THE HARLAN COURT: A CONSTITUTIONAL ALTERNATE HISTORY*

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Walter Dellinger shared the widespread perception that the Burger Court was characterized by "rootless activism" rather than principled constitutional adjudication, and for him this put in question the legitimacy even of decisions that reached outcomes he thought politically or morally desirable. To explain what was wrong with such decisions, he often imagined the Court as it might have been if Justice John Marshall Harlan, who died in 1971, had lived another decade, and inspired an era of constitutional decisions deeply rooted in constitutional tradition and characterized by careful adherence to legal method. This Essay seeks to explain Dellinger's idea and its relevance today. The "Harlan Court" of Dellinger's imagination would have reached its decisions through opinions that generally built on the legacy of the Warren Court by the logical development of precedent, a refusal to practice the Burger Court's frequent tactic of obliquely undermining or underenforcing decisions a majority disapproved, and a commitment to persuading the reader's judgment rather than imposing judgments by rhetorical fiat. Dellinger thought the characteristics of the "Harlan Court" he imagined were equally valuable to correctly identifying the most common error he saw in early twenty-first century constitutional law: the belief or assertion that difficult constitutional issues can be resolved through some method of decision that avoids the exercise of judgment by the decision-maker.

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INTRODUCTION

One of the reasons that Walter Dellinger was a great lawyer was that he was gifted with a great imagination. The importance of imagination to his work as a lawyer can be seen throughout Walter's public and professional life. This was quickly obvious to anyone who was privileged to work with Walter on issues about the soundest advice to give policymakers when he headed the Office of Legal Counsel, or in constructing the most persuasive arguments in litigation for a private client or for the United States when he was acting Solicitor General. Walter could marshal a remarkable command of detail and technicality, but what was most remarkable to me was his ability to construct a pattern of reasoning out of the details and technical issues that no one else had seen, to reframe an entire problem and reorient the basic argument, to state a position on a long-debated question that was fresh and appealing. A smart lawyer can work out what arguments seem logically possible in a controversy given the relevant authorities; it takes the imaginative powers of a great lawyer to break out of the limitations everyone assumes are given and transform the discussion.

One of the many joys of knowing Walter was the role his imagination played in his general conversation, as well as in his professional thinking. Walter had a restless and inquisitive mind, and he loved to think and talk about many things—American history and politics, novels and music, and movies and sports . . . and about the law too, when he was, as it were, off duty. And because he was an active rather than a passive thinker, Walter was far more likely to give you a surprising spin on a topic than to recite the facts about it. Let me give you a small, personal example. Sometime in mid-1993, Walter and I had to attend a meeting in what was then called the Old Executive Office Building next to the White House. As we were about to walk in, Walter stopped me and told me to take a good look at that massive late nineteenth-century construction. What its builders were saying in granite, Walter told me, and by their rejection of the neoclassical style of earlier public buildings in DC, was that the post–Civil War federal government was no longer an experiment patterned after European ideas: the government was "here to stay" and to serve as the permanent center of the distinctively American community. It was a brief but memorable lesson in Walter's understanding of the course of American history.

This Essay is based on a different example of Walter's imagination in action. I think Walter might have called it a riff, in the conversational rather than the musical sense: an alternate history that he liked to toy with and which

he called "the Harlan Court." The idea, as Walter spun it out, went like this.[1] Before Justice Felix Frankfurter's retirement in 1962, the second Justice John Marshall Harlan worked to some extent in Frankfurter's shadow. Harlan was unwilling, much of the time, to go beyond the boundaries on constitutional thought and decision that Frankfurter sought to police. By the late 1950s, Frankfurter's influence was waning, but Harlan's respect for the older justice, and the genuine overlap in their views, led him often to join Frankfurter in dissent, or to echo Frankfurter's themes in separate opinions and even after the latter's retirement.

Harlan only began to come fully into his own in the mid-to-late 1960s, Walter thought, as his opinions increasingly displayed an approach to constitutional decision-making that was free of Frankfurter's substantive timidity and Frankfurter's ability to tie himself in conceptual knots. At the same time, Harlan's opinions in this period continued to show his deep commitment to intellectual rigor and professional craftsmanship that often seemed missing in opinions by other members of the later Warren Court.

In our world, Justice Harlan retired in September 1971 and died before the end of that year, as did his great intellectual rival, Justice Hugo Black (the justice for whom Walter clerked). With the departure of those two giants, the era of the Burger Court truly began.[2] But what would have happened, Walter speculated, if Justice Harlan had lived another decade or more? The answer, in Walter's constitutional alternate history, would have been the Harlan Court: a Supreme Court of which Harlan, who was emerging in the late sixties, immediately became the intellectual leader, and for which Harlan provided the measure for intellectual excellence and integrity.

In Walter's telling, his imagined Harlan Court would have differed sharply from the Burger Court of our actual timeline. Walter's Harlan Court would have carried on the main lines of development evident in the decisions of the 1960s, but with Harlan setting the standard, the Court would have done so guided by the combination of bold creativity *and* meticulous craftsmanship Walter thought increasingly evident in the later opinions of the historical Harlan.

1. I heard Walter discuss his Harlan Court idea on a number of occasions. There no doubt were minor differences in the way he presented it at different times, but I was always struck by its consistency and by the seriousness with which Walter articulated it. This Essay is nonetheless a development rather than a transcript of what Walter said, and I am responsible for many details.

2. For the two Justices' contrasting constitutional perspectives, see generally the enduring insights in SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). I address their disagreements in H. Jefferson Powell, *John Marshall Harlan and Constitutional Adjudication: An Anniversary Rehearing*, 9 BELMONT L. REV. 62, 64 (2021) [hereinafter Powell, *John Marshall Harlan*].

Walter never visualized the Harlan Court in much greater detail, at least in my presence. What I shall try to do in this Essay is fill out what this alternate-history Supreme Court era might mean and why it appealed to Walter. In Part I, I briefly remind the reader of what I think was clearly the negative inspiration for the imagined Harlan Court—the performance of the historical Burger Court. In Part II, I discuss three opinions written by Justice Harlan during his final Term on the Court that taken together illustrate much of what Walter found so appealing about Harlan's later opinions. In Part III, finally, I briefly suggest the significance of the alternate-history Harlan Court for how Walter thought, and we might think, about constitutional law.

