An Examination of the Nature and Significance of the Comprehensive Ways of Thinking Exemplified by Some Recent Contributions to American Constitutional Thought.

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Abstract

American Constitutional scholarship is at present unsure of its aims and purposes; this unsureness makes a re-assessment of our ways of thinking about what the Constitution is and means appropriate. Three thinkers much respected in the Constitutional community, John Marshall Harlan III, Ronald Dworkin, and Robert Cover, provide examples of what the best or ideal way of thinking about American Constitutional politics might be. The differences among the comprehensive ways of thinking practiced by these three men are reflected in the forms of their reasoning, in their treatments of metaphorical and distinctive language, in their views of what interpretation is, in their responses to the problem of civic education, and, most generally, in their opinions of what good reasoning is and what the place of reason in the American regime is. Harlan's comprehensive way of thinking, a way which stresses the superiority of a form of reasoning guided by Constitutional purposes to two other forms of reasoning, "mechanical" interpretation and "unguided speculation," has a good claim to be the Constitutional way of thinking but nonetheless may perhaps be inappropriate to contemporary Constitutional politics and scholarship. The difficulty of deciding whether Harlan's or Dworkin's or Cover's way of thinking best comprehends the experience of the Warren Court may be partly responsible for the contemporary unrest in American Constitutional scholarship.

Preface

The reflections presented in this thesis were stimulated by three perceptions about American Constitutional scholarship. First, it seems to me that the contemporary Constitutional discussion is in some respects rather odd--scholars are making unusual and startling claims, are appealing to a surprising variety of sources for inspiration, and seem somewhat unsure of the nature and aims of their own enterprise. Second, it seems to me that, in American Constitutional scholarship and in philosophic thought in general, form--the way things are said--contributes to or determines content--what is said--in an essential way. Third, it seems to me, despite the skepticism on these scores that is fashionable in some quarters of the modern academy, that the Constitution of the United States remains a profound guide to American politics and that the serious study of political philosophy is indispensable to the study of constitutional politics. This thesis is an effort to inquire into, make sense of, and relate these perceptions.

I greatly appreciate the contributions of teachers and friends who have made this project both more enjoyable and more fruitful than it would have been without their help. I would like to thank Mark Crawford, David Frederick, Bart Gellman, Richard Klingler, Steve Macedo, Tom Patterson, and Michael Suarez, all of whom read and commented upon papers prepared as part of my work on this thesis. I am especially grateful to Paul Vogt, who provided comments on a number of papers and read a late draft of the thesis in its entirety. Numerous friends provided helpful ideas in the course of informal conversations.

I owe a large debt to my supervisor, John Finnis, who did much to help me improve the thesis. His thorough criticism enabled me to recognize some weak points and to shore up some inadequate discussions, and, though I suspect Dr. Finnis would still dissent from much of what follows, his observations and arguments persuaded me to change my views on some rather major questions. I am also grateful to Will Harris, who at Princeton University helped introduce me to and guide me in the serious study of Constitutional politics, and to Ronald Dworkin, whose Oxford seminars provided a stimulating forum in which to cultivate and air ideas about law and interpretation. I also owe much to Clifford Geertz, Stanley Rosen, and James Boyd White, whose writings have influenced my thought more than the few references and citations included in this work can indicate.

My greatest debt, however, is to Jeff Tulis of the Princeton University Politics Department. Conversations with him provoked and enriched the reflections which form the foundation of this thesis, and the counsel, encouragement, and criticism he provided in the course of my work were invaluable to me. He has been for me a teacher of the best kind.

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Chapter One

Mr. Justice Harlan's Constitutional Way of Thinking

I.

Introduction

The present time is an appropriate time to reassess our ways of thinking about what the United States Constitution is and means. American Constitutional scholarship is in a troubled state. Constitutional scholars, and the American jurisprudential community in general, have in recent years been conducting a sort of uneasy self-examination, an attempt to define or comprehend the aims and significance of Constitutional and legal scholarship.[1] This spirit of self-examination is evident in Richard Davies Parker's claim that recent books by Jesse Choper and John Ely have brought Constitutional scholars to a "crossroads," where they may choose either to "continue along the line" Choper and Ely followed or to "turn in a new direction."[2] Parker is a "critical legal scholar" and a self-described

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1. This thesis examines American Constitutional thought, and when I use either "Constitution" or "constitution" I will, unless the context makes clear that I mean otherwise, be referring to the Constitution or constitution of the United States. I will capitalize the "C" when I wish to refer to the document (the Constitution of the United States) and will employ a lower-case "c" to refer to the character or make-up of the American nation.

2. Richard Davies Parker, "The Past of Constitutional Theory--and its Future", Ohio State Law Journal 42 (1981), 223. The books he refers to are Jesse H. Choper, Judicial Review and the National Political Process (Chicago: University of Chicago Press, 1980), and John Hart Ely, Democracy and Distrust (Cambridge, Mass.: Harvard University Press, 1980).

polemicist, and his call for a departure from academic conventions may be attributable to his political aims. But the theme of self-examination he strikes is also present in a recent essay by G. Edward White, who reaches conclusions much more conservative than Parker's. White opens his essay by observing that "one is hard pressed to summon up subjects that are more important for American academic culture at this juncture in its history" than "the nature of scholarly interpretation and the formation of critical standards for evaluating scholarship."[3] Parker's paper and White's paper are among a large and expanding body of law review articles on what Constitutional and legal scholarship is or should be.[4]

The troubled mood of American Constitutional scholars is also manifest from the growing prominence of and concern over nihilism in Constitutional thought. Owen Fiss, for example, writes of the need to respond to a "new nihilism" which appears to him to be "unwarranted and unsound" but is nonetheless winning over "an increasing number of important and respected legal scholars, particularly in Constitutional law."[5] That this nihilistic doctrine is apparently at once untrue and influential (I think Fiss' observations accurate on both scores) makes it all the more interesting. Moreover, the extraordinary character of

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3. G. Edward White, "The Text, Interpretation, and Critical Standards", Texas Law Review 60 (1982), 569.

4. See for example the Texas Law Review's symposium on law and literature, Texas Law Review 60 (1982), 373-586, and the Yale Law Journal's symposium on the nature and purposes of legal scholarship, Yale Law Journal 90 (1981), 1055-1296.

5. Owen Fiss, "Objectivity and Interpretation", Stanford Law Review 34 (1982), 740.

the claims asserted by the adherents to this nihilism (consider for example Sanford Levinson's comment: "The 'death of constitutionalism' may be the central event of our time just as the 'death of God' was that of the past century (and for much the same reason)"[6]) underscores the profundity of the doubts which have provoked the Constitutional community's introspective turn.

My aim in this thesis is to inquire into what good American Constitutional scholarship is. I hope by pursuing this aim both to make sense of the discussion presently taking place among Constitutional scholars and also to provide some insight into what the Constitution itself is and means. I will undertake my study of Constitutional thought by a careful examination of the ideas of three thinkers who have been prominent in and much respected by the American Constitutional community in recent years: John Marshall Harlan III, Ronald Dworkin, and Robert Cover. These men have addressed different problems and have developed their thought in different contexts--Harlan was a Supreme Court Justice, Dworkin is an analytic legal and political theorist, and Cover is primarily a legal historian--but, despite their differences, the works of these thinkers are, I believe, alike in presenting particular, well thought-out answers to the fundamental question of how we should think about Constitutional politics and also in providing examples of what good Constitutional scholarship might be. Part of my objective in the pages that follow will be to develop a vocabulary and way of thinking which will allow the comparison of the works of Harlan, Dworkin, and Cover while respecting and appreciating

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6. Sanford Levinson, "The Constitution in American Civil Religion", Supreme Court Review (1979), 151.

the significant differences among those works. A crucial element of this vocabulary and way of thinking is an idea which I will elaborate and rely upon throughout this thesis, the idea of a comprehensive way of thinking.

My inquiry into the comprehensive ways of thinking exemplified and expounded by Harlan, Dworkin, and Cover will resemble a form of ethical reasoning most likely familiar to the reader from his or her own experience. There are times when we resolve ethical questions not by searching for some applicable principle but by asking ourselves how some appropriate model would behave were he or she in our position. We ask ourselves, "What would my best friend or Martin Luther King or Abraham Lincoln do if in my place?" Moreover, we ask such questions not only to decide which actions are permissible and which impermissible but also to decide in more comprehensive ways what kind of lives we will live and what kind of people we will be. We develop our characters largely through our choice of heroes and our way of emulating them. Certain ethical questions can in fact be adequately responded to only by appealing, in one form or another, to a comprehensive vision of what a good man or woman is, and heroes and models clearly possess this comprehensiveness or wholeness. The questions I have in mind include not only large questions about what kind of people we want to be, but also more particular questions of the following sort. Most people would agree that spontaneity is a virtue in some circumstances but not in others. How should a person who finds him or herself in circumstances where the goodness of spontaneity is unclear decide whether to be spontaneous? To suggest that the person in question engage in an exercise of analytic moral philosophy would, I think, in general be an error, since the decision to engage in that

exercise would, by the nature of the exercise involved, foreclose the possibility of spontaneity. Better advice to the person, assuming that he or she chooses friends wisely, would be to tell him or her to emulate good friends in such situations.

I think the activity involved in this kind of ethics of emulation might be described as discerning various ways of thinking and then performing or adopting the most admirable of these ways. When I deal, in the study of Constitutional law, with comprehensive ways of thinking, I will be speaking of something very much like the thing we look at when we ask, "What would my best friend do if he or she were in my position?" Moreover, I will be particularly concerned with a question, "What is good reasoning?", that is tricky in rather the same way that "Should I be spontaneous now?" is tricky.

The examples set by Harlan, Dworkin, and Cover can quite evidently teach us something about what it is to be a good Constitutional scholar. Despite the unrest and doubt that presently trouble the Constitutional community, each of these men has earned high regard for his contributions to Constitutional thought. I think we can also learn from studying these examples a great deal about the fundamental issues of Constitutional politics, for I think Constitutional politics and Constitutional thought are in part about ethical questions of a comprehensive kind, including questions about what the best vision or model of the good Constitutional interpreter or practitioner of Constitutional politics or Constitutional scholar is. Indeed, as I will explain in the remainder of this Chapter, I believe that the Constitution itself embodies and teaches one such vision.

