's substantive due process jurisprudence and that of Justice Scalia are "illusory"). Indeed, Cicia argues, there are many similarities between Scalia's approach and Harlan's in substantive due process cases: "(1) their belief in judicial restraint; (2) their reliance on tradition; (3) their beliefs about the proper sources of tradition; and (4) their narrow definition of an asserted right." *Id.* at 2261.

[303] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 268, at 24-25. *See also* Scalia, *The Rule of Law as a Law of Rules*, *supra* note 252, at 1180 (stating his preference for rules rather than balancing tests because "[o]nly by announcing rules do we hedge ourselves in").

[304] *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting). *But see* California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring ) (explaining that the Confrontation Clause means what it says: "the right to meet face to face all those who appear and give evidence at trial").

[305] *See* SCALIA, A MATTER OF INTERPRETATION, *supra* note 268, at 39-40.

explains, "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[306] For Justice Scalia, it is only the words of legal texts that have the force of law.[307] Legislative history and appeals to intentionalism supply only subjective information and are, therefore, mere attempts to glean meaning from textual language.[308] Nonetheless, Chow astutely explains that Justice Scalia's textualism does not preclude his prudentialism.[309] As Chow notes, Justice Scalia's jurisprudence meets the "web of beliefs" strand of prudentialism, as Justice Scalia "views [textual] meaning as coherence with a web of [existing] interpretive materials."[310] Justice Scalia's preference for dated meaning and his related refusal to consider "evolutive developments in social values" thus makes his coherentist epistemology more formal than others in the prudential school (like Justice Harlan, who observed that "*tradition is a living thing*"), but prudential nonetheless.[311] Moreover, Justice Scalia's place in the prudentialist school is

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[306] *Id.* at 23.

[307] *See id.* at 17 ("It is the *law* that governs, not the intent of the lawgiver.").

[308] *See id.* at 36. Justice Scalia argues that,

> [Legislative history] has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law .... Legislative history provides, moreover, a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive and there is something for everybody .... The variety and specificity of result that legislative history can achieve is unparalleled.

*Id.* at 35-36.

*See also* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597 (1991) (Scalia, J., concurring in the judgment) (demonstrating that the use of legislative history to interpret the Federal Insecticide, Fungicide, and Rodenticide Act actually provided no objective meaning of the statute). Justice Scalia, however, makes exceptions to this philosophy in the case of scrivener's errors or where his textualism would lead to absurd results. *See* Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) (Scalia, J., concurring).

[309] *See* Chow, *supra* note 12, at 804-809. Chow notes that critics of Justice Scalia's methodology see his textualism as a type of foundationalism. *See id.* at 804 (citing Eskridge, *supra* note 46, at 638). Chow argues, however, that there is "no fundamental difference" between Scalia's epistemology and that of Eskridge's dynamic statutory interpretation. *Id.* at 809.

[310] *Id.* at 808.

[311] *Id.* at 809.

enhanced, as the cases demonstrate, first, by his fidelity to tradition in the Burkean mold, revering tradition both because evolving law bears the imprimatur of historical customs and practices and because subsequent generations of lawmakers and judges owe allegiance to it for its own sake;[312] and second, by his preference for leaving the primary law development function to legislators.[313] Justice Scalia's overall jurisprudence reflects a cautious effort to limit the discretion of judges. In this sense, in particular, Justice Scalia is standing on Justice Harlan's prudential shoulders.

### B. JUSTICE SOUTER AND THE HARLAN LEGACY

Justice Souter is an interesting example to examine briefly, as his temperament and demeanor—sagacious, intellectual, moderate—mimic that of Justice Harlan. As mentioned earlier in this article, Justice Souter even identified Justice Harlan as his judicial model during Justice Souter's 1990 confirmation hearings before the Senate Judiciary Committee.[314]

Jurisprudentially, Justice Souter, like Justice Harlan, respects precedent and laments the overruling of cases.[315] Justice Souter also has recently embraced the

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[312] *See, e.g.*, Rutan v. Republican Party of Illinois, 497 U.S. 62, 95-96 (1990) (Scalia, J., dissenting) (defending the status of tradition as nearly dispositive in constitutional adjudication). *But see* Young, *supra* note 5, at 623 (arguing that Justice Scalia and Judge Bork are "not really conservative at all").