I. THE PROBLEM WITH THE BURGER COURT

Vincent Blasi famously described the Burger Court as driven by "rootless activism,"[3] its decisions characterized by the aggressive exercise of judicial power by a Court without a clear or coherent idea of why it was doing so. The Warren Court "was an extraordinary phenomenon, minting new rights and doctrines" with great frequency, and its decisions had an evident "core coherence" that was both egalitarian (think *Brown v. Board of Education*[4]) and libertarian (think *Griswold v. Connecticut*[5] and much of its First Amendment jurisprudence), even if it was "suspected [of] lack of professional discipline and principle."[6]

In contrast, Professor Blasi—like many others then and after—saw the Burger Court as "pursu[ing] no agenda, no political philosophy or identifiable set of values."[7] Unlike the Warren Court, it did "not burn to remake the world"; and yet it too was both pugnacious in outcomes and frequently undisciplined in its reasoning.[8] The result was that, in Charles Fried's words, the Burger Court "piled incoherence on incoherence. It neither carried forward and rationalized the left-liberal thrust of the Warren Court nor resolutely dismantled it."[9] Walter accepted this critical account of the Burger Court (as do I), and it provided the negative backdrop or impetus for his alternate history of the Harlan Court.

3. *See* VINCENT BLASI, *The Rootless Activism of the Burger Court*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198–201, 205, 208 (Vincent Blasi ed., 1983).

4. 347 U.S. 483 (1954).

5. 381 U.S. 479 (1965).

6. Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 74–75 (1995) [hereinafter Fried, *Revolutions*].

7. Gene R. Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315, 318 (1984) (book review).

8. *Id.*

9. Fried, *Revolutions*, *supra* note 6, at 76.

Someone who knew Walter Dellinger's personal views moderately well (but only moderately) or who is simply cynical about constitutional law as a disciplined practice might object at this point that the Blasi/Fried account (even if accurate) gave Walter no reason to regret the Burger Court. After all, the objection would go, the Burger Court handed down many important decisions, the outcomes of which Walter strongly approved, counting only those after the departure of Harlan. Given Walter's staunch defense of it, *Roe v. Wade*[10] immediately comes to mind, but the Burger Court's expansion of substantive due process generally, its equal protection and gender decisions, the Watergate tapes case, the *Bakke* decision approving race-based affirmative action . . . overall, the list of such cases in line with Walter's views is extensive. The Burger Court may not have been perfect, our objector continues, but it did a lot for Walter's preferred causes.

The flaw in this objection is that Walter wasn't a cynic about constitutional law as a tradition of reasoned argument and analysis. Walter's constitutional law teacher (and mine), Charles L. Black, Jr., once wrote that "responsibility to reason, even technical reason, is the soul of the art of law," and Professor Black's words precisely state Walter's view of what makes a legal decision admirable.[11] It is not enough that the outcome, divorced from its reasoning, is desirable for some moral or political reason. The decision-maker must have reached the decision through disciplined adherence to the methods of legal reasoning accepted in our tradition. Those methods, further, are not algorithmic, as if law were a kind of decisional calculus, but require the exercise of judgment and imagination: law is an art.

Walter expressed this understanding of law memorably in an essay he wrote when he was the head of the Office of Legal Counsel ("OLC"), and thus a senior executive branch legal advisor. Noting that the OLC under his leadership had been criticized for adopting positions that the critics thought were inconsistent with statements Walter had made as a professor, Walter pointed out that, unlike law professors, executive branch lawyers "have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions."[12] The same is true, Walter thought,

10. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

11. CHARLES L. BLACK, JR., THE HUMANE IMAGINATION 26 (1986). In praising this collection of essays, Walter called Professor Black "the poet laureate of the American Constitution." *Id.* (statement on jacket).

12. Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIA. L. REV. 107, 109 (1995). The quotation in the text reads "may have," but the paragraph as a whole removes any suggestion that Walter doubted the obligation's force. He continued:

of lawyers on the bench and judicial precedent, including judges on the highest Court. It is this judicial tradition that disciplines the practice of constitutional law and provides the tools of thought and debate that legitimate decisions, especially on highly contested, politically charged issues.

From this perspective, his emphatic approval of the specific outcomes of some Burger Court decisions could not excuse in Walter's mind its frequent disregard for traditional norms of craftsmanship and respect for precedent. To be sure, the same faults were ascribed to many Warren Court cases, but the earlier Court's work product had an underlying consistency that invited rationalization and further development. The Burger Court's fitful combination of oblique retrenchment on its predecessor's precedents and aggressive extension of the Court's power, yet without any evident rationale, was distressing precisely because it undermined the legitimacy and defensibility of decisions Walter thought desirable and justifiable. In contrast, the Harlan Court, in his imagination, would have furthered the lasting themes of the Warren era. Under the intellectual leadership of John Marshall Harlan, a fastidious legal craftsman and above any suspicion of pursuing a covert liberal agenda, this alternate-history Court would have rendered decisions on issues such as reproductive freedom and racial justice that were patently legitimate (whatever their outcome and however contested) and built to last.

II. THE ROOTS OF THE HARLAN COURT

In talking about the Harlan Court, Walter Dellinger stressed what he saw as the significant development that Justice Harlan's constitutional opinions displayed in his last years, after the Frankfurter aura had faded. Walter never listed the opinions he had in mind, in part (or so I think) because he meant to describe an overall orientation to constitutional decision-making more than to praise specific constitutional judgments. Nonetheless, I think we can identify three specific opinions, each filed in a case decided in 1971, during the October Term 1970 (Harlan's last on the Court), that read together indicate some of the themes in Harlan's later opinions that characterize the Harlan Court of Walter's imagination. The first two opinions I know Walter consciously had in view; the

> When lawyers who are now at the Office of Legal Counsel begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions. That is not to say that prior opinions will never be reversed, only that there are powerful and legitimate institutional reasons why one's views might properly differ when one sits in a different place.

Id. at 110.

third exemplifies important features of Harlan's constitutional views that were equally important to Walter.