II.

Mr. Justice Harlan and Constitutional Interpretation

In the remainder of this Chapter, I will examine closely an example of what I consider extraordinarily good Constitutional interpretation, Mr. Justice John Marshall Harlan's dissent in Poe v. Ullman.[1] My hope is that careful study of this opinion will yield some insights into what the Constitution is and means and into what it is to be a good interpreter of the Constitution and a good practitioner of Constitutional politics. I will in particular aim to reveal and to make comprehensible Harlan's way of thinking. His way of thinking is, I believe, the Constitutional way both in the sense that it is the way of thinking most appropriate to the interpretation of the Constitutional text and in the sense that it reflects and depends upon a view of reason essential to the aims and purposes of the Constitution.

My search for Harlan's way of thinking will in many respects resemble an attempt to determine what it would mean to accept Harlan as a model Constitutional statesman or Constitutional interpreter. There is good reason to consider Harlan as such a model, for he is a recognized master of the judicial art. Indeed, Norman Dorsen has

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1. Poe v. Ullman 367 U.S. 497, 522 (1961). Two Mr. Justice John Marshall Harlan's have served on the United States Supreme Court. The younger of the two is the grandson of the elder; his full name is John Marshall Harlan III. As I will in this thesis be concerned only with the younger Harlan, I will for the sake of brevity omit the "III" in my references to the Justice.

written that[2]

> In the years since June 30, 1971, when John Marshall Harlan's last opinion was rendered, his reputation has grown so steadily that he has become a model for jurists, lawyers, and law students who, in a world increasingly skeptical about heroes, seek a standard by which to judge others and themselves.

And United States Circuit Court Judge Henry Friendly has commented,[3]

> I believe, and I have measured these words, that there has never been a Justice of the Supreme Court who has so consistently maintained a high quality of performance, or, despite differences in views, has enjoyed such nearly uniform respect from his colleagues, the inferior bench, the bar, and the academy.

Harlan's dissent in Poe is a superb example of his careful and precise judicial reasoning, and that fact alone is sufficient to make it worthy of our attention.

The opinion is worthy of our attention for another reason, however, for it occupies a special and interesting place in the recent history of the Supreme Court. The place the opinion occupies is remarkable first because of its relation to Harlan's curious image in the eyes of contemporary Constitutional scholars and lawyers. While Harlan's opinions are admired for their just, thorough, and lucid treatment of the issues, they are at the same time unacceptable to much of the legal community because of the conclusions Harlan reaches. Harlan is considered by many to have been too conservative and restrained a justice; he was a dissenter from, rather than a contributor to, a number of the boldest and most applauded political

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2. Norman Dorsen, "John Marshall Harlan", in The Justices of the United States Supreme Court, Vol. 5, ed. L. Friedman (New York: Chelsea House, 1978) p. 215.

3. Henry Friendly, "Mr. Justice Harlan, as Seen by a Friend and Judge of an Inferior Court", Harvard Law Review 85 (1971), 384.

strokes of the Warren Court (including, for example, the Court's holdings in Reynolds v. Sims and Miranda v. Arizona).[4] Indeed, an analysis of votes cast during the 1963 through 1967 terms showed that during those years Harlan dissented more often than did any other justice, an average of over sixty-two times per term (Justice Potter Stewart, with fewer than thirty-nine dissenting votes per term, was second behind Harlan on the list).[5] Poe v. Ullman provides a particularly interesting context within which to consider the Constitutional community's ambivalent attitude toward Harlan, for in that case Harlan, supposed by many to be too much an advocate of restraint, voted to decide the case while more "activist" justices, Earl Warren and William Brennan, struggled to find grounds to deny review, and, moreover, Harlan, supposed to be too conservative, reached the merits and supported the apparently liberal result (ruling Connecticut's anti-contraception statute unconstitutional). Harlan was joined in his findings on both the questions of justiciability and Constitutionality only by Justice William O. Douglas, who perhaps differed more from Harlan in his judicial philosophy than did any other justice on the Court.

There is a second reason that Poe v. Ullman's place in recent Court history is a special one; it belongs, as a precursor to Griswold v. Connecticut,[6] to a line of decisions that is at once among the most

4. 377 U.S. 533 (1964); 384 U.S. 436 (1966).

5. "The Supreme Court: 1967 Term", Harvard Law Review 82 (1968), 312.

6. 381 U.S. 479 (1965).

politically potent and far-reaching in the Warren Court's catalogue and also a showcase for the doctrinal disagreement and difficulties produced by the jurisprudence of that Court. These cases are politically important largely because they affirmed the existence of a Constitutional "right to privacy" not explicitly granted by any clause of the Constitution; that right later became a crucial element in the Supreme Court's decisions in controversial cases including Eisenstadt v. Baird and Roe v. Wade.[7] The Justices, however, found it quite difficult to decide even how to reason about the existence or nonexistence of a right to privacy--Griswold alone produced six separate opinions. Griswold was, in the words of Charles L. Black Jr., "a case that tested the law." Black writes that the Warren Court "has accumulated the materials for a corpus juris of human rights, but it has not given them the needful conceptual unity." He goes on to say that an indispensable step toward achieving such a unity "may be acceptance of a methodology needful to justify Griswold."[8] As a result of the political and doctrinal significance of Griswold, understanding Harlan's opinion in Poe v. Ullman (which he reaffirmed by reference in his concurring opinion in Griswold) is particularly important to understanding the significance of the Warren Court's decisions. The American Constitutional community's ambivalence toward Harlan's judicial performance and the community's inability to provide a satisfactory explanation of the Court's holding in Griswold are, I think, crucial constituents of the uneasiness and self-doubt which, as

7. 405 U.S. 438 (1972); 410 U.S. 113 (1973).

8. C.L. Black, Jr., "The Unfinished Business of the Warren Court", Washington Law Review 46 (1970), 32, 44.

I observed in the Introduction, currently trouble the Constitutional community. The apparent failure of established ways of thinking to give an account of and make sense of the experience of the Warren Court has provoked scholars, statesmen, and lawyers to doubt the efficacy of those ways.

Yet while the importance of Griswold to the study of the Warren Court helps to underscore the significance of the considerations that follow, my aim in this chapter is not to state the implications of Harlan's dissent in Poe for the legacy of the Warren Court but rather to describe the comprehensive way of thinking embedded in Harlan's opinion (though I regard the latter project as an indispensable preliminary to the former project). This way of thinking is comprehensive in that it amounts to a way of reasoning about and understanding not merely some particular, discrete legal controversies but rather questions about the nature of the good or ethical life in general. As I noted earlier, I believe that, for reasons I will explain below, Harlan's comprehensive way of thinking is the Constitutional way of thinking. Section III will provide a necessary preliminary to the study of Harlan's opinion by recounting the facts of the case and summarizing the plurality and concurring opinions. In Section IV I will outline the reasoning by which Harlan disposes of the issues in Poe. My extended inquiry in Sections III and IV into the problems, arguments, and purposes upon which and for which Harlan exercises his way of thinking in his dissent in Poe is not a digression from my primary project of describing Harlan's comprehensive way of thinking. It is rather an essential element of the study of that way of thinking, for a careful consideration of the details of the particular matters at issue in Poe will, I think, illuminate Harlan's

opinions on more general topics. Indeed, as I will later show, Harlan's own teaching emphasizes that it is difficult and imprudent to consider general ideas in abstraction from concrete circumstances and purposes. Finally, in Section V, I will, through a more detailed analysis of Harlan's dissent, attempt to explain the nature of Harlan's way of thinking. I will also in Section V attend to some fine points of argument raised by my first reading of Harlan's opinion in Section IV.

III.

Circumstances for Dissent

A.

A History of Connecticut's Anti-Contraception Statute

The facts of the case in Poe v. Ullman are unusually complex and confusing. The difficulty of giving an accurate account of the dispute is perhaps best indicated by the shortcomings of Justice Felix Frankfurter's plurality opinion in Poe, an opinion which supports the Court's decision with reasons that are, as noted in Subsection B below, inadequate in substantial part because they simply overlook, deny, or fail to face up to the undisputed facts of the case. Because of the complexity of the relevant circumstances, I intend in this section to provide not merely a conventional summary of the facts of the case but instead a fuller history of the Connecticut anti-contraception statute which the appellants in Poe alleged to be unconstitutional.

In 1879, the Connecticut state legislature enacted a statute prohibiting the use of contraceptives.[1] Although the state made it a crime to use contraceptives, no prosecutions for use were ever brought. The only prosecutions resulting from the anti-contraception statute were instead brought under a more general Connecticut statute providing that those assisting or abetting the commission of crimes

1. Title 53 (Crimes), Ch. 939 (Offenses Against the Person), Section 53-52 (Use of Drugs or Instruments to Prevent Conception) of the 1958 revision of the Connecticut General Statutes read, "Any person who uses any drug, medicinal article, or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

could be punished as though they were the principal offender; this statute, when taken together with the anti-contraception statute, enabled the state to prosecute suppliers of contraceptives.[2] Most other legislatures chose to control the use of contraceptives by regulating the sale and distribution of birth-control materials; no other state prohibited use.[3]

Connecticut's decision to criminalize the use of contraceptives is of crucial importance to the legal history of the statute for two reasons. First, the Supreme Court's eventual decision upon the Constitutionality of the law turned on the fact that it prohibited the use (more precisely, the use even by married couples) rather than merely the sale of contraceptives. Second, the question of justiciability was complicated because while the strongest Constitutional claims could be made on behalf of users the state was interested only in prosecuting suppliers.

