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Justice Harlan's Conservatism and Altenative Possibilites

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JUSTICE HARLAN'S CONSERVATISM AND ALTERNATIVE POSSIBILITIES*

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I. IN WHAT SENSES WAS JUSTICE HARLAN CONSERVATIVE?

Bruce Ackerman and Charles Fried's rich essays[1] address the subject of Justice Harlan as a conservative. One who comes to this topic has in mind questions like: Was Justice Harlan a conservative? If so, what kind of a conservative was he? How did his judicial actions exemplify a conservative approach? Most importantly, is his conservatism an appealing model for modern judicial practice?

Professors Ackerman and Fried's slices on this topic reflect their own casts of mind and philosophies of judging. Fried looks at a broad range of Justice Harlan's opinions and sets them against particular conservative qualities that Fried commends. He manages a few acerbic swipes at those who have failed to exhibit these virtues, most notably Justice Douglas. Ackerman presents a contrast of two grand themes, two fundamentally opposed approaches to constitutional adjudication. Justice Black, with his expressed views somewhat improved by constructive re-creation, is revealed as an Ackermanian hero who begins with big general ideas and works down; Justice Harlan's common law approach to constitutional decision making is shown to have grave defects. Although Ackerman's final paragraph says he has not "done much more than express some doubts"[2] about Harlan's method, no reader will fail to grasp Ackerman's own strong commitment to the contrary approach.

What is a conservative judge? Wisely perhaps, neither Fried nor Ackerman take this question head on. But I think that facing it allows one better to understand Justice Harlan's place and how the two essays relate to him and to each other. Distinguishing conservatism in basic social philosophy, conservatism in politics, and conservatism in judging is a helpful start.

With controversy and confusion reigning about what is true conservatism in each arena, I settle here for brief assertion rather than

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1. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5 (1991); Charles Fried, *The Conservatism of Justice Harlan*, 36 N.Y.L. SCH. L. REV. 33 (1991).

2. Ackerman, *supra* note 1, at 32.

developed argument. Conservatism in social philosophy involves limited confidence in the ability of human beings to understand themselves and their societies, skepticism about abstract ideas, fear of radical social changes based on the application of abstract ideas, and severe doubt that people can restructure their societies in fundamental ways to produce human beings and institutions of a much "higher" order. Political conservatism is wedded to traditions and leery of altering the status quo; it opposes gross political reform. Since most reform in the history of our country has been toward the left, political conservatives are on the "right" side of the political spectrum. Edmund Burke's *Reflections on the Revolution in France*,[3] with its eloquent opposition to radical change based on abstract, optimistic ideas of the French Enlightenment, is understandably the most revered of conservative texts; reading it illuminates how conservatism in social philosophy ties to political conservatism. But the two are not always joined. By most criteria, Richard Posner's claims that "wealth maximization" should govern a social order[4] do not represent a conservative social philosophy. In our comparatively capitalist society, however, those claims may have politically conservative implications, supporting existing power and opposing major social change. Reinhold Niebuhr, a leading Christian thinker, had a deeply unhopeful view about human nature and what social orders might achieve, but his sensitivity to social injustice led him to urge substantial reform toward the left.[5] He was politically liberal and philosophically conservative.

Conservatism in judging concerns the criteria judges employ to decide cases. Although the phrase "judicial restraint" does not appear in either Ackerman or Fried's essay, I think of conservatism in judging cases as something close to exercising judicial restraint, if not identical with it. A conservative judge conserves and carefully elaborates upon what predecessors have done rather than striking out on his or her own in an active way. In constitutional cases, there are three obvious sources of what the judge might conserve. The first is the original Constitution or Amendments: what is in the text itself or the understandings of the adopters. A second source is decisions by the federal political branches and state governments. A third is the body of doctrine and values developed in earlier judicial opinions. Although one can trace connections

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3. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (J.G. Pocock ed., 1987).

4. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

5. *See* REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY (1952); REINHOLD NIEBUHR, THE NATURE AND DESTINY OF MAN (1941); REINHOLD NIEBUHR, AN INTERPRETATION OF CHRISTIAN ETHICS (1935).

between broader conservatism and conservatism in judging, someone who is philosophically and politically a liberal might believe that courts should have a limited role in the politics of a democracy and, therefore, endorse a highly conservative role for judges. Felix Frankfurter was certainly not a political conservative, yet he was a strong proponent of judicial restraint in constitutional cases.[6] His example is particularly important for us because he had a great influence on Justice Harlan during Harlan's early years on the Supreme Court.

Where did Justice Harlan stand? He was a judicial conservative in all three senses of restrained judging. As Ackerman and Fried both emphasize, he was hesitant to overrule earlier decisions and break with established doctrines. He was also hesitant to overturn decisions of the political branches and to disregard what he thought was a *decisive* understanding to be found in the constitutional text and intentions of the adopters.

Without going beyond the evidence of his opinions and my impressions during the tremendously rewarding year I spent with him as a law clerk, I am confident that he was conservative, at least moderately conservative, in social philosophy. He had no appetite for grandiose intellectual schemes or programs of social reform. I believe he would have agreed with Michael Oakeshott that government is a practical discipline, learned mostly through practice rather than by mastering abstract ideas.[7] Justice Harlan believed that judges should detach themselves from ordinary politics, and he did not vote in elections after becoming a judge. He talked rather little (at least to clerks) about political issues, but my sense is that he was somewhere near the middle of the political spectrum, particularly sensitive to intrusions into personal life, and probably further toward the left on issues of civil liberty and international relations than on issues of economic and social policy. This is the understanding of Justice Harlan and of conservatism that I bring to these papers.

Ackerman and Fried convey a good sense of Justice Harlan and his judicial philosophy. That philosophy was not systematic; it was mainly expressed in what he did and articulated when needed as particular issues arose. In my experience, Harlan was both resigned to his role as a dissenter and relatively sanguine about the long-term health of the Supreme Court and the country. He cared very deeply about trying to get things right, and this motivated his high standards of scholarly craft, but

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6. See, for example, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), where Frankfurter stated that "[d]isregard of the inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces . . . [but] may well impair the Court's position as the ultimate organ of 'the Supreme Law of the Land.'"

7. *See* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS 129 (1962).

he faced defeat with equanimity, displaying the almost stoic quality Ackerman mentions in connection with more personal travails.[8] Fried talks about Harlan being "enraged," and his strong opinions reflecting "wrath."[9] I respect Fried's mastery of the language too much to suppose that these are just loose words meant as equivalents for very strong dissents, but during my time as a clerk, during which major constitutional decisions went against Harlan, I never witnessed anything approaching the emotions of rage and wrath about majority results or opinions. Ackerman puts a lot of stress on Harlan's "patrician" background.[10] Perhaps he is right to suggest that that background deeply affected Harlan's self-conception. Nevertheless, I am sure Harlan would strongly have rejected any notion that the health of the federal judiciary and the common law approach of courts depended on a supply of patrician judges. Among the judges he admired most were Hugo Black, Felix Frankfurter, and Henry Friendly. Harlan's sense of an elite in the law was an elite of intelligence, competence, diligence, and integrity, not an elite of background and class. Harlan would not have shared Ackerman's worry about the ability of judges in a pluralist society to carry forward common law traditions of judging.

As Fried points out, Harlan's conservatism was hardly dogmatic.[11] He was unafraid to extend precedents or to innovate in directions typically thought of as liberal when that seemed appropriate to him. His opinion for the Court in *Cohen v. California*[12] and his dissent in *Poe v. Ullman*[13] are especially notable, and Gerald Gunther reminds us that they are by no means isolated examples.[14] Nevertheless, Harlan's judicial record overall marked him as conservative both in the narrow judicial sense and in broader senses of that word.

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8. *See* Ackerman, *supra* note 1, at 10-11.

9. Fried, *supra* note 1, at 44-46.

10. *See* Ackerman, *supra* note 1, at 10.