A. Cohen v. California

Justice Harlan's opinion for the Court in *Cohen v. California*[13] is justly famous. Cohen was convicted of disturbing the peace by wearing a jacket sporting a vulgar anti–Vietnam War slogan into a state courthouse; the Court held that the conviction violated his constitutional freedom of speech.[14] Harlan's majority opinion begins with a contrast: "This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance."[15] In reality, he goes on to show, *Cohen* presents a question of the greatest importance for our understanding of freedom of speech. A consistent feature of Harlan's legal thinking was his insistence on grappling precisely with the particular issues in a case or a line of reasoning rather than dealing in generalities,[16] and the *Cohen* opinion is carefully written to pivot around what Harlan identifies as the precise issue before the Court.

The first half of the analysis thus eliminates a variety of issues that *Cohen* did not raise.[17] The case involved "a conviction resting solely upon 'speech'" and "not upon any separately identifiable conduct" being regulated without regard to Cohen's message—and note Harlan's intellectually fastidious acknowledgment that Cohen did not vocalize his message, nicely communicated by the scare quotations around the word "speech"[18] and a citation to the early red-flag-display decision, *Stromberg v. California*.[19] The offense of conviction was not limited to maintaining decorum in a courthouse, and Cohen's mode of expression did not fall within "those relatively few categories" in which the very form of the expression permits government "to deal more comprehensively . . . . This is not, for example, an obscenity case," or one involving "fighting words" or a captive audience.[20]

Having eliminated what *Cohen* was *not* about, the opinion now turns to the exact "issue flushed by this case": "whether California can excise, as 'offensive

13. 403 U.S. 15 (1971).

14. *Id.* at 16, 26. My reading of *Cohen* reflects Walter's perspective as well as the insightful analysis in James Boyd White's *Living Speech: Resisting the Empire of Force*. *See* JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 175–97 (2006).

15. *Cohen*, 403 U.S. at 15.

16. *See* Powell, *John Marshall Harlan*, *supra* note 2, at 115–17, 124–28, 137–38 (discussing the role this concern plays in Harlan's famous dissent in *Poe v. Ullman*, 367 U.S. 497 (1961)).

17. *See id.* at 126 n.224 (referring to Harlan's "familiar technique of discussing so he could reject doctrines and principles that he thought did not apply" in a case).

18. *Cohen*, 403 U.S. at 18.

19. 283 U.S. 359 (1931).

20. *Cohen*, 403 U.S. at 18–22; *see Stromberg*, 283 U.S. at 368–70.

conduct,' one particular scurrilous epithet from the public discourse."[21] Harlan dismisses the rationale of the state court below that Cohen's vulgarity might provoke a lawless, violent reaction from someone seeing his jacket as adopting "the self-defeating proposition" that hypothetical private censorship of speech can be avoided by actual governmental censorship.[22] He then conceded that the State's argument that it may take action to maintain "a suitable level of discourse" raised deeper issues, about the very nature and purpose of the constitutional protection of free speech and its connection to even broader constitutional themes.[23]

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion . . . [and to] comport with the premise of individual dignity and choice upon which our political system rests . . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.[24]

Freedom of speech plays an essential role in the American political community, Harlan indicates, and is consonant with—or really an aspect of—the basic principles of our constitutional order. There is thus no principled limit to the proposition that government may cleanse public speech of what government deems unacceptable because the proposition itself is constitutionally unacceptable. The argument that government can draw such lines by distinguishing an idea from the way the idea is expressed rests on a deep misunderstanding of human communication itself.

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[25]

21. *Cohen*, 403 U.S. at 22.

22. *Id.* at 23.

23. *Id.* at 23–24.

24. *Id.* at 24–25.

25. *Id.* at 26. Harlan also pointed out that forbidding specific words runs "a substantial risk of suppressing ideas in the process." *Id.*

In these crucial paragraphs, Harlan does not present and interpret legal authorities that the Court and the reader ought to accept. Instead, he presents a particular interpretation of the American constitutional system as a whole, and its grounding in human behavior and social reality. The opinion invites the reader to evaluate and, Harlan hopes, to agree with his account, and in doing so to see how Cohen's "scurrilous epithet" implicated the crucial place of reason and emotion in American public discourse.

The *Cohen* opinion is elegant in structure and in style. Justice Harlan's doctrinal discussion explains each step clearly and adequately—the reader can follow the reasoning and recognize that it is firmly grounded in the case law, but there is no unnecessary elaboration or case discussion. The opinion's high point—that the Constitution must protect both the cognitive and the emotional aspects of speech—is then offered to the reader for the latter to accept (or of course reject) as the necessary culmination of all that has gone before.

In every respect, Harlan's opinion in *Cohen* is a counterpoint to the many Burger Court opinions that substitute an implicit demand that the reader accept the Court's *ipse dixit* for the presentation of reasoning worthy of the reader's agreement.[26] No one, including Walter, could expect every opinion to rise to this level, but *Cohen*'s role in shaping Walter's alternate history is, I think, clear. It should be the justices' ambition to address specific issues specifically, to deal responsibly with precedent, to show how a particular judgment is interwoven with the overall fabric of constitutional law, and to speak persuasively to the reader's grasp of the Constitution's overall purposes and general principles. A well-crafted constitutional opinion seeks to convince the American political community, not proclaim dogmas to that community.

The Harlan Court, in Walter's imagination, would have kept this objective continually in view. It would have avoided the empty generality and instead rendered decisions focused on the specific issues before the Court but situated in the context of constitutional law as a whole. In doing so, Walter thought, the Harlan Court would have made it possible even for those who disagreed with a judgment to understand and appreciate the intelligence and good faith the justices had exercised in reaching the Court's decision.

B. Bivens v. Six Unknown Named Agents

Two weeks after the Court decided *Cohen v. California*, it announced *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[27] *Bivens* held that the federal judiciary could infer the existence of a cause of action for damages against federal actors for the alleged violation of the plaintiff's Fourth

26. *See, e.g.*, Fried, *Revolutions*, *supra* note 6, at 76–77 (discussing the Burger Court's failings).

27. 403 U.S. 388 (1971).