The anti-contraception statute was the subject of a long-term political battle in the Connecticut state legislature. The Planned Parenthood League of Connecticut (PPLC) coordinated an effort at repeal or amendment of the statute in every session of the Connecticut state

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2. For an account of the enforcement of the statute, see pages 14-18 of this Section; the statute under which prosecutions were brought read, in the 1958 revision of the Connecticut General Statutes, as follows. Tit. 54 (Criminal Procedure), Ch. 959 (Jurisdiction and Powers of Courts), Section 54-196 (Accessories): "Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

3. 367 U.S. at 554-555; for a survey of the various anti-contraception statutes adopted by the American states, see C. Thomas Dienes, Law, Politics, and Birth Control (Urbana: University of Illinois Press, 1972) Appendix B.

legislature from the 1920's onward. In 1931, the Connecticut Joint Legislative Committee for the first time reported favorably a bill to alter the statute; in 1933, the Connecticut House of Representatives passed such as bill by a large margin but the state Senate rejected it in an 18-15 vote. Beginning in 1941, the PPLC began a more concerted assault aimed at repealing or altering (by, for example, creating exceptions for married couples or allowing physicians to prescribe contraceptives) the anti-contraception statute. Seventeen bills seeking reform were introduced during the next twelve sessions of the legislature. However, supporters of the anti-contraception statute, led by the Catholic church, retained enough strength in the state Senate to defeat all of these measures.[4]

Enforcement of the statute was lax. As of 1935 there had been no recorded prosecutions, and the Connecticut Birth Control League (CBCL) in July of that year opened nine birth control clinics. The clinics were allowed to operate for almost four years and proved popular. Their success, however, provoked the Catholic Clergy Association to issue a declaration in June 1939 calling the clinics to the attention of state prosecutors. Soon thereafter police raided the Waterbury Maternal Center in the city of Waterbury, arresting two doctors and a nurse. Acting on the advice of its lawyers, the CBCL closed all of its clinics. A Connecticut State Superior Court, reviewing the case resulting from the arrest of the doctors and nurse, held the anti-contraception statute unconstitutional, but, in State v. Nelson,[5]

4. Dienes, pp. 142-144, 186.

5. 126 Conn. 412; 11 A 2d. 856 (1941).

the Connecticut Supreme Court of Errors reversed that decision. For technical legal reasons further appeal was impossible. Charges against the doctors and nurse were dropped, but the clinics remained closed.[6]

The state prosecutor had declared in Nelson that[7]

> Henceforth any person, whether a physician or layman, who violates the provisions of these statutes, must expect to be prosecuted and punished in accordance with the literal provisions of the law.

Such expectations, if ever they developed, went unfulfilled. Prosecutions under the law were few and violations of the law were many. Though the Nelson decision effectively discouraged the opening of any birth control clinics, the only prosecutions under the statute after Nelson were in a couple of unappealed police court cases convicting individuals who had sold contraceptives via vending machines. By 1958 contraceptives were openly and notoriously sold in Connecticut drug stores.[8]

Proponents of birth control, finding themselves unsuccessful in the Connecticut legislature, turned to the courts. In 1943 Wilder Tileston, a New Haven physician, sought a declaratory judgment against the Constitutionality of the statute, claiming that it deprived some of his female patients of due process by denying to them medical assistance made necessary by the dangers that pregnancy might pose to their life or health. The Connecticut Supreme Court of Errors again upheld the Constitutionality of the statute. Tileston appealed to the

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6. Dienes, pp. 137-138.

7. quoted in 367 U.S. at 532.

8. A. Bickel, "The Passive Virtues", Harvard Law Review 75 (1961), 59-60. See also Dienes, p. 158.

United States Supreme Court, which dismissed the case on the ground that Tileston lacked standing to assert the rights of his patients.[9]

In 1958, Dr. C. Lee Buxton, an emminent gynecologist and obstetrician on the Yale Medical School faculty, and Fowler Harper of the Yale Law School faculty decided that a new attempt at securing a judicial declaration of unconstitutionality might prove successful.[10] A collection of cases, all asking for declaratory judgment finding the anti-contraception law unconstitutional, were initiated. Poe v. Ullman was brought by a childless married couple; three pregnancies of the wife had resulted in the birth of babies with extreme congenital defects, and all three babies died shortly after birth. The couple had consulted Dr. Buxton, who believed that another pregnancy would involve stress dangerous to the health of both husband and wife. The couple asserted that they were unable to obtain contraceptives solely because Connecticut statute prohibited the use of such devices; the state's attorney admitted in demurrer that the use of contraceptives by the married couple would be a violation of Connecticut law, and that he intended to prosecute violations of Connecticut law. Appellants contended that the anti-contraception statute denied them due process of law because it was premised upon a Constitutionally impermissible purpose and because it invaded their marital privacy. In Doe v. Ullman,[11] a married woman whose life would be endangered by a pregnancy raised claims very similar to those at issue in Poe. Dr.

9. Tileston v. Ullman 318 U.S. 44 (1943).

10. Dienes, p. 151.

11. 367 U.S. 497 (1961).

Buxton, in Buxton v. Ullman,[12] alleged that the statute deprived him of due process by interfering with a doctor's right to advise and treat his patients to the best of his ability. After the Connecticut State Supreme Court of Errors construed the anti-contraception statute to apply even in cases involving married women whose health would be severely endangered by a pregnancy and again upheld the Constitutionality of the statute, Doe, Poe, and Buxton reached the United States Supreme Court on appeal. For a variety of reasons, several other cases, including one brought by ministers claiming that the law deprived them of a right to counsel members of their congregation and one brought by a married couple claiming a right to use contraceptives because of economic (rather than medical) advantages they supplied, did not reach the high court.[13]

In a five-to-four decision, the Supreme Court dismissed Doe, Poe, and Buxton for lack of a justiciable controversy; the plurality opinion and concurring opinion are discussed below. Dr. Buxton and the PPLC were, however, not easily discouraged. In November 1961 the PPLC, seeking to ensure the existence of a justiciable controversy, opened a public clinic in New Haven providing family-planning services for married women. The PPLC publicized the opening of the clinic widely. Executives of the PPLC apparently feared that local authorities might choose to look the other way and not enforce the law, thereby denying the PPLC a chance to challenge the law's Constitutionality, but public pressure mounted, and, after the clinic had been operating for over two weeks, Dr. Buxton and Estelle Griswold, Executive Director of the PPLC,

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12. Ibid.

13. Dienes, pp. 152-156.

were arrested.[14] The cases again reached the United States Supreme Court. This time, in Griswold v. Connecticut, the Supreme Court reached the merits of the case, and in a 7-2 decision, found the Connecticut statute unconstitutional because it violated married couples' right to privacy.[15]

B.

Arguments to Dismiss

The Court's reluctance to decide the Constitutional issues raised by Poe is readily understandable. The details of Poe and Doe were carefully designed to illustrate the sort of injuries that would result from a law denying married women access to contraceptives, but (as the Justices knew) the Connecticut law simply did not, as a matter of practical fact, have this effect. Moreover, the Justices also realized that the litigants before them were interested in educational campaigns and public counseling supportive of birth control, and that these sorts of activities were the center of a long-standing political controversy in Connecticut. The Justices' task, then, was to decide whether or not these facts warranted dismissal of the cases before them, and to explain the reasons which led them to their conclusions.

As noted earlier, the Court voted 5-4 to dismiss. Justice Felix Frankfurter authored a plurality opinion (joined by the Chief Justice and by Justices Clark and Whittaker) widely scored for its opacity and

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14. Ibid., p. 162.

15. 381 U.S. 479 (1965).

its wrongness.[16] Frankfurter's reasoning involves four steps. First, he observes that the Court may look beyond the claims of the parties in order to determine whether a real controversy exists. To begin with, he observes, the appellants in this case do not allege that the State's attorney in fact intends to prosecute them but only that he intends, in the course of his duty, to prosecute violations of Connnecticut law, and that the acts appellants describe would in fact violate that law. In any case, Frankfurter adds, the Court is not bound to accept what is alleged by one party and admitted by the other if those allegations and admissions "collide with plausibility."[17]

Second, he claims that inspection of the history of the anti-contraception statute reveals a record of nonenforcement which testifies to the unreality of the dispute before the Court. The only prosecution under the law, he asserts, was the Nelson case, and that instance he dismisses (pointing out that charges were eventually dropped) as a "test-case," aimed only at determining whether the law was Constitutionally enforceable and not at securing compliance. He concludes that[18]

> The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they

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16. The most exact and persuasive criticism of Frankfurter's opinion is Harlan's dissent, discussed in Sections IV and V below. For other critical comments, see "Threat of Enforcement: Prerequisite of a Justiciable Controversy", Comment, Columbia Law Review 62 (1962), 106; "The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts", Comment, Columbia Law Review 63 (1963), 688; and Gerald Gunther, "The Subtle Vices of the 'Passive Virtues'--A Comment on Principle and Expediency", Columbia Law Review 64 (1964), 16-21.

17. 367 U.S. at 501.

18. Ibid. at 502.

> have been on the statute books bespeaks more than prosecutorial paralysis.

The absence of prosecutions has, Frankfurter says, brought into being a law truer than the one on the books.

Third, Frankfurter notes that the Court has developed and must observe rules of justiciability in deciding which cases to adjudicate. These rules derive from several sources: from "the historically defined, limited nature and function of courts;" from the dependence of the adjudicatory process on the illumination of issues by a real and pressing controversy; and from the Court's place within the separation of powers. Many of these rules, Frankfurter continues, emphasize that the Court should exercise its power of judicial review only when a litigant is himself harmed, or immediately threatened by harm, as a consequence of the legislation challenged.[19]

Fourth, Frankfurter concludes that the rules governing justiciability require that Poe be dismissed. He is somewhat unclear as to which of the many rules and precedents cited he means to invoke, and as to how he intends to subsume the instant case under that rule. He does, however, say that if a prosecutor agrees not to prosecute, a case claiming harm as a consequence of a threat to prosecute is not an adversary proceeding, and, while no explicit agreement exists in Poe, Frankfurter claims that eighty years of Connecticut history "demonstrates a similar, albeit tacit agreement." Frankfurter concludes the opinion with a paragraph maintaining that justiciability is a concept whose use is necessarily "the resultant of many subtle pressures."[20]

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19. Ibid. at 503-506.