11. *See* Fried, *supra* note 1, at 36-37, 50-51.

12. 403 U.S. 15 (1971).

13. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

14. *See* Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y.L. SCH. L. REV. 67, 69-70 (1991) (citing Street v. New York, 394 U.S. 576 (1969); Ginzburg v. United States, 383 U.S. 463, 493 (1966) (Harlan, J., dissenting); Noto v. United States, 367 U.S. 290 (1961); Scales v. United States, 367 U.S. 203 (1961); Yates v. United States, 354 U.S. 298 (1957)).

II. COMMON LAW CONSTITUTIONALISM AND THE SUSPECT CONSERVATISM OF ACKERMAN'S INDEPENDENT CONSTITUTIONALISM

Ackerman contrasts the common law constitutional conservatism of Justice Harlan against a model of what he calls an independent constitutionalism "which is no less self-consciously conservative than Justice Harlan's, but which differs radically in its understanding of the tradition it proposes to conserve."[15] We are presented, as it were, with two versions of conservative constitutional adjudication. One is to develop constitutional law step by step, in the manner of the common law. The other is to glean major abstract ideas represented by constitutional movements, and to develop and apply them. The movements may result in new constitutional texts, such as the original Constitution, the Bill of Rights, and the Reconstruction Amendments, but they need not, as the New Deal did not, produce major change in any existing constitutional text. For Ackerman, the difference in the two basic approaches to constitutional decision making is highlighted by *Wesberry v. Sanders*,[16] which he discusses at length.[17] Justice Harlan rejected the Court's view that the original Constitution, through the phrase in Article I, Section 2, that the "House of Representatives shall be . . . chosen . . . by the People of the several States,"[18] requires equal population districting within states.[19] For Ackerman, Harlan's position "suggests the desperate lengths he would go to deny that popular sovereignty is one of our Constitution's foundational commitments,"[20] and an "almost Pavlovian aversion to encounters with the democratic aspect of our constitutional tradition."[21]

My comparing Harlan's approach in *Wesberry* with that of Ackerman's independent constitutionalist is rendered difficult because Ackerman's apparent view of some facts and inferences from facts is so different from mine. Given the then shortly to be decided and more important case of *Reynolds v. Sims*,[22] which required equal population apportionment for state legislatures under the Equal Protection Clause, the

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15. Ackerman, *supra* note 1, at 7-8.

16. 376 U.S. 1 (1964). Some diligent reader might discover that *Wesberry* was decided during the Term when I was a law clerk, so it may be well to note that I did not work on the case and that what I write here does not depend on personal recollection of how Justice Harlan regarded the case.

17. *See* Ackerman, *supra* note 1, at 12-18.

18. U.S. CONST. art. I, § 2, cl. 1.

19. *See Wesberry*, 376 U.S. at 24 (Harlan, J., dissenting).

20. Ackerman, *supra* note 1, at 16.

21. *Id.*

22. 377 U.S. 533 (1964). *Reynolds* was argued five days before *Wesberry* was argued.

Court might have handled *Wesberry* differently. It could have reached essentially the same conclusion through the equality component of the Fifth Amendment's Due Process Clause, or said explicitly that the language of Article I should receive a creative reading in light of equal protection values.[23] But Justice Black's opinion for the Court in *Wesberry* is squarely grounded in the text of Article I, Section 2. The words "chosen . . . by the People"[24] are said to mandate equal districts, a conclusion bolstered by the allocation, in the same Section, of representatives to states primarily on the basis of population.[25]

How persuasive is Justice Black's conclusion? Relying upon the materials presented in the Black and Harlan opinions, I think the "original intent" was not to correct malapportionments. To be more precise, I believe that that possibility was neither in the minds of the adopters nor would have occurred to a reasonable, contemporaneous, trained reader of the language. Not only would adopters and reasonable readers have denied that equal population districts were a specific objective of the language, they would not have supposed that the clause was appropriately open to later extension of that sort. Some fervent believers in equal districting might have "hoped" for such an extension if asked, but few would have expected it or thought it proper for a judge. If asked, nearly all would have said: "This clause is about direct election, not equal population districts."