Amendment rights despite the absence of an act of Congress authorizing the action.[28] Although several years later two decisions approved "*Bivens* actions" under other constitutional provisions, *Bivens* is now a deeply "disfavored judicial activity."[29] As the Court recently observed, in a case involving a Fourth Amendment claim,

> Over the past 42 years . . . we have declined 11 times to imply a similar cause of action for other alleged constitutional violations . . . . And . . . we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution.[30]

Bivens survives, to the limited extent it does, as a fossil precedent without generative power, and would likely be outright overruled if a majority of the justices thought it necessary.[31]

The Supreme Court justifies its long-standing hostility to *Bivens* on the ground that "creating a cause of action is a legislative endeavor," and that it is not "relevant" that without a *Bivens* action "a [constitutional] wrong . . . would otherwise go unredressed . . . . [T]he question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts."[32] The constitutional separation of powers, in the majority's view, requires that even when a federal official or agent deliberately violates someone's constitutional rights, the existence of a damages remedy, the traditional form of redress for individual wrongdoing, is entirely up to the legislative branch.[33] The decision whether a damages remedy should exist depends on a variety of "policy considerations," including "administrative costs," that are essentially legislative and that the courts are ill-suited to judge.[34] For courts to make such a decision is to usurp Congress's power.[35]

Justice Harlan, a principled advocate of judicial restraint and respect for separation of powers, thought differently. Although his "initial view" when *Bivens* came before the Court was that the petitioner had no cause of action, he changed his mind and concurred in the Court's judgment sustaining the claim.[36] To be sure, Harlan was writing in an era when the Supreme Court was much

28. *Id.* at 397.

29. Egbert v. Boule, 142 S. Ct. 1793, 1803 (2022) (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017) (internal quotation marks omitted)).

30. *Id.* at 1799, 1809.

31. Justice Gorsuch would have done so in *Egbert*. *See id.* at 1810 (Gorsuch, J., concurring).

32. *Id.* at 1802, 1804, 1807 (majority opinion) (internal quotation marks omitted) (quoting Bush v. Lucas, 462 U.S. 367, 388 (1983)).

33. *Id.* at 1802.

34. *Id.* (first quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 (Harlan, J., concurring); and then quoting *Ziglar*, 582 U.S. at 134).

35. *Id.* at 1802–03.

36. *Bivens*, 403 U.S. at 398 (Harlan, J., concurring).

more willing to recognize implied causes of action under federal statutes than it has since become.[37] But Harlan's opinion did not essentially depend on the Court's contemporaneous approach to implied statutory causes of action, and presents a logical and coherent view even if that approach is obsolete.

As to the practical question of competence, Harlan pointed out that the federal courts are thought "competent to choose among the range of traditional judicial remedies to implement . . . common-law policies, and even to generate substantive rules governing primary behavior" under statutes such as the Sherman Act,[38] and that the exercise of the judiciary's equity powers involves similar considerations of policy.[39] "[C]ourts of law are capable of making the types of judgment concerning" "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."[40] The question for Harlan was not whether the courts are intrinsically capable of making appropriate decisions about constitutional causes of action even if Congress is silent—they are—but whether the Constitution reserves those decisions "exclusively" for Congress.[41]

On that pure question of separation of powers law, Harlan's *Bivens* opinion is unequivocal.

> [T]he judiciary has a particular responsibility to assure the vindication of constitutional interests such as those embraced by the Fourth Amendment. To be sure, "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." But it must also be recognized that the Bill of Rights is particularly intended to vindicate the interests of the

37. *See Egbert*, 142 S. Ct. at 1802 (asserting that the Court has come "to appreciate more fully" the separation of powers problem than it did in 1971 (quoting Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020))).

38. Act of July 2, 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–7).

39. *Bivens*, 403 U.S. at 403–04 (Harlan, J., concurring).

40. *Id.* at 407, 409.

41. *Id.* at 401–02. I leave to one side the somewhat complicated question of how Harlan understood the relationship between damages actions and suits in equity as means of vindicating constitutional rights. At least two considerations weighed with him: the fact that damages actions are a traditional—indeed, *the* traditional—mode of redress in American law, and his belief that the long-standing power of federal courts to grant equitable remedies was equally questionable if *Bivens* was wrong.

> [I]f a general grant of jurisdiction to the federal courts by Congress is thought adequate to empower a federal court to grant equitable relief for all areas of subject-matter jurisdiction enumerated therein . . . then it seems to me that the same statute is sufficient to empower a federal court to grant a traditional remedy at law.

Id. at 405.

> individual in the face of the popular will as expressed in legislative majorities.[42]

The current Court's insistence that the authority of the federal judiciary to vindicate constitutional rights held against the elected branches of the government and their servants is entirely dependent on those branches' decision to permit the courts to act, from the perspective Harlan laid out succinctly in *Bivens*, is simply wrong-headed. It would be "anomalous to conclude that the federal judiciary . . . is powerless to accord a damages remedy to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will."[43]

Walter Dellinger emphatically agreed with Justice Harlan's opinion in *Bivens*. He thought that both constitutional structure and judicial tradition support Harlan's belief that the ordinary and well-nigh invariable rule is that the judiciary will provide relief in meritorious cases within their jurisdiction: a litigant with a valid constitutional claim must not go remediless.[44] It is very old learning, which Harlan and Walter thought beyond dispute, that the correct judicial answer is yes when the question is "If [a party] has a right, and that right has been violated, do the laws of this country afford him a remedy?"[45] Although the post-Harlan Court, to its credit in Walter's view, initially expanded *Bivens*, in other areas the Burger Court often cut back on or undermined constitutional rights obliquely, by procedural or definitional limitations that made it difficult to enforce those rights.[46] That was, from his perspective, one of the era's besetting errors.

42. *Id.* at 407 (quoting Mo., Kan. & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

43. *Id.* at 403–04.

44. Harlan's commitment to this principle runs throughout his opinions. *See, e.g.*, *In re* Gault, 387 U.S. 1, 72 (1967) (Harlan, J., concurring in part and dissenting in part) (explaining that due process must be interpreted to impose "requirements [that] guarantee to juveniles the tools with which their rights could be fully vindicated").

45. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803); *see id.* at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

46. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 709 (1976) (limiting review of procedural due process claims by defining defamation not to infringe an individual's liberty or property); Stone v. Powell, 428 U.S. 465, 495 (1976) (limiting review of Fourth Amendment claims in federal habeas cases); Albert W. Alschuler, Commentary, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987) (explaining that the Burger Court "typically left the facade of Warren Court decisions standing while it attacked these decisions from the sides and underneath"); *cf.* Flast v. Cohen, 392 U.S. 83, 133 (1968) (Harlan, J., dissenting) (reasoning that under proper rules for standing, the Court would not "be enabled to avoid our constitutional responsibilities, or . . . confine to limbo the First Amendment or any other constitutional command").

Walter invariably mentioned the *Bivens* concurrence in the judgment in imagining the jurisprudence of the Harlan Court. The Court of his alternate history would not have manipulated procedure or doctrine to avoid the logical implications or hamper the application of constitutional principles about which it was unenthusiastic, but which it was unwilling to expressly confront and repudiate. As Harlan wrote in a 1969 opinion, "[i]n the classical view of constitutional adjudication, . . . it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case" by the principled application of the constitutional rules the Court purports to accept.[47] Harlan accepted the legitimacy of formal reconsideration of a seriously mistaken precedent, but his ordinary practice was to accept a decision he thought wrong and seek to make sense of it in subsequent cases. The Harlan Court as Walter imagined it would have treated constitutional precedents it did not repudiate with scrupulous respect for their appropriate reach, and it would have viewed the full enforcement of recognized constitutional principles as its duty.

C. Boddie v. Connecticut

A few months before Justice Harlan filed his opinions in *Cohen* and *Bivens*, he delivered the Court's opinion in *Boddie v. Connecticut*.[48] The plaintiffs were indigent married persons unable to file for divorce in Connecticut because they could not afford to pay the state-mandated entry fees and costs for service of process. The Court held that due process did not permit the State effectively to bar the plaintiffs from divorce proceedings on that ground. *Boddie* subsequently has been understood as one in the line of decisions beginning with *Griffin v. Illinois*[49] and *Douglas v. California*[50] that recognize a "fundamental right of access to the courts" that sometimes requires states to eliminate financial barriers to equal participation in the litigation process.[51]

Anyone who ever heard Walter Dellinger talk about the effect on persons with limited financial resources of restricting their reproductive health options knows that Walter thought that predicating the effective exercise of constitutional rights on the ability to pay is morally and constitutionally outrageous. I have no doubt he approved of the practical result of the *Boddie* decision. However, I think the *Boddie* opinion provides a valuable resource for understanding his alternate history Harlan Court for an entirely distinct reason:

47. Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting) (citing *Marbury*, 5 U.S. (1 Cranch), at 154).

48. 401 U.S. 371 (1971).

49. 351 U.S. 12 (1956).

50. 372 U.S. 353 (1963).

51. *See* Tennessee v. Lane, 541 U.S. 509, 533–34, 533 nn.21–23 (2004) (first citing *Boddie*, 401 U.S. 371; then citing *Griffin*, 351 U.S. 12; and then citing *Douglas*, 372 U.S. 353).

Boddie is a good example of what Professor Fried has described as Justice Harlan's usual willingness to "let go [of his disagreement with precedent] and rejoin the communal task of knitting the continuing fabric of the law" on the basis of the Court's decisions rather than his personal views on constitutional issues.[52]

To see how this is so, begin with the fact that Harlan dissented in both *Griffin* and *Douglas*; he did not share the intuition seemingly held by Justice William O. Douglas that an inability to pay ought never to affect an individual's interactions with government.[53] But Harlan's dissent in *Douglas* (1963) reflected the ongoing development of constitutional law from *Griffin* (1956) on. In *Griffin*, Harlan argued that a state "policy of economy" limiting its expenditure of state funds to assist indigent criminal defendants "can hardly be said to be arbitrary" in violation of due process.[54] In *Douglas*, however, Harlan's position had shifted. He premised his due process analysis in *Douglas* on "the State's responsibility under the Due Process Clause is to provide justice for all," and advanced the view that "[r]efusal to furnish criminal indigents with some things that others can afford may fall short of constitutional standards of fairness."[55] His disagreement with the Court's judgment came only after his customary analysis of the factors he thought relevant to a serious due process analysis.[56]

52. Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 190–91 (2002) [hereinafter Fried, *Five to Four*]. As Fried notes, this was Harlan's usual practice, but not an invariant rule. *Id.* at 180 n.84; *see also* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 452 (2008) ("A known critic of *Mapp v. Ohio* and *Miranda v. Arizona*, Justice Harlan routinely joined subsequent cases that required application of those precedents.").

53. *See, e.g.*, *Douglas*, 372 U.S. at 355 ("[T]here can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" (quoting *Griffin*, 351 U.S. at 19)). Harlan was not insensitive to the plight of poor criminal defendants, but he had no patience with Douglas's tendency to "substitute resounding phrases for analysis." *Id.* at 361 (Harlan, J., dissenting); *see Griffin*, 351 U.S. at 39 (Harlan, J., dissenting) (referring to his "inclination to hasten the day when *in forma pauperis* criminal procedures will be universal"). In *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), which struck down on equal protection grounds a state poll tax, Justice Douglas managed to insert into his opinion for the Court the astonishingly inaccurate statement that "[l]ines drawn on the basis of wealth or property . . . are traditionally disfavored." *Id.* at 668. The only precedents Douglas cited were *Griffin* and *Douglas*. Harlan dissented, in an opinion ending with the sharp rebuke that "the Equal Protection Clause of that Amendment [does not] rigidly impose upon America an ideology of unrestrained egalitarianism." *Id.* at 686 (Harlan, J., dissenting). I do not suggest that Walter, or I, agree with Harlan's dissents in these cases. But once the cases were settled precedents, it is fair to say that Harlan no longer agreed with his dissents either.

54. *Griffin*, 351 U.S. at 37 (Harlan, J., dissenting).

55. *Douglas*, 372 U.S. at 363 (Harlan, J., dissenting).