20. Ibid. at 508, 509.

It is difficult to imagine any critique of Frankfurter's opinion more telling or precise than the one contained in Harlan's dissent, and, since I will be examining that dissent at great length, I will limit myself to two observations here. First, we should note that, in light of the history presented in the preceding subsection of this chapter, Frankfurter quite clearly misconstrues the significance of Connecticut's record of nonenforcement. Connecticut may well have been reluctant to invoke the law and it certainly never lived up to the language its attorney employed in Nelson, but, on the other hand, the Nelson prosecution not only aimed at but in fact secured a certain degree of compliance. The Connecticut law was not a dead letter, and the record of nonenforcement cannot aptly be described as "an undeviating policy of nullification."[21]

Second, Frankfurter's opinion seems, particularly in its closing reference to "subtle pressures," to suggest that the Court's justiciability policy includes a nonconstitutional discretion to choose among some cases on the basis of an assessment of the political implications of deciding those cases. Several commentators have read Frankfurter's opinion as invoking or asserting the existence of a

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21. In light of Frankfurter's claims about the history of the statute, it is worth stressing that the Court knew of the police court prosecutions I mentioned earlier; the prosecutions were noted by counsel for the state of Connecticut in oral argument (see 29 United States Law Week 3259 (1961)) and are referred to by Justice Douglas (367 U.S. at 512-513 (dissenting opinion)).

discretion of this kind; Gerald Gunther, for example, writes that[22]

> ...as used in the plurality opinion, the reasonably well-defined or adequately definable doctrinal background indeed becomes a "catch-all for an unarticulated discretion on the part of this Court to decline to adjudicate appeals involving Constitutional issues."

Frankfurter's opinion does not contain any unambiguous declaration of a judicial power to refrain from deciding some cases otherwise within the Court's jurisdiction. Yet if Frankfurter did wish to found his concept of justiciability upon Constitutional purposes and ideas or to deny the existence of a nonconstitutional policy of discretion, he failed to do so clearly. As we shall see in the next two sections, Harlan takes issue with Frankfurter's treatment of the general nature of the justiciability doctrine as well as with Frankfurter's more specific conclusions.

The fifth and deciding vote in favor of dismissal came from Justice William Brennan. Brennan concurred in a very short opinion which asserted that the "true controversy in this case is over the opening of birth-control clinics on a large scale ..." That sort of activity, and not the use of contraceptives by married couples, is what the state has sought to suppress in the past, Brennan observed; the couples in these cases therefore do not face a true dilemma.[23]

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22. Gunther, 18. See also the other articles listed in note 16 of this Section. For more sympathetic (although very brief) interpretations of Frankfurter's discussion of justiciability in Poe, see Tribe, American Constitutional Law (Minneola, New York: Foundation Press, 1978) p. 53, and Jesse H. Choper, Judicial Review and the National Political Process (Chicago: University of Chicago Press, 1980), p. 407.

23. 367 U.S. at 509.

Brennan's opinion has the advantage of bluntness. He states in straightforward terms the considerations which, as I said earlier, make readily understandable the Court's reluctance to reach the merits of the case in Poe. Brennan's opinion also has the singular disadvantage of failing to explain why these considerations translate into a judgment of nonjusticiability. Since none of his eight brethren were ready to accept his claim that the "true controversy in this case is about the opening of birth-control clinics," this failing is a major one.

IV.

Mr. Justice Harlan's Dissent

A.

Justiciability

Harlan introduces his dissent by apologizing for its unusual length. He explains that he believes it necessary to dissent from the majority's finding of nonjusticiability because in this case "a present determination of the Constitutional issues is the only course which will advance justice," and, that, moreover, he finds it necessary to reach the merits of the case in dissent because those Constitutional issues are inextricably entangled with the issues of justiciability.[1] Harlan then takes up these various issues in an opinion which he divides into two parts, the first titled "Justiciability" and the second titled "Constitutionality."

Harlan opens his examination of justiciability by opining that while, as the plurality claims, it is impossible to formulate a precise or scientific definition of justiciability, it is nonetheless possible to say or describe what justiciability is. Furthermore, it is, on Harlan's view, important to undertake this project of giving an account of what justiciability is because, though he respects deeply the limits placed upon the Court's exercise of power by its doctrines of justiciability, he believes that a careful account of those doctrines will show that they do not compel dismissal of the instant case.[2]

Harlan's account of what justiciability is divides into two parts: an exposition of the nature of the general idea, and an

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1. 367 U.S. at 524.

2. Ibid.

examination of the more particular rules developed by the Court out of that idea. He begins by identifying four insights which, he thinks, together constitute the wisdom embodied in the idea of justiciability; I will in Section V consider this portion of Harlan's opinion in some detail.[3]

After completing this account of the purposes behind the Court's justiciability doctrine, the Justice observes that the Court has developed a number of rules "in particularization of this ... policy." Harlan then considers and eliminates three rules mentioned by the plurality. First, the fact that only Constitutional issues are presented does not preclude anticipatory relief; the precedents cited by the plurality stand only for the proposition that no such relief will be provided when an authoritative state court construal of a state statute is lacking. Second, there is no lack of ripeness in the present case, for "there is no circumstance besides that of detection or prosecution to make remote the particular controversy." Third, the controversy presented in Poe is not a "feigned, hypothetical, friendly, or colorable suit." It would, Harlan says, be unduly "stretching things" to assume appellants undeterred by the threat of prosecution or to assume the prosecutor insincere in his statement of intent to prosecute. Insofar as the majority relies on this third rule, Harlan says, it confuses[4]

> the predictive likelihood that, had they not brought themselves to appellee's attention, he would not enforce the statute against [appellants], with some entirely suppositious "tacit agreement" not to prosecute ....

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3. See pages 38-45 below.

4. 367 U.S. at 528-529.

The Justice turns next to a rule providing that the Court will not consider cases in which no real and concrete interest is at stake. This rule, Harlan says, requires further particularization if it is not to become a "catch-all for an unarticulated discretion on the part of the Court." Harlan then makes the rule more precise: the Court cannot be objecting that the parties claiming an interest in this case are not the appropriate parties to do so; it must therefore be asserting that they raise the claim on an inappropriate occasion. This latter claim in fact takes us, the Justice tells us, to the precise contention which must lie at the heart of the plurality and, ultimately, the concurring opinions' judgment: the lack of recorded enforcements of the Connecticut statute is said to render the rights claimed by appellants so remote, contingent, and hypothetical as to be nonjusticiable.[5]

Having narrowed the issue at stake to the validity of this contention, Harlan disputes the Court's conclusion. The Court's finding rests, he says, on two misconceptions, a misconception about what the significance of the anti-contraception statute's history is and a misconception about what the nature of the rights claimed by the appellants is.[6]

Harlan examines first the misunderstanding of the record. This misunderstanding turns, he says, upon a failure to discern the significance of Nelson. The plurality treats Nelson as a test case, but it was a test case only in the sense that it was brought to demonstrate the State's willingness to enforce the law. In light of the declaration by the State's attorney in Nelson, says the Justice, he

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5. Ibid. at 530-531.

6. Ibid. at 531.

"finds it difficult to believe" that Nelson would not discourage doctors from openly disseminating contraceptives. In short, he concludes, the Court has[7]

> ignored the fact that the very purpose of the Nelson prosecution was to change defiance into compliance. It has ignored the very possibility that this purpose may have been successful. The result is to postulate a security from prosecution for open defiance of the statute which I do not believe the record supports.

The Court's misconception about the record affects primarily its assessment of the threat of prosecution for the sale or prescription of contraceptives. However, continues the Justice, the plurality and concurring opinions would be in error even if only the issue of use were at stake, for those opinions misconceive the nature of the Constitutional rights implicated by the statute under review. Harlan's reasoning on this point involves three steps. First, neither the plurality nor the concurring opinion suggests that the absence of prosecutions gives the appellants any legally cognizable right. Second, it follows that the appellants' enjoyment of marital privacy rests upon the "whim of the prosecutor." Third, this arrangement is sufficiently injurious to constitute a violation of the married couples' Constitutionally protected right "to enjoy the privacy of their marital relations free of the enquiry of the criminal law." The third step depends, of course, upon a delineation of what the Constitutional right to privacy is, and it is for that reason that Harlan finds it necessary to reach the merits of the case in order to support his finding of justiciability.[8]

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7. Ibid. at 534-535.

8. Ibid. at 536-537.

B.

Constitutionality

The Justice begins the second part of his dissent with a brief introduction. The appellants advance two Constitutional claims; Harlan agrees with them that the Connecticut statute violates the Fourteenth Amendment because it is "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life," but notes that he finds it "difficult and unnecessary to accept" the appellants' other claim, which maintains that the moral judgment behind the Connecticut statute is so unreasonable and arbitrary as to be unconstitutional.[9] Harlan discusses these conclusions in the three sections of the opinion that follow. Because the appellants' Constitutional claims raise novel issues, Harlan views it as desirable to describe the framework of Constitutional principles which will govern his reasoning about those issues, and so sets out those principles in the first section. In the second section, Harlan examines the appellants' claim that the State bases its anti-contraception policy on a Constitutionally impermissible moral judgment. In the third and final section, Harlan investigates whether or not the means chosen by the State to effectuate its moral judgment infringe upon a Constitutionally protected right to privacy.

Harlan's enquiry into the principles governing Constitutional interpretation, presented in Section I of Part Two of his dissent, is subtle and insightful, and I will examine it in some detail in the next

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9. Ibid. at 539.

Section of this Chapter.[10] I will at this point, however, attempt only to summarize what I take to be the Justice's major points. The Court, Harlan observes, must interpret the Constitution in a "rational" way, one that treats the Constitution not as though it were a tax statute but rather as a charter of government, setting out "in spare but meaningful terms" the principles upon which the government is based. If, he continues, the interpretation of the Constitution is always a "rational process," it is nowhere more necessarily so than in the interpretation of the Due Process Clause of the Fifth and Fourteenth Amendments.[11]

The legislative history of the Fourteenth Amendment sheds little light on the meaning of its Due Process Clause, the Justice notes. He tells us that it is however important to realize that two approaches to the construction of that clause have not been accepted by the Court. One of these constructions would limit the clause to a guarantee of procedural fairness, the other would equate the clause with the more specific restrictions contained in the Bill of Rights. These constructions are, according to Harlan, inappropriate because[12]

> "due process" in the consistent view of this court has ever been a broader concept than the first view and more flexible than the second.

There exists no code or formula which can substitute for the idea of due process; instead, the Justice says, the best that can be said about due process is that it represents the balance that the American

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10. See pages 45-59 of this thesis.

11. 367 U.S. at 540.