[313] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (arguing that the invalidation of a Colorado constitutional amendment prohibiting protected status for homosexuals "is an act, not of judicial judgment, but of political will"). *See also* SCALIA, A MATTER OF INTERPRETATION, *supra* note 268, at 136 (stating that "[j]udges are *not*, however, naturally appropriate expositors of the aspirations of a particular age; that task can be better done by legislature or by plebiscite").

Justice Scalia also, like other prudentialists, rejects the view that the Constitution is itself an abstraction. *See id.* at 134 ("There is no [abstract] philosophizing in our Constitution, which . . . is a *practical and pragmatic charter of government.*") (emphasis added).

[314] *See supra* text accompanying note 10.

[315] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854-855 (1992) (joint opinion of Souter, O'Connor, and Kennedy, JJ.) (discussing the importance of following *stare decisis* and stating that cases should be overruled only in compelling circumstances).

In fairness, Justice Scalia, too, respects the doctrine of *stare decisis*, although he does not make it the focal point of his jurisprudential worldview. As Justice Scalia himself states, "I cannot deny that *stare decisis* affords some opportunity for arbitrariness—though I attempt to constrain my own use of the doctrine by consistent rules . . . . *stare decisis* is not *part* of my originalist philosophy; *it is a pragmatic exception to it.*" SCALIA, A MATTER OF

role of tradition in constitutional adjudication, although in a more limited sense than that advocated by Justice Harlan (and Justice Scalia).[316] Although Justice Souter appears to advocate a less restrained judiciary than did Justice Harlan, his sense of prudence in decisionmaking also places him squarely on Justice Harlan's jurisprudential shoulders.[317]

First, as to their prudential similarities, Justice Souter's methodology is driven by deference to judicial precedent and his defense of *stare decisis*. For example, Justice Souter helped author the joint opinion in *Casey* that Justice Scalia criticized so candidly.[318] In Part III of the *Casey* opinion, the Court, per Justice Souter, considering the question of whether *Roe* should be overruled, wrote that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[319] Although Justice Souter acknowledged that *stare decisis* cannot be followed blindly in every constitutional case, he nevertheless treated the principle's function as a pragmatic one: "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the . . . costs of reaffirming and overruling a prior case."[320] Guided by these practical considerations, Justice Souter (along with joint authors Justice O'Connor and Justice Kennedy) found that *Roe* had proven disagreeable, but not "unworkable."[321] Moreover,

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INTERPRETATION, *supra* note 268, at 140 (emphasis added in part).

[316] *See* Washington v. Glucksberg, 117 S.Ct. 2258, 2275 (1997) (Souter, J., concurring).

[317] *See* Kan, *supra* note 268, at 1426-27. Kan argues that "pragmatism" does not fully explain Justice Souter's jurisprudence, *id.* at 1402-03; nevertheless, the author perpetuates the comparisons between Justice Souter and Justice Harlan, stating that Justice Souter, like Justice Harlan, is "a conscientious judge exercising prudence." *Id.* at 1426.

*Cf.* YARBROUGH, *supra* note 9, at 337 (explaining that Justice Harlan was "clearly devoted to the 'passive virtues' he found implicit in the principles of separation of powers, federalism, majoritarian democracy, and precedent."). In Yarbrough's view, however, Justice Harlan, like Justice Souter after him, saw the judge's own sense of self-restraint as the best means of anchoring the judiciary, rather than the less effective restraints imposed by "the inherent ambiguities of constitutional text and history." *Id.*

[318] *See Casey*, 505 U.S. at 854 (joint opinion of Souter, O'Connor, and Kennedy, JJ.).