Various factors make this conclusion seem compelling to me. Section 3 of Article I says that senators from each state shall be "chosen by the Legislature thereof."[26] The structure of the phrase "chosen . . . by the People" and its placing in a parallel position to the contrasting phrase of Section 3 show that its main and obvious purpose was to establish direct election of representatives as a balance to the indirect election of senators (not altered until 1913 by the Seventeenth Amendment[27]). The phrase "by the People" is inadequate to suggest equal districting. Using population as the primary device to apportion representatives among states hardly amounts to requiring equal population districting within states. States had to have the same electors for representatives as for the most numerous branch of the state legislatures, but this permitted them to exclude altogether not only women and blacks, but many white adult males as well. Section 2 adopted a three-fifths formula for counting slaves

23. I do not mean to imply that either of these avenues would have been uncontroversial.

24. U.S. CONST. art. I, § 2, cl. 3.

25. *See Wesberry*, 376 U.S. at 7-8, 17-18.

26. U.S. CONST. art. I, § 3, cl. 1.

27. U.S. CONST. amend. XVII.

in determining representation in the House of Representatives.[28] As a clear compromise, a slave was to count as three-fifths of a person in deciding how many seats a state would receive. If Section 2 were assumed to require equal population districting *within* states, how were states to count slaves? Was the three-fifths formula to extend to states' districting, or could they perhaps count each slave as anywhere between zero and one? It is extremely unlikely that the federal provision was meant to embroil federal courts in deciding these slave-counting questions. Finally, the districts for state legislatures that picked senators could be grossly malapportioned. If that was acceptable, it is implausible that unrevealing words were understood to demand equal apportionment for House districts.[29]

In my view, no sincere, moderately competent, originalist approach that relies heavily on the specific text of Article I, Section 2, can reach the conclusion arrived at in *Wesberry*. But that is precisely the argument made by Justice Black for the Court.[30] One reason why Justice Harlan concentrated so hard on original meaning in *Wesberry* was because that was what the majority relied upon. His dissent needed to rebut the majority's claims. But this is hardly a full explanation, because Harlan also focused on original meaning in *Reynolds v. Sims*,[31] although the majority there did not. Another reason for his attention in *Wesberry* was that he regarded the crucial clause as not relevantly open-ended and subject to changing application with the times—it simply had nothing to do with how states chose to district. Finally, no significant prior case bore on the disputed issue. Contrary to what Ackerman says, I do not find it "odd" that in *Wesberry* Harlan departed from his usual attention to developed case law and paid so much attention to original intent.[32]

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28. *See* U.S. CONST. art. I, § 2, cl. 3.

29. Congress retained a supervisory control over state districting for elections to Congress. Comments focused on that power suggest that the states were otherwise to have great discretion, not that Congress was to *enforce* an equal population requirement already established. *See* A.B.A. SPECIAL COMM. ON ELECTION LAW AND VOTER PARTICIPATION, CONGRESSIONAL REDISTRICTING 18-19 (1981).

30. *See Wesberry*, 376 U.S. at 7-8, 18.

31. 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

32. Ackerman says some puzzling things about Harlan's acceptance of the idea that racially motivated malapportionments are unconstitutional. *See* Ackerman, *supra* note 1, at 13-15, 14 n.22. For Ackerman, this acceptance undermines Harlan's intentionalist approach to the Fourteenth Amendment's Equal Protection Clause. But if it takes the Fifteenth Amendment's explicit language about denial of the vote on the basis of race to protect voting rights of blacks, that only strengthens the argument that the Fourteenth Amendment did not protect the voting rights of blacks (unless it seems, on balance, that the Fifteenth Amendment was clarificatory), and also strengthens the argument that the Equal Protection Clause did not protect voting rights in general.