12. Ibid. at 541.

nation has struck between the goal of liberty and the need for restraint. The articulation of this balance, Harlan says, is necessarily a rational process, but it is not an unguided one. It is a process informed by the country's traditions; the implications of the Due Process Clause in particular circumstances will become apparent only through careful attention to the history and purposes which form the context of the Clause.[13]

Having set out his view of the Due Process Clause, Harlan proceeds to consider the particular claims raised in Poe in light of this understanding. He begins the second section of his discussion of the anti-contraception statute's Constitutionality by noting that the State claims, in defense of the statute, that the challenged law protects the moral welfare of its citizenry both because the use of contraception is itself immoral and because the availability of contraception encourages fornication and adultery, which are immoral acts. The appellants challenge this purpose on the ground that it is Constitutionally impermissible because arbitrary and irrational.

On the one hand, the Justice begins, it is true that the State cannot justify any and every law it makes simply by referring to "the controversial realm of morals." On the other hand, it is also true, according to the Justice, that the State has a legitimate interest in caring for or fostering the "moral soundness" of its citizenry. In light of these circumstances and of the history of the public view of contraception, the particular moral judgment asserted by the State in this case is, Harlan says, not demonstrably incorrect. Fortunately, the Court is not forced to pass on the validity of an abstract moral

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13. Ibid. at 541-544.

proposition, for, Harlan observes, the State must pursue its purpose through the regulation of overt actions. The State must therefore choose among means, and the choice it makes is subject to review.[14]

In the third and final section of the second part of his dissent, Harlan considers the Constitutionality of the means selected by the State. He begins by observing that the State's choice of means requires heightened scrutiny, for it allows the State to "enquire into, prove and punish" the private use by a married couple of their marital intimacy, and so involves "what must be granted to be a fundamental aspect of 'liberty,' the privacy of the home in its most basic sense." Harlan next investigates the nature of the right to privacy protected by the Constitution. He notes that only the Third and Fourth Amendments to the Constitution explicitly announce a protection of privacy, but reminds us that these particular provisions must be read as part of the scheme of "ordered liberty" aimed at by the Constitution.[15]

The Justice takes up and rejects two possible reasons for excluding the claims made by appellants in Poe from this right to privacy. First, he states that the form of government intrusion in Poe--the enacting of a substantive offense rather than the causing or creation of a physical intrusion--does not preclude the making of a valid Constitutional claim. To insist that the right to privacy comprehends only a protection against physical intrusions would, Harlan says, be an extreme instance of sacrificing substance to form. Second,

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14. Ibid. at 545-548.

15. Ibid. at 548, 549.

he states that it would be unreasonable to object that it is the home rather than the life natural to the home that is protected. On the contrary, Harlan contends, the right of privacy is surely aimed to protect the life within the home.[16]

And more precisely, Harlan continues, reaching now a point which brings his reflections to bear directly on the issues at stake in Poe, the source of the preeminence of the home life, and of the Constitutionally protected privacy it enjoys, is its claim to be the locus of family life. Furthermore, he adds, the marital relations of husband and wife are the most private aspect of that life. Harlan concedes that the State may regulate certain aspects of the home life, so that "traditional offenses against good morals" and crimes which, though they might have occurred elsewhere, happen to have taken place within the home, are not outside the purview of the State's control. Nonetheless, Harlan says in what is a crucial step in his assessment of the Constitutionality of the Connecticut statute, these crimes and offenses must be sharply distinguished from the sort of regulation of marital intimacy the Connecticut law imposes, for that intimacy is an essential feature of marriage, an institution which the State fosters and condones.[17] This distinction rests on a particular understanding of what marriage is; I will comment on this matter at length in the next section.[18]

Having decided that marital intimacy falls within the scope of

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16. Ibid. at 550-551.

17. Ibid. at 553.

18. See pages 64-71 of this thesis.

the Constitutional right to privacy, Harlan quickly concludes that the Connecticut law is unconstitutional. The appellants, he says, have presented a pressing claim. The liberty at stake is a fundamental one, so that strict scrutiny is appropriate; in particular, it is not sufficient for the State to show that the statute bears a rational relation to a permissible end. Connecticut, the Justice claims, has presented no justification adequate to support the "noxiously intrusive means it has chosen to effectuate" its anti-contraception policy. As a consequence, he reasons, the appellants' claim should be upheld and declaratory relief granted.[19]

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19. 367 U.S. at 554-555.

V.

Reason and the Constitution

I would like in this Section to try to set out Harlan's way of thinking, a way founded upon a teaching about the place of reason in American Constitutional politics that is, I believe, embedded in Harlan's opinion. I do not mean to say that Harlan intended his opinion as a teaching about reason and politics, or that his opinion is really about this topic, or even that the teaching I will articulate is one that Harlan himself had contemplated. I do, however, make two claims on behalf of that teaching. First, I think that this teaching guides Harlan's understanding of the questions at issue in Poe v. Ullman. I believe the teaching plays this role not because it represents unconscious impulses or conscious ideas which, though unspoken, directed Harlan's reasoning, but rather because I believe that the teaching is the best way of comprehending the meaning both of Harlan's own (several) explicit statements about the kind of reason appropriate to Constitutional interpretation and of the way of reasoning that he himself employs as a Constitutional interpreter. Second, I think that the teaching is in fact the Constitution's teaching about reason in politics. I have two reasons for making this second claim: first, Harlan accepts the Constitution as a guide to his own thinking, and, because I think he reads the Constitution well, I think that the understanding of reason's place in politics that informs his opinion is likely to emerge from the Constitution; and, second, the teaching I see in Harlan's work reflects, as I shall try to show below, certain ideas articulated by some of the Constitution's principal

framers. In the pages that follow, I will try to describe Harlan's way of thinking, and its Constitutional status, by attending with some care to what he has to say about reason, to the way he in fact does reason, and to what he has to say about the nature and purposes of the Constitution.

A.

The Nature of General Ideas

There is a passage early in Harlan's dissent which allows us, I think, to discern a view of the nature of general ideas which is of crucial importance to understanding what Harlan has to say about the Constitution and about the nature of reason. Harlan begins his discussion of justiciability by examining the plurality opinion's assertion that justiciability is somehow an inherently imprecise idea.[1]

> There can be no quarrel with the plurality opinion's statement that "Justiciability is of course not a legal concept with fixed content or susceptible of scientific verification," but, with deference, the fact that justiciability is not precisely definable does not make it ineffable.

According to Harlan, one cannot define precisely what justiciability is, but one can nevertheless say or describe what it is. Moreover, Harlan's treatment of the justiciability issue in the remainder of his opinion demonstrates that he does not believe that the problems with defining justiciability render the idea indeterminate in particular legal circumstances. Harlan's distinction may as a consequence seem overly fine: if it is possible to say what justiciability is, and if justiciability has a well-determined and discoverable significance in particular circumstances, what can it mean to say that justiciability

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1. 367 U.S. at 524.

is not precisely definable? I believe, however, that Harlan's comment on the concept of justiciability is both coherent and wise, for I think (though I realize that his language does not compel this interpretation) it reflects an unusually insightful understanding of the nature of general ideas. On this understanding it is unwise to insist upon great rigor or precision in the abstract statement of general ideas, but those ideas nonetheless have specific import when considered in the light of particular contexts. In other words, general ideas are meaningful because they possess unambiguous significance in concrete circumstances and because they help us to comprehend the relations among various particular situations, but are not precisely definable because it is impossible to provide any abstract formulation or statement of them which distinguishes them cleanly from all other general ideas or rules out all possible misunderstandings. This way of thinking about general ideas, which on the one hand affirms their meaningfulness and importance but on the other hand declares them in a sense dependent for their significance upon particular circumstances and details, surfaces again and again in the course of Harlan's opinion.

Because this idea is so important, I would like to dwell a bit longer on the sentence just quoted. We can, I think, better understand Harlan's ideas if we consider what he means when he accepts the plurality opinion's assertion that justiciability is not a concept "susceptible of scientific verification." The plurality opinion's claim is somewhat unclear, for one normally speaks in science of verifying results or conclusions rather than concepts. I think, however, we can discern correctly the sense of the assertion if we render it as denying that there exists any algorithm for determining

whether a particular controversy is justiciable; justiciability is a concept not susceptible of scientific verification because it is impossible to define any procedure or method by which to verify particular judgments of justiciability. This interpretation of the plurality opinion's assertion gains some support if we consider not only Harlan's response to it but also the larger paragraph from which that assertion is excerpted:[2]

> Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.

The plurality opinion appears here to claim that because justiciability is "not a legal concept with a fixed content or susceptible of scientific verification," it would be impossible or a mistake to decide questions of justiciability by an extended inquiry into what justiciability is. Frankfurter's recitation of the various specific rules comprehended by the idea of justiciability leads him to conclude that questions of justiciability must instead be answered by considering, in some unarticulated way, "subtle pressures" which impinge upon the Court. Harlan replies, on the interpretation I have advanced, that this claim rests on a non sequitur. It may well be that one cannot offer a certain kind of definition of justiciability, or that it is impossible to translate the idea of justiciability into an algorithm, but that does not mean the idea is vague or indeterminate when considered in the light of particular circumstances. In essence, I read Harlan as pointing out that general ideas can guide reason

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2. Ibid. at 508-509.

without substituting for or determining it. On this view, a general idea is something more analogous to a map, which guides our attempt to relate and comprehend the significance of the details of the world we inhabit, rather than an algorithm or recipe, which determines our action or prescribes steps to take in particular circumstances.

Harlan's opinion provides a superb example of the way general ideas work, for having asserted that it is possible to say what justiciability is, he continues by showing how this saying may be accomplished. We can enhance our understanding of Harlan's view of general ideas, and learn something about the way the Court must deal with those ideas, by examining the way the Justice begins his account of justiciability. In the passage I have in mind, Harlan gives a general (but, he cautions, not definitive) account of justiciability:[3]

> Without undertaking to be definitive, I would suppose it is a policy the wisdom of which is woven of several strands: (1) Due regard for the fact that the source of the Court's power lies ultimately in its duty to decide, in conformity with the Constitution, the particular controversies which come to it, and does not arise from some generalized power of supervision over state and national legislatures; (2) therefore it should insist that litigants bring to the Court interests and rights which require present recognition and controversies demanding immediate resolution; (3) also it follows that the controversy must be one which is in truth and fact the litigants own, so that the clash which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely; (4) finally, it is required that other means of redress for the particular right claimed be unavailable, so that the process of the Court may not become overburdened and conflicts with other courts or departments may not needlessly be created, which might come about if either those truly affected are not the ones demanding relief, or if the relief we can give is not truly needed.