[319] *Id.*

[320] *Id.*

[321] *See id.* at 855 (joint opinion of Souter, O'Connor, and Kennedy, JJ.).

overruling *Roe* without a "most compelling reason" would undermine the Court's legitimacy.[322] Prudential factors that inform the doctrine of *stare decisis* therefore, counseled *Roe's* reaffirmation.[323] Justice Souter's concerns rose again later in his *United States v. Lopez* dissent, in which the Justice criticized the Court for departing from nearly fifty years of Commerce Clause precedent in invalidating a federal statute prohibiting the possession of firearms in school zones.[324] In Justice Souter's opinion, the Court's decision relied upon notions that had been discredited by the Court during the watershed 1937 term and ignored the very nature of rationality review in Commerce Clause jurisprudence, a standard well-established over the preceding five decades.[325] Once again, Justice Souter saw the Court's defiance of precedent as a strike against its legitimacy in the constitutional structure.[326]

Importantly, unlike Justice Scalia, Justice Souter embraces the substantive due process theory that Justice Harlan advanced in *Poe*.[327] Justice Souter's con-

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[322] *Casey*, 505 U.S. at 867 (joint opinion of Souter, O'Connor, and Kennedy, JJ.).

[323] See id. at 869 (joint opinion of Souter, O'Connor, and Kennedy, JJ.). *Casey* was one of only a few recent cases in which Justice Souter and Justice Scalia have butted heads on jurisprudential issues. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687 (1994). In *Grumet*, where the Court in an opinion by Justice Souter held unconstitutional a New York statute creating a special school district for Satmar Hasidism, Justice Scalia authored a characteristically strong dissent, accusing Justice Souter of abandoning text and history as a jurisprudential guide. *See id.* at 732 (Scalia, J., dissenting). Justice Souter responded by quoting Justice Cardozo's statement that the dissenter is like "'the gladiator making a last stand against the lions.'" *Id.* at 708 (quoting BENJAMIN CARDOZO, LAW AND LITERATURE 34 (1931)). "Justice Scalia's dissent is certainly the work of a gladiator," Justice Souter wrote, "but he thrusts at lions of his own imagining." *Id.*

*See also* Printz v. United States, 117 S.Ct. 2365 (1997) (Souter, J., dissenting) (arguing that Justice Scalia's majority opinion, invalidating portions of the Brady Handgun Violence Prevention Act on federalism grounds, misread Madison's theory of the subject in the *Federalist*).

[324] 115 S.Ct. 1624 (1995).

[325] *See id.* at 1653-54 (Souter, J., dissenting).

[326] *See id.* at 1657 (Souter, J., dissenting) ("[T]oday's decision . . . [is] hardly an epochal case. . . . [But] not every epochal case has come in epochal trappings . . . . But we know what happened.").

[327] *See Poe*, 367 U.S. at 549 (Harlan, J., dissenting). *But see* Cicia, *supra* note 302, at 2261 (arguing that Justice Harlan's formulation and Justice Scalia's theory are not substantially different).

currence in *Washington v. Glucksberg*, in which the Court upheld a state law prohibiting physician-assisted suicide,[328] provides direct evidence of this. In *Glucksberg*, Justice Souter agreed that the respondents had failed to demonstrate the law's invalidity but wrote separately to explicitly defend Justice Harlan's *Poe* opinion and the notion of substantive due process contained therein.[329] After an exhaustive study of the Court's precedents dealing with the Due Process Clause's protection of liberty, Justice Souter argued that Justice Harlan's opinion defended not merely traditions based in social and political practice but rather *judicial* tradition, "the tradition of substantive due process itself, and his acknowledgment of the Judiciary's obligation to carry it on."[330] Justice Souter thus rejected implicitly Justice Scalia's extreme position of "equating reasonableness with past practice described at a very specific level,"[331] preferring instead to look broadly at the constraints imposed by the "values . . . truly deserving constitutional stature" and the nature of constitutional review in this area, which requires reasoned judgment rather than mere deference to majorities.[332] Balancing the competing claims, then, Justice Souter conceded that the practice of physician-assisted suicide could fall within a broadly defined social tradition of permitting the medical profession to serve "the whole person," but ultimately found that Washington's law here survived constitutional scrutiny because of the significance of the state's interests.[333] In this area, at least, Justice Souter was willing to defer to legislative judgments, saying that "[t]he Court should accordingly stay its hand to allow reasonable legislative consideration" given the legislature's superior "institutional competence" on this issue.[334] Justice Souter's was thus a defense of the common-law method that Harlan himself espoused, particularly in the area of due process jurisprudence.