56. *Id.* at 361–67. Harlan disagreed fundamentally with the reasoning of Douglas's opinion for the Court, which relied exclusively on the Equal Protection Clause. *Id.* at 361 ("To approach the present problem in terms of the Equal Protection Clause is, I submit, but to substitute resounding phrases for analysis.").

On the same day the Court announced *Douglas*, it also decided *Gideon v. Wainwright*,[57] the landmark case which held, with Harlan concurring, that trial counsel must be provided to all defendants in serious criminal cases.[58] Harlan explained that the "evolution" of the Supreme Court's decisions showed that the Court had "come to recognize" that "the mere existence of a serious criminal charge" was sufficient to require the provision of counsel.[59] *Gideon*, in his view, merely announced what had come to be implicit in the Supreme Court's decisions.[60] Harlan did not think that *Gideon*'s requirement that trial counsel be provided logically compelled the holding in *Douglas* about counsel on appeal because he thought that argument inattentive to the differences between trials and appeals, but his *Douglas* opinion acknowledged the relevance of *Gideon* and offered clear reasons for distinguishing it, none of which was the rationality of a "policy of economy."[61]

Turn now to *Boddie*. Harlan began his analysis by outlining the "theoretical framework" within which "the precise issue" ought to be considered. "At its core," Harlan observed, "the right to due process reflects a fundamental value in our American constitutional system."[62] It guarantees that no individual may "be deprived of his rights, neither liberty nor property," except through procedures that respect the freedom and dignity of the individual by requiring government to "function strictly within th[ose] bounds."[63] The underlying constitutional purpose is "to maintain an ordered society that is also just" and consonant with "the values of a free society."[64] "It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."[65]

Harlan's summary of principle and precedent in *Boddie* implicitly but fully accepts the Court's rejection of his views in *Griffin* and *Douglas*. The Court's "due process decisions, representing over a hundred years of effort by this Court to give concrete embodiment to this concept," have "firmly embedded" the principle that where an individual is obliged to litigate to protect liberty or property, "'within the limits of practicability' . . . a State must afford to all individuals a *meaningful* opportunity to be heard."[66] Although earlier decisions

57. 372 U.S. 335 (1963).
58. *Id.* at 339, 349.
59. *Id.* at 351 (Harlan, J., concurring).
60. *Id.*
61. *Douglas*, 372 U.S. at 365 (Harlan, J., dissenting).
62. Boddie v. Connecticut, 401 U.S. 371, 374 (1971).
63. *Id.* at 375.
64. *Id.* at 375, 380.
65. *Id.* at 374–76, 380.
66. *Id.* at 377, 379 (emphasis added) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 318 (1950)).

addressed the claims of defendants, Harlan reasoned that in light of marriage's central role in American society, and the states' monopolization of the processes by which one may enter or exit that vital social institution, it is unconvincing to categorize the *Boddie* plaintiffs as voluntary litigants "in a realistic sense."[67] Like a criminal defendant unable to afford counsel at trial or on appeal, as a practical matter the imposition of Connecticut's fee requirements was a denial to them of the ability to litigate their legal claims.[68] And *Griffin* had already rejected the argument, which Harlan had then accepted, that "resource allocation or cost recoupment" could justify such a denial.[69]

Justice Harlan's opinions from *Griffin* through *Boddie* exemplify his characteristic willingness to "collaborate in the work of developing, refining, and perhaps qualifying the Court's work," which was perhaps especially characteristic of his later years.[70] Harlan continued to resist what he and others viewed as the slapdash approach that Justice Douglas took to the role of economic factors in constitutional controversies; he continued to view due process, rather than equal protection, as the proper framing of the issues, and he maintained his longstanding insistence that the basic issue in due process[71] analysis is whether government is acting, substantively or procedurally, on an arbitrary rather than a reasonable basis. But after *Griffin*, Harlan's opinions show him working to make the best sense of *Griffin* and later cases in light of an increasingly clear account of how the decisions fit into the overall principles and commitments of the Constitution.

It is this aspect of *Boddie* that leads me to identify it as a pointer to what Walter had in mind when he talked about the Harlan Court. Walter had strong, well-developed views on many controversial constitutional issues, and he was not afraid to label a decision wrong. But his strong inclination was to accept settled precedent as the starting point for analysis rather than as a nuisance to be cabined in whenever contrary to his personal opinion. The Harlan Court in his alternate history would have treated the decisions of the Warren Court as a baseline, to be developed and applied in new cases in a logical and good faith

67. *Id.* at 377.

68. *Id.*

69. *Id.* at 382; Griffin v. Illinois, 351 U.S. 12, 19–20 (1956).

70. Fried, *Five to Four*, *supra* note 52, at 183. On the (possible) change in Harlan's practices, "[c]onsider . . . Justice Harlan's final two Terms on the Court. 'As against his average of 62.6 dissenting votes per term between 1963 and 1967, he cast only 24 such votes in the 1969 Term and 18 in that for 1970.'" *Id.* at 180 n.84 (quoting Henry J. Friendly, *Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 388 (1971)). Of course there are other possible explanations: perhaps the Harlan Court was already emerging!

71. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 599–600 (1971) (Harlan, J., concurring in part and dissenting in part) (accepting the application of earlier decisions that he thought constitutional errors, but declining to "extend those cases further *than is required by their logic*" (emphasis added)).

manner or forthrightly reconsidered. And the Harlan Court would have approached the novel issues of the 1970s by focusing on the specific facts and problems of each case, while its analysis would have situated its decisions within a carefully explained and tradition-based understanding of constitutional law as a whole.