This very lengthy sentence is of interest for three (related) reasons. First, it is of interest because of the ideas about the

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3. Ibid. at 525.

Court's power of judicial review it expresses. Second, it is of interest because of the way it presents those ideas. Third, it is of interest because of the part those ideas play in Harlan's discussion of the justiciability issue in Poe v. Ullman.

First, Harlan's statement of the wisdom underlying the Court's justiciability policy tells us a great deal about his understanding of the nature and purposes of the Court's power. The power arises from a duty; in particular, the duty to decide cases in conformity to the Constitution. Harlan regards the second and third strands, which he introduces with "therefore" and "also it follows," as consequences of the nature and source of the Court's power. It is thus apparently necessary first to understand the general purposes or wisdom which give rise to the Court's power in order to comprehend the particular doctrines and policies of the Court. This necessity reflects general themes in Harlan's dissent both in the way it stresses the importance of purposes and in the relationship between general and particular it implies.

The second strand Harlan identifies follows relatively clearly from the first: because the Court's power emanates from its duty to decide cases rather than from any more general grant of supervisory power, the Court would be wise to confine its exercise of power to the deciding of particular cases. The relation of the third strand to the first is, however, less evident, and Harlan therefore supplies a reason which clarifies the relation. By requiring that the controversy be the litigants' own, the Court secures a "sharpening" and "illumination" of the issues upon which "our adjudicatory system has come to rely." This sharpening and illumination enables the Court to fulfill its duty, which is not simply to exercise a power to decide cases but rather to

decide cases rightly (that is, in conformity to the Constitution). Harlan's emphasis on the importance of a thorough understanding of detail to the proper resolution of a case strikes again a more general theme: while general ideas, including the idea of justiciability and the ideas embodied by the Constitution, are meaningful and have determinate consequences in particular situations, it is difficult if not impossible (and certainly unwise) to use such ideas to decide abstract questions posed apart from any specific context. The fourth and final strand which Harlan identifies is not presented as a consequence of the nature of the Court's power; one might therefore be tempted to view it as the assertion of a discretionary power. This view would, I think, be misleading, for it is prudent if not obligatory for the bearer of a duty to do what he can, so far as is compatible with the requirements of that duty, to keep the duty manageable.

The fourth strand, like the second and third, might thus be said to follow from the first, but we should note that it, like the others, follows as a matter of prudence and not as a matter of logical entailment. It is simply not true, for example, that recognizing as the source of the Court's power its duty to decide cases according to the Constitution compels one to concede that the Court should or must confine its exercise of power to the execution of its duty. One might, of course, engage in interpretive gymnastics in order to construe Harlan's opinion in a way that makes the second and third strands the logical entailments of the first, but to do so would be to misunderstand not only Harlan but also the nature and purposes of general ideas.

Second, Harlan presents these ideas for the reader's consideration not as an argument or as a deduction from some theory

but, more simply, as what he is inclined to think true; indeed, he begins the sentence by indicating that what follows is what he "would suppose" to be the case. Moreover, he supplies no evidence or argument to back up his supposition, but submits it unsupported for the reader's consideration. This manner of exposition resembles that employed by Alexander Hamilton in Federalist 23, where Hamilton is expounding ideas no more obvious or incontrovertible than Harlan's observations about justiciability; in particular, Hamilton is pressing the point that the "circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be placed on the power to which the care of it is committed." Hamilton, like Harlan, offers no argument for his conclusions, but, unlike Harlan, he pauses to explain why his mode of exposition is appropriate:[4]

> This is one of those truths which to a correct and unprejudiced mind carries its own evidence along with it, and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the means ought to be proportioned to the end; the persons from whose agency the attainment of any end is expected ought to possess the means by which it is to be attained.

Certainly Hamilton cannot mean to suggest that it is not possible to muster a cogent or persuasive argument against the claims he has made; indeed, he fears, apparently, that additional argument or discussion might "obscure" the truth of what he has said. What, then, can he mean when he says that this truth is one "which to a correct and unprejudiced mind carries its own evidence along with it?" A cynical reader might suspect that Hamilton is invoking a rhetorical ploy designed to discourage criticism or dissent by implying that those who

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4. Alexander Hamilton, "Federalist 23", in The Federalist Papers, ed. Clinton Rossiter (New York: Mentor, 1961), p. 153.

would disagree with him have minds which are not "correct and unprejudiced." While I do not deny that this tactic may have been part of Hamilton's purpose, I think that a more subtle wisdom underlies the passage. More particularly, I think that Hamilton's claims rest upon two beliefs about the nature of reason. First, I think that Hamilton means to emphasize the importance of "having a look" at things: no amount of argument or reasoning can substitute for or replace the act of looking or seeing what is the case with good government. This emphasis upon "having a look" emanates from a view of what reason is which holds that reason involves (though it is not reducible to) a kind of activity best described somewhat metaphorically as a sort of seeing or looking and which is suggested, I think, by our everyday use of the ideas of discernment, judgment and intuition. What reason sees is our ethical environment: it perceives the nature (including the goodness and badness) of things around us. By using the visual metaphor, I mean both to suggest that reason's perception of the good, the ethical world, is straightforward and underived in much the same way as visual perception of the material, physical world is, and to emphasize the dependence of this faculty of discernment on the particularity of the situations in which it is exercised (we see the details of the concrete, specific world we inhabit, not those of fictive worlds we imagine).

Second, the nature of good government will be visible only to those who share Hamilton's commitment to the practical enterprise of building the best possible government for the United States. Those who do not share this commitment will overlook relevant points because, to put the matter somewhat metaphorically, they do not look in the right place. The second of these two beliefs explains, I think, what

Hamilton means when he speaks of a "correct and unprejudiced mind." To put this point another way, Hamilton asserts here that the questions he addresses are practical in the sense that ethics is practical for Aristotle. As John Finnis observes,[5]

> ... in calling ethics practical, Aristotle ... meant that one does ethics properly, adequately, reasonably if and only if one is questioning and reflecting in order to be able to act--i.e. in order to conduct one's life rightly, reasonably, in the fullest sense 'well.'

In summary, then, I would propose that the following interpretation makes sense of the paragraph quoted from Hamilton. Reasoning rightly about the questions at stake in the Federalist Papers requires a practical commitment to the project of building the American nation. For those who possess this commitment, the points Hamilton is making will be evident to those who look carefully at the problems of government. Further argument or reasoning is undesirable, for it could only distract the reader from the proper commitments or from the necessary task of looking.

Hamilton wrote, I suspect, with a thorough understanding of the frame of mind which would allow his readers access to his insights, and of the difficulties involved in provoking or teaching his readers to adopt that frame of mind. Harlan likely gave such matters less reflection than did Hamilton, but, as a consequence of his training and experience, was inclined to address his thoughts to lawyers and judges who shared his purposes rather than to others (including captious academics) who did not. I would therefore suppose that he saw little need to explain that his opinions about justiciability represented a

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5. John Finnis, Fundamentals of Ethics (Oxford: Clarendon Press, 1983), p. 1.

truth of the sort "which to a correct and unprejudiced mind carries its own evidence along with it, and may be obscured but not made plainer by argument or reasoning," though I think the form of his comments suggests that he thought this to be the case. Because Harlan's consideration of the wisdom underlying the idea of justiciability is a practical sort of reflection, it (and, I think, much of the rest of Harlan's opinion) is a discussion accessible and comprehensible only to those who share Harlan's practical purposes, in particular, the purpose of deciding cases in accordance with the guidance of the Constitution. Moreover, it is a discussion which, like Hamilton's, depends upon the willingness of the reader to reason about, in the sense of having a look at, the practical problems at stake.

Third, turning finally to the part that Harlan's lengthy sentence on the wisdom of the justiciability policy plays in his more comprehensive examination of the justiciability issue, we may note that the sentence functions in a way consistent with what I have already said both about the importance of practical purposes and about the nature of general ideas. It is consistent with the thesis that while general ideas cannot be stated or defined with a rigor or precision which precludes misunderstanding, they are nonetheless determinate when applied to particular circumstances, for Harlan's statement of the general wisdom of the justiciability policy guides, without determining or compelling, his reasoning about the particulars of that policy. It functions more like a map, indicating the place of particular rules within a larger understanding of judicial responsibility, than like a recipe or algorithm, prescribing steps or requirements that follow from some general aim. It is consistent with the thesis that certain practical purposes may be prerequisites to the perceiving and

comprehending of practical truths, for it accomplishes its mapping or guiding function by revealing the practical aims which animate the Court's jurisprudence of justiciability. Just as it is apparently necessary to share Harlan's commitment to act conformably with the Constitution in order to understand his statement of the aims of the justiciability policy, it is apparently helpful and perhaps necessary to share his commitment to those more particular aims in order to comprehend his discussion of the details of justiciability.

B.

The Constitutional Status of Harlan's Way of Thinking

Harlan's inquiry into the principles of Constitutional interpretation, presented in Section I of Part Two of his opinion, can teach us much about his way of thinking and also about the relation of that way of thinking to the Constitution. Harlan begins his consideration of the Constitutional questions in Poe by noting that because of the novelty of the appellants' Constitutional claims he would like "at the outset to state the framework of Constitutional principles in which I think the issue must be judged."[6] Harlan thus replicates here the general structure which we observed to govern his discussion of justiciability: he begins his examination of a particular problem in Constitutional interpretation by setting out the aims and purposes of Constitutional interpretation in general. What follows Harlan's promise to state a "framework of Constitutional principles" is, however, something rather different from what the reader might expect, for he does not attempt to enumerate specific

6. 367 U.S. at 539.

rights or values implicit in the Constitution or to sketch a general theory of what the Constitution means. He is instead, I believe, concerned to identify and defend the Constitutional way of thinking, a sort of guided reasoning, and to distinguish this way of reasoning from two other forms of reasoning, one "literal" or "mechanical" and the other involving "unguided speculation," which he deems inappropriate to Constitutional adjudication. Harlan's view emerges in a series of passages which I would like now to collect and consider together.[7]

> But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching 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.
>
> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.
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> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria.

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7. Ibid. at 539-540, 542, 544.