Reading Ackerman's essay suggests that he disagrees almost down the line with what I have just said. He apparently thinks that the arguments in *Wesberry* are pretty much of a toss-up if one is to concentrate, unwisely in his view, on the narrow significance of Section 2. If Ackerman really does think that, this suggests to me how much the attraction of "big ideas" empowers people to delude themselves about small recalcitrant details.

In any event, I believe that Ackerman's main response to what I have said, and to the claims in Harlan's opinion, is that they don't really make much difference. Even if the narrow originalist argument favors Harlan, and favors him strongly, Section 2 should be interpreted in light of big themes, including those emphasized by *later* constitutional movements. Fair representation is a big theme to be found in constitutional movements, and equal districting is an appropriate way to carry that theme through. Thus, the independent constitutionalist rightly reaches the *Wesberry* result as an application of Section 2.

My objective here is not to argue that this conclusion is wrong. I believe that, despite what may have been a limiting original understanding, the Equal Protection Clause was appropriately applied to voting, and that roughly equal population districting was the only administrable rule to achieve fairness in apportionment. Imposing a similar rule for congressional districting was also appropriate, and it mattered little, practically, whether that was done through the language of Section 2 or through the equality component of the Fifth Amendment's Due Process Clause. The Constitution should be read as a whole, and subsequently adopted text should affect how the original Constitution is interpreted, although the reading of "by the People" in *Wesberry* does seem to me to be on the far edge of what is appropriate in creative construction of constitutional language. Justice Black's simplistic "on its face" textual approach cannot be defended, but that is not of large importance for whether the Court's result, which the independent constitutionalist would also reach, is to be preferred to Justice Harlan's result.

What I want to explore is what *Wesberry* reveals about the conservatism of Ackerman's independent constitutionalist approach. Ackerman says that this approach is "no less self-consciously conservative than Justice Harlan's, but it differs radically in its understanding of the tradition it proposes to conserve."[33] According to Ackerman, for an independent constitutionalist, "one cannot understand the Founders or their great successors without recognizing that they were great gamblers on the power of untested abstractions."[34] This sentence follows a sentence indicating that the independent and common law constitutionalists have

33. *Id.* at 7-8.

34. *Id.* at 9.

"competing orientations to rationality."[35] The independent constitutionalist, we may conclude, distills central abstract ideas from the country's major constitutional movements, and then applies them to the subject matter at hand. He owes no special deference to: (1) the linguistic import of individual clauses or the adopters' narrow intentions for those clauses, (2) the judgments of contemporary political branches, or (3) doctrines or values reflected in judicial opinions. Certainly in *applying* those central abstract ideas, the independent constitutionalist displays none of the earmarks of judicial conservatism or conservatism in social philosophy. He starts at the top and uses *reason* to derive specific conclusions—precisely the mode of social analysis of which conservatives are leery. But, Ackerman may respond, the independent constitutionalist is conservative in conserving our central constitutional traditions, even if these call for approaches to particular cases that are decidedly unconservative in their methodology.

This response would be misleading in two respects. The first respect concerns selection of the central abstract ideas. Why, in reapportionment disputes, is democratic equality to win out over federalism or some notion of minimal interference of the judiciary with decisions about voting of other bodies with authority gleaned from relevant texts?[36] When one is interpreting ideas of large constitutional movements, one has a good bit of latitude in picking central ideas and ordering their priority. Someone who is conservative about methods of understanding will not feel very comfortable with this endeavor. In any event, more is involved in the independent constitutionalist's choice than determining central themes from the tradition. He must first decide that the *judge's role* is to choose such themes and apply them, because this concept of the judge's role best represents our tradition. That the Constitution originally had no Bill of Rights and that the first eight amendments applied only against the federal government may be some indication that the Founders did not expect courts applying the federal Constitution to play a major role in developing basic political values. As for the Reconstruction Amendments, one can emphasize the limited aspirations of the moderates rather than, as Ackerman does, the much greater ambitions of the radical Republicans.[37] Suppose someone tried to look *backward* to the tradition *without* a judgment about what kind of judicial role is best; he would be at least as

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35. *Id.*

36. A more conservative way to reach the conclusion that courts should impose equal population districts is to conclude that history shows that egregiously malapportioned state legislatures will not make corrections that cause members to lose seats, that judicial intervention is the only way to stop this, and that roughly equal districting turns out to be the only manageable judicial standard.