III. THE HARLAN COURT AND THE PROBLEM OF PERSUASION

Viewed through the lens of the three opinions I've discussed, it is clear why Walter Dellinger found the Harlan Court of his alternate history appealing. Walter saw Justice Harlan in his later years as ever more clearly rejecting any argument that drives a wedge between the historical meaning of the Constitution's words and the changing application of the Constitution to the issues of American political life. In their shared view, the law of the Constitution is not a fixed set of propositions, but a tradition in which decision-makers maintain their fidelity to the past through their conscientious participation in "the communal task of knitting the continuing fabric of the law" in the light of the Constitution's purposes rather than by pretending that it *is* the past and thereby ignoring the ongoing evolution of doctrine.[72] Harlan's opinion in *Boddie* is a splendid example of a judge of strong views acting on what Walter thought the ordinary duty of the judge,[73] which is to make sense of precedent, including precedent the judge thinks wrong, and to address novel questions in light of the overall shape of constitutional law as it has evolved. None of this is to say that precedent can never be overruled, but overruling a precedent is the rare exception to the tradition's near-universal rule of rational

72. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 202–03 (1970) (Harlan, J., concurring in part and dissenting in part) ("It must be recognized, of course, that the amending process is not the only way in which constitutional understanding alters with time. The judiciary has long been entrusted with the task of applying the Constitution in changing circumstances, and as conditions change the Constitution in a sense changes as well. But when the Court gives the language of the Constitution an unforeseen application, it does so, whether explicitly or implicitly, in the name of some underlying purpose of the Framers."); Williams v. United States, 401 U.S. 675, 677, 678–79, 681 (1971) (Harlan, J., concurring in part and dissenting in part) ("I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time . . . . We announce new constitutional rules . . . as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules . . . . I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was. Inquiry into the nature, purposes, and scope of a particular constitutional rule is essential to the task of deciding whether that rule should be made the law of the land.").

73. Or another decision-maker. The close parallel between Walter's views on legitimate constitutional law decision-making and Harlan's can be seen most easily in Walter's opinions as the head of the Office of Legal Counsel, which typically engaged deeply with earlier presidential statements and executive-branch legal opinions.

extension. The Harlan Court would have confronted new and controversial issues such as the constitutionality of campaign finance laws and abortion regulations in the same way.[74]

Walter also thought that Justice Harlan's later opinions evinced a clear break with Justice Frankfurter's view of the role of deference to political decision in constitutional adjudication. Frankfurter's instinct much of the time was to find a way to avoid judicial interference with political decisions, even if in doing so the Court effectively failed to carry through to the conclusion it would have reached had it followed its own substantive analysis of the issues. The later Harlan was increasingly clear that a federal court that acts in this manner is failing in its duty to decide the case before it according to the court's view of the law, to "say what the law is" and act on the law it pronounces. Decision through craftsman-like constitutional law reasoning is *itself* already the appropriate deference the federal courts ordinarily should give to other parts of American government. Harlan's concurrence in *Bivens* exemplifies this conviction that the judiciary should fully enforce the Constitution as they understand it. None of this is to deny that substantive constitutional law sometimes imposes a duty on courts to defer to a particular type of political decision, but that duty is the product of the discretion the Constitution has conferred on the political actor.[75] The Harlan Court would not have closed the courthouse doors to individuals with valid constitutional claims, or in other ways evaded its responsibility to act on its view of the law of the Constitution, whatever the views or actions of other parts of government.

74. The theme of doctrinal evolution, always present in Harlan's thought, seems to me increasingly prominent in his later opinions. *See, e.g.*, Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) ("[M]any, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation."); Welsh v. United States, 398 U.S. 333, 346 (1970) (Harlan, J., concurring) (contrasting statutory construction with interpreting "a phrase of the Constitution, like 'religion' or 'speech,' which this Court is freer to construe in light of evolving needs and circumstances"); Baldwin v. New York, 399 U.S. 117, 124–25 (1970) (Harlan, J., concurring in part and dissenting in part) ("It is, of course, true that history should not imprison those broad guarantees of the Constitution whose proper scope is to be determined in a given instance by a blend of historical understanding and the adaptation of purpose to contemporary circumstances."); California v. Byers, 402 U.S. 424, 454 (1971) (Harlan, J., concurring) (explaining that with respect to some provisions of the Bill of Rights, "it is the task of this Court continually to seek that line of accommodation which will render th[e] provision relevant to contemporary conditions"). As the qualifications in the passages just quoted suggest, Harlan did not think all constitutional provisions create the same judicial duty of evolving application. *See, e.g.*, *Baldwin*, 399 U.S. at 125 (Harlan, J., concurring in part and dissenting in part) ("The right to a trial by jury, however, has no enduring meaning apart from historical form."). Exploring the complexities of his views on the matter is beyond the scope of this Essay.

75. In that circumstance, the court *is* fully enforcing the constitutional rule as it understands the rule, and it is the court that has determined the existence and scope of the political actor's discretion.

And what about *Cohen*? As I discussed above, Justice Harlan's analysis in that opinion is structured around his statement of the specific question before the Court. Harlan first identifies the question by discussing the constitutional issues that were *not* presented. He then answers the question by offering the reader a broad vision of the meaning of free expression and its fundamental role in the American constitutional order. Walter thought *Cohen* a brilliant demonstration of both disciplined lawyerly craft and bold constitutional vision. Walter's alternate history was his way of imagining a Court that would take seriously the demands of technical reason *and* at the same time present a persuasive account of the Constitution's purposes. But to imagine the Harlan Court in this way is to bring up a fundamental problem in constitutional law: the nature of persuasion.

The problem of persuasion runs throughout the law and is misunderstood when it is treated as simply a question of effective advocacy. The first person's mind the lawyer needs to persuade is the lawyer's own judgment, and this is as true of a judge as of any other. What makes the judge's role different is, of course, that the judge's sole concern is meant to be that of rightly "saying what the law is." Constitutional law in the courts is unique only in that the stakes can be so high, and the Supreme Court's decisions in particular so difficult to overturn, that the internal pressure on judges and justices to be persuaded by the argument they *wish* to find persuasive is tremendous. How then, should a judge, or especially a Justice, guard against this temptation?

As Walter knew, good constitutional lawyers have seen this problem from the beginning; indeed, from before the Supreme Court became the central forum for constitutional debate and decision. The February 1791 debates in the House of Representatives and in President Washington's cabinet over the constitutionality of the first national bank bill already revealed two fundamental responses to the problem of temptation.[76] One approach was pressed by James Madison in the House and Thomas Jefferson in his cabinet opinion: what renders a constitutional law argument rightly persuasive is its adherence to a method of analysis that strives to prove its conclusion in an almost geometric fashion. Jefferson pressed on Washington a stringently textual approach to construing Congress's powers: "To take a single step beyond the boundaries thus specially drawn" by a narrowly literal reading of the Constitution's words

76. On the 1791 bank debate and issues of constitutional method, see JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 202–34 (2018); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS 21–30 (2002) [hereinafter POWELL, A COMMUNITY]. Walter was thoroughly familiar with the debate; indeed, he edited and published Attorney General Edmund Randolph's previously unreported cabinet opinion. *See* Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 DUKE L.J. 110, 121 (1994).

is, Jefferson wrote, to go astray.[77] Constitutional law arguments are persuasive insofar as they leave no room for disagreement. The persuasive argument, on this view, compels the reader's assent.