Harlan emphasizes in each of these passages a need for a Constitutional adjudication that is a "rational process." A rational process is essential because there is no algorithm or recipe, nothing approaching a computer program, which can substitute for the judge's autonomous reason: we must remember that due process "has not been reduced to any formula" and that "its content cannot be determined by reference to any code;" we have, in short, "no mechanical yardstick" or "mechanical answer" when we consider issues in Constitutional law.

This need for judges to exercise their powers of reason raises, in Harlan's view, a danger. That danger is not, however, that judges will be guided by interests rather than by reasons, but rather seems to be that they will exercise their powers of reason immoderately or overconfidently:[8]

> If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.

Harlan does not here imply that "unguided speculation" is not a "rational process;" on the contrary, I think that on the most natural reading of this sentence he indicates that speculation is a form of reasoning. Nor does Harlan imply that such speculation necessarily reaches wrong or unjust results. He does, however, think that such speculation is imprudent and undesirable--it entails a considerable risk of wrong or unjust results. The good judge therefore shows "judgment and restraint" by seeking guidance for his reason rather than allowing it to roam freely.

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8. Ibid. at 542; the passage is excerpted from the second of those quoted at note 7 above.

Harlan's concerns here resemble some raised by James Madison in Federalist 10. Madison, like Harlan, worried about problems that might arise from an overly enthusiastic exercise of reason:[9]

> As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.

Madison in this passage identifies two distinct problems. First, different opinions will be formed because man's reason is fallible. Second, the passions and reason are connected and so will exert a reciprocal influence on one another. Though these problems are distinct, they are related, for the difficulty of reasoning rightly makes it easy for our passions to tempt us to rest content with wrong opinion. Nonetheless, as Madison points out in his next paragraph, human nature is such as to make the exercise of fallible reason in and of itself both inevitable and problematic, for, he observes, man has[10]

> A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice ...

We may thus, on this account, supplement my earlier observation that reason in Harlan's way of thinking involves something comparable to a sort of seeing by adding that reason is in some important respects fallible. A notion of reason which maintains that reason is capable of seeing the goodness of things and that reason is fallible may strike

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9. James Madison, "Federalist 10", in The Federalist Papers, p. 78.

10. Ibid., p. 79. See Martin Diamond's insightful comments on these quotations from Madison; Diamond, "Ethics and Politics: the American Way", in The Moral Foundations of the American Republic, ed. R. Horwitz (Charlottesville: University of Virginia Press, 1979), p. 51.

the reader as novel or unfamiliar, but I believe that this view of reason, however foreign it may be to contemporary scholarship, in fact reflects common, everyday ways of thinking and talking about reason.[11] We speak, for example, of "seeing what somebody means," of having a particular "view" of or "perspective" upon a matter, and of "looking into things." The idea of contemplation comprehends both gazing thoughtfully at something and also considering something. The view of reason which I attribute to Harlan (and accept myself) is also reflected in our ideas of judgment, discernment, and intuition. We speak of judgment, for example, as a kind of faculty for seeing what is the case in certain situations and as something which is fallible--people may have "good judgment" or "bad judgment," and even those with good judgment misjudge things on occasion. Yet while the visual metaphor may be helpful, it is inadequate to describe the complexity of the idea of reason upon which Harlan's way of thinking is founded. The inadequacy arises largely because reason studies itself in a way that vision does not. The reflexive character of reason is evident in the dual role of general ideas in Harlan's way of thinking, for those ideas are at once guides to reason and also the objects which reason most needs guidance in order to apprehend well.

In addition to pointing out the problems created by the need for judges to exercise their reasoning or opining capacities, Harlan proposes a particular solution. The Justice apparently believes that judges should use guides to inform and restrain their reasoning: those

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11. For some insightful and illuminating reflections on the nature of reason, see generally the work of Stanley Rosen. Of particular interest is his The Limits of Analysis (New Haven: Yale University Press, 1985).

who recognize the hazards inherent in roaming freely will find maps at hand. The most important of these maps is the Constitution itself, which guides the political choices judges must make. Nonetheless, the interpreting of the Constitution is itself a rational process, so judges may need additional help. The relevant guide here is the "background of Constitutional purposes," purposes which are discenible from not only the text itself (provided that the text is not approached in a "literalistic" way) but also the traditions from which the Nation "developed as well as those from which it broke." Moreover, we should also remember from Harlan's earlier discussion that judges may benefit from the "illumination and sharpening of issues" produced by an adversarial clashing of litigants.

Harlan observes that judges will have two incentives encouraging them to make use of the available guides:[12]

> ... tradition is a living thing. A decision of the Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.

Those judges who depart from tradition are likely to see their judgments prove ineffective (their decisions "cannot long survive"), while those judges who adhere to it gain the additional satisfaction of knowing that they have probably decided well (their decisions are "likely to be sound."). Nonetheless, we may ultimately have to rely on the virtue of our judges if we are to avoid the dangers of unguided speculation, for there is no formula which "could serve as a substitute, in this area, for judgment and restraint."[13]

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12. 367 U.S. at 542; the passage is again excerpted from the second of those quoted at note 7 above.

13. Ibid.

It is important at this point to avoid two possible misunderstandings of what Harlan is saying. First, Harlan is not suggesting that tradition is an alternative to the Constitution, or that tradition speaks where the Constitution is silent. The purposes tradition helps us to discern are Constitutional purposes. A judicial decision must rest ultimately on a Constitutional judgment; Harlan's point, as I understand it, is that a prudent and modest judge will welcome the teachings of history and tradition because those teachings may aid him in his attempt to reason rightly about the Constitution, not because those teachings can substitute for such reasoning. Second, Harlan does not intend by referring to a "living tradition" and to the "historical development" of Constitutional purposes to suggest that either tradition or the Constitution may be recast or construed to fit the impulses of the moment. His reference to tradition which is "a living thing" is designed to point out that tradition is a source of vitality, not that tradition may be altered to fit the times. His comment about the historical development of Constitutional purposes is meant, I think, to draw attention to the way the significance and implications of those purposes become more clear as they operate in various contexts, not to assert that those purposes change from one year to the next.

Harlan devotes a great deal of attention in his development of a "framework of Constitutional principles" to the evils of "literalistic" or "mechanical" thinking on the one hand and to "unguided speculation" on the other, but these are not his only themes. He makes an effort at several points to say what due process is, though, heeding his own advice, he does not attempt to translate it into a formula or a list of rights. Those efforts deserve our attention, and I shall now quote

them together (the second is of course excerpted from a longer passage quoted above):[14]

> However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights "which are ... fundamental; which belong ... to the citizens of all free governments." Corfield v. Coryell (PA) 4 Wash CC 371,380,386, F. Cas. No. 3230, for "the purposes [of securing] which men enter into society," Calder v. Bull (U.S.) 3 Dall 386, 388...
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> The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between the demands of that liberty and the demands of organized society.
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> ... the full scope of the liberty of the Due Process clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

As his view of the nature of general ideas recommends, Harlan paints with broad strokes: he does not aim at precise or "scientific" definition, but rather attempts to lay out, in a way comprehensible to those who share his commitment to deciding cases well, the purposes which underlie or are embedded in the concept of due process. These purposes, he tells us, are the purposes which lead men to enter into society. While it would of course be difficult to give a complete account of these purposes, and imprudent if not impossible to attempt

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14. Ibid. at 541 (the brackets, emphasis, and ellipses are Harlan's), 542, 543; the second of these passages is excerpted from the second of those quoted at note 7 above.

to specify their implications completely, it is nonetheless possible to see how Harlan's statement of due process can guide judicial inquiry even in the absence of such an account or specification. Harlan's explanation of due process aids the judge by directing him to the relevant questions. Is the right claimed in this case fundamental in the sense of being one that belongs to citizens of all free governments? What is the place of the citizen's right or State's power asserted in this case within our Nation's balance between the liberty of the individual and the demands of organized society? Is the interest claimed here one which by its nature merits special protection? But not, Can the claim advanced here be accommodated within one of the specific provisions of the Bill of Rights? The questions Harlan would have judges pose are difficult ones, requiring an independent exercise of reason, but they are answerable ones. The need for an exercise of reason, and the sort of exercise appropriate to the task, was, of course, the subject of the last set of quotations we examined.

Harlan's framework of Constitutional principles would thus appear to involve, first, a way of thinking or reasoning appropriate to Constitutional issues, and, second, a set of questions which guide the selection or framing of those issues. This set of questions is, of course, presented as appropriate to Fourteenth Amendment Due Process Clause controversies rather than as befitting Constitutional claims more generally, but Harlan's explication of due process suggests those questions have much wider scope. Indeed, it could be said of the whole Constitution, as Harlan in fact says of due process, that it represents "the balance which our Nation, built upon postulates of respect for the

liberty of the individual, has struck between that liberty and the demands of organized society."

There is, I think, a rather deep unity joining these two aspects of Harlan's framework, for the purposes upon which the nation was founded (and to which Harlan's way of framing questions directs us) lead quite directly to the aim of securing in government precisely the moderate and restrained exercise of reason which Harlan recommends and demonstrates. The Founders, as Madison's discussion in Federalist 10 shows, were concerned about the dangerous factions that might arise from the unrestrained play of man's opining faculty[15]. Madison and the Founders sought to check the rise of such factions, and to deal with the problem of faction more generally, by encouraging the pursuit of material well-being which, they thought, would give rise to a less dangerous sort of factionalism. Nonetheless, their principal aim was not prosperity but liberty. As a consequence, the pursuit of interest was inadequate to ensure the success of the government, for securing liberty required the safeguarding of those rights which the Declaration of Independence had described as "self-evident." The protection of these rights had to be accomplished without the aid of speculative reason, for such speculation--though it retained a place in the regime (in its universities, churches, homes, and private associations)--was too dangerous to admit into politics. Madison's famous solution was to provide a guide to right action--the Constitution--together with

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15. see Diamond, "Ethics and Politics: The American Way", pp. 49-56. I rely upon Diamond's excellent essay throughout this paragraph.

incentives for office holders to use that guide. In his often-quoted phrase,[16]

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

This policy sought to encourage a guided use of reason motivated not by a "zeal for opining" but by the exigencies of interest (though one would of course hope that participation in this sort of moderate self-government might teach at least some citizens the virtues of the moderate use of reason, and so educate them to practice such reasoning even where not compelled to do so.) It is possible to believe, as Harlan apparently did and as some very thoughtful contemporary scholars do,[17] that more than interest--virtue, wisdom, or self-restraint--is necessary to secure the moderate exercise of reason in American politics, but it would, I think, be difficult to deny the essential place of this kind of reason in American government.