37. *See* Ackerman, *supra* note 1, at 6, 9, 11-12.

likely to settle on the restrained common law approach of Justice Harlan as the central themes approach of the independent constitutionalist. The choice to adopt the central themes approach does not itself flow from a conservative perspective. Indeed, the central themes or independent constitutionalist approach is nonconservative in its basic decision to look for central abstract ideas, as well as in its choices among plausible central abstract ideas, and in its applications of those ideas to legal cases. That approach *is more conservative* than one that says judges should write their own values (or what they believe are objectively correct values) into the Constitution, but that hardly is enough to recommend it to anyone who is a true conservative.

In truth, Ackerman's disagreement with Justice Harlan goes to the roots of the defining elements of conservatism. As one who has benefitted from Bruce Ackerman's encouragement to think bigger and more abstractly, I know from personal contact as well as from his writings of his confidence in the soundness and constructive power of abstract ideas and in the major social changes they suggest. His dispute with Harlan far transcends some limited question about the functioning of the American judiciary: it embraces the most fundamental issues of human understanding and social philosophy. Harlan was a true conservative. Ackerman's independent constitutionalist is strongly liberal and a social engineer, conceding only the point that judges must in some way connect the central premises of their reasoning to the past and preserve enduring values.

III. CONSERVATISM AND CRAFT

In the remainder of my essay, I want to discuss the connection between Justice Harlan's conservatism and features of his judicial life on which Fried and Ackerman comment: his dedicated craftsmanship, his use of balancing tests, and his rejection of formulaic holdings of the sort found in *Reynolds v. Sims*[38] and *Miranda v. Arizona*.[39]

In a striking paragraph, Fried connects careful craftsmanship to intellectual honesty and conservatism:

> It is this sort of rigorous analysis that characterizes Justice Harlan's conservatism, an analysis that formed the foundation of his unshakable conviction about the importance of intellectual honesty in his opinions. One can only possess this sort of conviction when one has worked over the record of a case, the

38. 377 U.S. 533 (1964).

39. 384 U.S. 436 (1966).

> precedents cited to the Court, and the arguments presented by counsel.[40]

Is "intellectual honesty" connected to great care? That depends on what one says and the degree of confidence one implies. Suppose after a slipshod review, one says, "the legislative history supports the plaintiff." That alone is not dishonest, if that is one's best guess at the time. But a *judicial opinion* holds itself out as being based on extremely careful review. Someone who has not done the work is being dishonest in implicitly claiming a foundation for conclusions that do not exist.

How does care relate to conservatism? Certainly we can imagine a judge of conservative inclinations who is confused, unperceptive, and not inclined to work hard; there are such judges. We can also imagine a liberal judge, or an Ackermanian independent constitutionalist, who is an extremely good craftsman. But I do believe there is a double connection between being a "legal craftsman" in the traditional sense and being conservative. For the activist judge, the traditional sources of precedent and original understanding just matter less than they do for the believer in judicial restraint. People work harder at and are more careful about things that matter more to them. Were judicial opinions fully candid, we might expect most independent constitutionalists to excel at broad historical interpretation and applications of central concepts of political philosophy, and the Harlan-like conservatives to master traditional legal sources. But opinions are not fully candid. Whatever they may believe, or intuitively perform without understanding, few judges write opinions that are openly and fully independent constitutionalist. Almost inevitably, judges claim support from mundane sources like precedent and narrow original intent. Judges who decide to reach a "good result" that is hard to square with those sources end up distorting them to reach their conclusions. So long as activist judges suppose that traditions, or maximum acceptability of their results, counsel opinions that pretend restraint, their opinions will have less integrity and reflect less craftsmanship than those of the best practitioners of restraint.