In their cabinet opinions, Alexander Hamilton and Edmund Randolph offered Washington a different approach to the problem of temptation, but Fisher Ames in the House explained it more incisively. Ames dismissed the search for a method of constitutional argument that can eliminate disagreement by logical demonstration as bootless.[78] The "rules of interpretation" of the Constitution's terminology that Madison had insisted were determinative could not prove Madison's conclusions about the Constitution's meaning, as he claimed, but "only set up one construction against another."[79] Instead, Ames asserted, "[t]hat construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the [g]overnment was adopted."[80] The task of the constitutional decision-maker is to determine how best to apply the Constitution's purposes to the issue at hand, a determination that unavoidably involves the exercise of judgment or, in Ames's language, "discretion."[81] Sound constitutional reasoning necessarily exercises "discretion with regard to the true intent of the Constitution" and cannot be limited to textual exegesis or logical deduction.[82] Such a form of reasoning persuades by inviting agreement, and addresses the problem of temptation by the fact that it has authority only insofar as it actually persuades the reader's own judgment.

Justice Harlan's opinion in *Cohen v. California* decisively adopts the second of these two approaches. Harlan does not attempt to *prove* that the original public meaning of "freedom of speech" or "liberty" encompasses or leads inexorably to the conclusion that Mr. Cohen's vulgarity, with its primarily emotive force, falls within the Constitution's protection. Instead, in the second part of his analysis, Harlan offers an account of the importance of free expression, including its emotive as well as its cognitive functions, in the free and therefore inevitably raucous public discourse of American society.[83] The reader is herself left free to agree or not, as she finds Harlan's account persuasive

77. Thomas Jefferson, *Opinion on the Constitutionality of a National Bank*, *in* THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 651, 651 (Paul Leicester Ford ed., 1898).

78. *See* GIENAPP, *supra* note 76, at 202–34; POWELL, A COMMUNITY, *supra* note 76, at 21–30.

79. 2 ANNALS OF CONG. 1955 (1791) (remarks of Fisher Ames).

80. *Id.* at 1956.

81. *Id.* at 1954–56.

82. *Id.* at 1954. On the meaning of "discretion" in Ames's speech and elsewhere in founding-era discussion, see H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 996–1008 (1993).

83. Cohen v. California, 403 U.S. 15, 23–25 (1971).

or not after "examination and reflection."[84] The opinion shows its fidelity to past constitutional tradition, including above all the past embodied in the written Constitution, if the reader concludes "yes, this is the best way to understand the purposes of the written instrument, as well as what has been said about those purposes since."[85]

For Walter Dellinger, this second, purposive approach to the problem of persuasion and temptation is the appropriate perspective to apply in "expounding" a Constitution whose "nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."[86] Walter agreed with Justice Harlan that all attempts to find some decisional algorithm that will obviate the necessity of judgment and thereby armor the decision-maker against temptation are doomed to failure. No algorithm is proof against manipulation, whether intentional or not, and no algorithm can substitute for the exercise of judgment in determining how best to translate the Constitution's historical purposes into law effectively governing the problems of today.[87]

Like Harlan, Walter recognized an important and (for some) unsettling reality: to identify constitutional law reasoning as ultimately a matter of inviting agreement rather than compelling assent is to admit the inevitability and the legitimacy of reasonable disagreement. As Harlan once put it, "Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it."[88] Many constitutional

84. *Id.* at 24.

85. Justice Harlan's understanding of the relationship between written constitutional provisions and the ongoing tradition of constitutional norms was central to his intellectual disagreements with Justice Black and is beyond the scope of this Essay. *See* Sniadach v. Fam. Fin. Corp., 395 U.S. 337, 342–43 (1969) (Harlan, J., concurring) ("[Black's] and my divergence in this case rests, I think, upon a basic difference over whether the Due Process Clause of the Fourteenth Amendment limits state action by norms of 'fundamental fairness' whose content in any given instance is to be judicially derived not alone, as my colleague believes it should be, from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage—not, as my Brother [Black] continues to insist, from the mere predilections of individual judges.").

86. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 433 (1819). For Justice Harlan's self-conscious adherence to Chief Justice Marshall's views, see, for example, Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting) (citing *McCulloch*, 17 U.S. (4 Wheat.) 316) (arguing that the Court must "approach[] the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government").

87. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) ("Judicial self-restraint will not, I suggest, be brought about in the 'due process' area by [a] historically unfounded incorporation formula . . . . It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . .").

88. *Id.*

questions can be answered with a fair degree of certainty: to disagree with Harlan's assertion that Mr. Cohen's slogan was not "obscene expression"[89] for constitutional purposes is simply to misunderstand the meaning of "obscenity" in the law. But Harlan's argument that the Constitution protects not only "the cognitive content of individual speech"[90] but its "emotive function"[91] as well derives its force from fundamental convictions about the nature of human expression and the original and ongoing purpose of protecting freedom of speech. Such convictions are not open to proof or disproof in the same manner.

CONCLUSION

Walter Dellinger thought our present-day fascination with algorithmic and supposedly objective methods of legitimate constitutional argument was in part a direct response to the Burger Court era, which abounded in empty formulas and multipart balancing tests. In the Harlan Court of his alternate history, Walter imagined a Supreme Court that was confident of the legitimacy of the methods it inherited from the Marshall Court, and sure-footed in their exercise. Such a Court, he thought, would be at one and the same time disciplined in its reasoning and craft, and visionary in its faithfulness to the Constitution's great purposes of establishing justice, securing the blessings of liberty, and ensuring the equal protection of the laws to every person.

89. *Cohen*, 403 U.S. at 20.
90. *Id.* at 26.
91. *Id.*