It is evident that Justice Souter's respect for precedent and his affinity for Justice Harlan's *Poe* methodology in the substantive due process arena bring the Justice firmly within the prudential school with Justice Harlan. A caveat is, however, in order. One must note that Justice Harlan's *Poe* dissent took a strong

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[328] 117 S.Ct. 2258 (1997).

[329] *See id.* at 2275 (Souter, J., concurring).

[330] *Id.* at 2280 (Souter, J., concurring).

[331] *Id.* at 2281 (Souter, J., concurring).

[332] *Id.* at 2283 (Souter, J., concurring).

[333] *See id.* at 2288-89 (Souter, J., concurring).

[334] *Glucksberg*, 117 S. Ct. at 2293 (Souter, J., concurring).

view of social custom and practice as deserving of "constitutional stature," as Justice Souter opined.[335] Such practices as adultery, fornication, and homosexuality, however, could not gain similar constitutional protection as contraception because there was no identifiable tradition of tolerance regarding those matters.[336] One wonders, though, whether Justice Souter would be more willing to expand the concept of "liberty" to include matters of personal conduct such as these, particularly in light of his reluctance to join Justice Scalia's deeper commitment to legal positivism.[337] Regardless, Justice Souter's eye for precedent and interpretive coherence help place him, too, alongside Justice Harlan among prudentialist justices.

## V. CONCLUSION

The second Justice Harlan proved to be a model of prudentialism. As his opinions demonstrate, Justice Harlan favored strongly the consideration of social and political tradition in adjudicating constitutional cases, following the Burkean notion that subsequent generations owe allegiance to the practices of their forefathers, thus creating a political and legal continuity that stabilizes and strengthens the rule of law. Justice Harlan also believed that reasoned judgment required the consideration of social values and mores, often embodied in cultural traditions, so that legal decisions cohere within that web of values. In addition, Justice Harlan decried judicial intervention in matters he viewed as best left to the democratic processes, lamenting the fact that judicial adventurism designed to reach an earthly Paradise would ultimately create a Terrestrial Hell.[338] Within this contextual methodology, then, the Justice urged restraint, sagacity, and moderation; in a word, prudence.

Justice Harlan's jurisprudential legacy, his method and the outcomes to which the Justice reasoned, are not to be found helplessly in dusty books shelved in the nation's law libraries. Rather, Justice Harlan's legacy lives in the work of subsequent Supreme Courts, and lower courts, that have relied upon his intellect and reason. In particular, Justice Harlan's legacy lives in the current Supreme Court. Justice Scalia's jurisprudence is, like Justice Harlan's, driven by a respect for tradition, deference to the political branches, and a concern for restraining

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[335] *See* Poe v. Ullman, 367 U.S. 497, 553 (Harlan, J., dissenting).

[336] *See id.* at 552-53. *See* Cicia, *supra* note 302, at 2247 (stating that Harlan tempered the liberality of his *Poe* dissent with an "emphasis on the common law tradition").

[337] *See* Kan, *supra* note 268, at 1426 (explaining Justice Souter's view that "if there is a profound social problem long ignored by the two political branches, judges must resolve it").

[338] *See supra* text accompanying note 55.

judicial discretion. In addition, Justice Souter's jurisprudence tracks that of Justice Harlan insofar as Justice Souter follows the demands of *stare decisis* conscientiously and carefully balances the interests of the individual against those of the government, recognizing the same inherent tension between liberty and authority that Justice Harlan recognized so often. Although Justices Scalia and Souter often reach different results, this fact is further evidence that the prudential school of jurisprudence is broad enough to accommodate judges from across the spectrum, so long as those judges are committed to the virtues of traditionalism, coherence, and legal positivism without foundations.

Justice Harlan's method in various contexts is not without its critics. It is, however, a reflection of one man's desire to preserve the integrity of the judiciary by pursuing a tolerable constitutional order. In doing so, Justice Harlan's legacy was not merely the exercise of prudence but the preservation of the rule of law.