I do want to say that Justice Harlan's extraordinary craft and sincerity of opinion flowed primarily from his personal integrity and quality of mind rather than his conservative philosophy of judging. Near the end of his essay, Fried says "candor, care, being true to the facts, the record, and the precedents, and a modest respect for the other institutions that surround the Supreme Court—these are the hallmarks of Mr. Justice Harlan's conservative ethic."[41] I embrace this thought if the emphasis is on "Justice Harlan's" rather than "conservative," but I am uncomfortable

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40. Fried, *supra* note 1, at 49.

41. *Id.* at 51.

with how tightly Fried's form of expression ties most of these virtues to Harlan's conservatism.

How is "balancing," which Justice Harlan favored, connected to conservatism? Skepticism about abstract ideas and rapid change, and concentration on particular context, does incline one toward balancing approaches to the resolution of social problems. But an activist might also approve of some sorts of balancing formulations. Indeed, the compelling interest test, which is very hard for the government to surmount, is a kind of balancing test in which the strength of the government's need is measured against the strength of a principle that the government violates. Fried comments that balancing "must respect precedent" and "the competence and validity of the other decision-making centers."[42] "Respect" is a loose word. Perhaps Fried means only "pay serious attention to," but he may also mean "defer to in cases of genuine doubt." I agree with those who believe the tendency of most balancing tests is to induce such deference because it is difficult for a court to say that legislators or prior courts have considered all that is relevant but gotten the balance wrong. But a Justice less conservative than Justice Harlan could, with integrity, adopt balancing formulations that are much less deferential than his own approach.[43] A conservative who employs candid balancing will properly "respect" in the sense of "defer," but it does not follow, as perhaps Fried supposes, that balancing works as a method only when deference is accorded.

Finally, Ackerman writes as if the independent constitutionalist will accept judicial establishment of code-like rules, such as the *Miranda* warnings, whereas a common law constitutionalist will not.[44] He is right that Justice Harlan was generally resistant to such rules, and that someone inclined toward common law methods is less likely to embrace them quickly. Still, one might be conservative, one might believe in developing the law piece by piece in context, and nevertheless be persuaded that in a particular area only a code-like solution will yield adequate clarity and supervision of executive officers. The connection between Harlan's general judicial approach and nonacceptance of code-like resolutions is genuine, but it is by no means as tight as Ackerman implies.

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42. *Id.*

43. Recent Canadian constitutional decision making is instructive here. *See, e.g.*, R. v. Keegstra, 3 S.C.R. 697 (1990) (upholding Parliament's anti-hate propaganda statute as constitutional because the value of preventing harm caused by the intentional promotion of hate outweighs the relatively minor impairment of an individual's freedom of expression).

44. Ackerman, *supra* note 1, at 9-10. Fried makes a similar point in Fried, *supra* note 1, at 46-47.

IV. SUMMARY

Justice Harlan was a true conservative—a judicial conservative and a conservative in social philosophy. This much is shown by both Fried and Ackerman, though I believe Gerald Gunther's comments are a needed corrective to the overall impressions the two major essays yield.[45] Ackerman insightfully treats Justice Harlan's approach to constitutional adjudication as resembling that of traditional common law adjudication, a comparison the Justice himself had drawn.[46] Ackerman makes some appealing claims for an alternative independent constitutionalist approach, but he misleadingly parades this approach as if its conservative credentials are as strong as those of Harlan's approach. Fried is right in finding some connection between Harlan's conservatism and his craftsmanship and the use of balancing tests, and Ackerman and Fried correctly discern some connection between Harlan's conservatism and his disquiet with code-like resolutions. But the connections are looser than Fried and Ackerman suppose. Many judicial conservatives without Justice Harlan's personal qualities are not only weaker in craft but much less conscientious. Liberals can reasonably endorse balancing tests and conservatives may find that occasions call for courts to adopt code-like resolutions.

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45. *See* Gunther, *supra* note 14.

46. *See* John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Functions in Balance*, 49 A.B.A. J. 943 (1963), *reprinted in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN 289 (David L. Shapiro ed., 1969).