This deep unity of Harlan's framework of Constitutional principles manifests itself, I think, not only in the structure of Constitutional purposes but also in what I would regard as a metaphorical or symbolic dimension of Harlan's idea of due process. This metaphorical or symbolic dimension has two aspects. I have already remarked on one of these: Harlan describes the Due Process Clause in a way that makes it representative of the Constitution as a

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16. James Madison, "Federalist 51", in The Federalist Papers, p. 322.

17. see, for example, R. Goldwin, "Of Men and Angels: A Search for Morality in the Constitution" and especially R. Horwitz, "John Locke and the Preservation of Liberty: A Perennial Problem of Civic Education", both in The Moral Foundations of the American Republic, ed. R. Horwitz; see also W. Berns, "Judicial Review and the Rights and Laws of Nature", Supreme Court Review (1982), 49.

whole, for he takes it to be representative of "the balance struck" by the American republic between the desire to secure liberty and the need for order. The second aspect emerges most clearly from Harlan's description of the Fourteenth Amendment's Due Process Clause (in a passage not quoted above) as a guarantor of "ordered liberty."[18] The idea of ordered liberty captures well, in an image that is certainly not scientifically exact or precisely definable but that is nonetheless meaningful, both the way of life at which the Constitution aims and the way of thinking which Harlan advocates and exemplifies. Ordered liberty is an apt description of the way of life at which the Constitution aims because while, as was mentioned before, liberty was the chief objective of the Founders, the liberty they sought was less free than the sort which prevails in a state of nature; liberty had to be reigned in or ordered so as to secure peace. The same phrase names well the sort of freedom characteristic of Harlan's way of thinking, for while that way of thinking involves some liberty--reason cannot be replaced or confined by mechanical restraints--it is not a liberty which allows judges (or anyone else who would adopt it) to "roam freely" as they would if engaging in "unguided speculation." That ordered liberty describes at once the activity of the good judge and the benefits which the good judge will secure for the country is, of course, neither coincidence nor accident: this parallelism arises out of the structure of Constitutional purposes sketched earlier, and reflects the fact that the Constitution embodies a particular idea of what is good for men and women (more specifically, for the citizens of the United States). As a consequence of its particular choice of ends

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18. 367 U.S. at 549.

and its particular view of what is good, it teaches a particular sort of virtue, a particular kind of character, to those, citizens and judges alike, who accept it as a guide to right action.

In recognizing the metaphorical dimension possessed by the idea of due process in Harlan's thought, we can begin to appreciate how his way of treating general ideas blurs, or, more precisely, takes into account the inherent precariousness of, the distinction between metaphorical and literal thought. The sense in which the general ideas in Harlan's jurisprudence retain a literary or metaphorical significance is evident, I think, in his warning that the Constitution must not be construed literally and in his refusal to translate ideas like justiciability or due process into technical formulae or to replace such ideas with theories. Harlan's way of interpreting the Constitution and general ideas bears a certain resemblance to the literary treatment of metaphor, in that Harlan regards the Constitution and general ideas not as references to theories or as careless or deceiving expressions for ideas better articulated otherwise, but rather as the most accurate possible statement of ideas which are by their nature not susceptible of more technical description.[19]

Nonetheless, it would be wrong to classify Harlan's ideas of the Constitution, due process, justiciability, or ordered liberty as simply, entirely, or even primarily metaphorical, for one reason that

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19. See my discussion of the literary and nonliterary treatment of metaphor at pages 109-113 of this thesis. I would add that general ideas on Harlan's view guide the comprehension of novel political circumstances by showing or representing their relationship to other, more familiar circumstances, and thus function in political discourse in much the way that metaphor, on the account given by Clifford Geertz, does; see my discussion of Geertz at pages 146-149.

he sees no need to translate them into his own conceptual framework is that they are in fact part of that framework. It is, for example, simply not reasonable to ask Harlan for a specification of due process in his technical language of Constitutional jurisprudence for the concept of due process is in fact part of that language (insofar as Harlan recognizes any language of Constitutional jurisprudence that can justly be called technical). General ideas like due process or justiciability are in Harlan's way of thinking not things external to Constitutional discourse but rather elementary and irreducible constituents of that discourse; to attempt to replace them or substitute for them is to mistake the character of general ideas. There is at any rate a way in which the distinction between metaphorical and literal meaning is never very firm or sharp, for while we can supply dictionary defintions for nearly all the words we use, there are few instances in which we could substitute the definition for the word without losing some meaning (but likewise few occasions when this substitution would not preserve a substantial part of the meaning). James Boyd White stresses the importance of this point in a passage which supports, I think, Harlan's way of treating general ideas:[20]

> Think of such terms in our own language as "honor," "dignity," "privacy," "property," "liberty," "friend," "teacher," "family," "marriage," "child," "university," or "school." Such words do not operate in ordinary speech as restatable concepts but as words with a life and force of their own. They cannot be replaced with definitions, as though they were parts of a closed system, for they constitute unique resources, of mixed fact and value, and their translation into other terms would destroy their nature. Their meaning resides not in their reducibility to other

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20. James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (Chicago: University of Chicago Press, 1984), p. 11.

> terms but in their irreducibility; it resides in the particular ways each can be combined with other words in a wide variety of contexts. They operate indeed in part as gestures, with a meaning that cannot be restated.

C.

Reason in Constitutional Politics: The Problem of Civic Education

We may summarize what I have said thus far about Harlan's view of reason and way of thinking as follows. Harlan expounds a "framework of Constitutional principles" by describing a way of thinking rather than by articulating a theory or enumerating rights. The way of thinking he advocates and exemplifies avoids both "mechanical" interpretation and "unguided speculation" and aims instead for a guided form of reasoning. The guides which the prudent judge will employ are the Constitution itself and, more generally, a "background of Constitutional purposes," purposes which are revealed in the traditions and history of the American regime. These guides or maps compensate for the fallibility of the reason of the interpreter and so help him to make his way through unfamiliar political terrain. Reason is, on Harlan's view, something like vision in that it is capable of discerning, in underived fashion, the goodness of things and also in that it is fallible and so may see certain things vaguely or indistinctly or not at all. Among the things that are difficult to see (perhaps because, extending as they do over a wide variety of circumstances, they are extraordinarily large) are general ideas, but it is possible to see well the particular manifestations or implications of these ideas in particular circumstances and it is, moreover, possible to give some account of general ideas (though not a scientifically precise account). Because of the difficulty (or perhaps impossibility) of providing a scientifically precise account of a

general idea, Harlan does not attempt to translate such ideas into technical language or to replace them with theories. This treatment of general ideas gives them a certain partly metaphorical character.

Harlan's examination of the particular claims advanced in Poe v. Ullman tells us more about his view of the place of reason in American Constitutional politics, in part because he exemplifies the way of thinking about Constitutional issues he describes as appropriate to Constitutional interpretation but also because his disposition of the issues itself relies upon observations about the place of reason in Constitutional politics. Substantive assertions about reason's place or standing in the American regime appropriately enter Harlan's opinion because he deals with issues of civic education, and, in particular, the question of to what extent and how the State may permissibly inculcate "moral soundness" in its citizens. Harlan first approaches this issue when he takes up the appellants' claim that the State's justification for the anti-contraception law invoked an arbitrary or otherwise impermissible purpose. In responding to this claim, Harlan affirms that "moral soundness" of the citizenry is an aim allowed to government by the Constitution.[21]

> ... society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed, to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal.

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21. 367 U.S. at 549.

This passage raises a significant question. Given Harlan's framework of Constitutional principles, it is not sufficient to point out that civilized communities have traditionally concerned themselves with moral soundness in order to defend Connecticut's claim to act upon such a concern. One must instead show that this concern is in fact compatible with or implied by the Constitutional purposes of the United States; it must, in other words, be demonstrated that this community concern is part of the traditions from which the nation developed rather than of those from which it broke. This task is not an easy one; the traditions from which the Framers broke were largely concerned with the cultivation of a virtuous citizenry.[22] The First Amendment's protection of religious and philosophic freedom, for example, places beyond state control matters long considered fundamental to "moral soundness." Thus while it is true that the United States, like other civilized communities, aims at something more than "well-being," it is nonetheless unclear whether the "ordered liberty" the Constitution does seek to secure involves any sort of moral soundness of the citizenry. What, then, does Harlan mean by "moral soundness," and how does he propose to accomodate the aim within the scheme of Constitutional purposes?

We begin to get an answer to this question in the sentences which follow immediately after those just quoted:[23]

> The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication, and homosexual practices which express the

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22. see Diamond, "Ethics and Politics: the American Way", pp. 45-49.

23. 367 U.S. at 546.

> negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

The moral soundness of which Harlan is speaking thus includes (though it would be wrong to assume that it is limited to) a responsible sexuality. The State's interest in promoting a responsible sexuality has, on Harlan's account, two related but distinguishable facets: a concern to ensure an appropriate environment or set of circumstances for the raising of children, and a concern to determine proper circumstances for the use of "the sexual powers." That the first of these concerns must be within the scope of the powers of even a limited government is, I think, evident; the relation of the latter to the American scheme of government is less obvious. Harlan's closing phrase, asserting that the institution of marriage and the accompanying laws "form a pattern so deeply pressed into the substance of our own social life that any Constitutional doctrine in this area must build upon that basis," may provide the beginnings of an answer to the question of how the moral soundness described here fits into the "background of Constitutional purposes," but before this answer can be useful we must know what pattern it is that Harlan refers to and how this pattern provides a "basis."

Responsible sexuality is, in any event, a rather pedestrian form of moral soundness, one at least potentially compatible with the limited aims of the American government. We get another indication of the limited character of the moral soundness of which Harlan speaks a bit later in his opinion. Harlan admits that even if one grants the State a power to control sexual vice, it is possible that the particular moral claims advanced by Connecticut in Poe are wrong or benighted to the extent of being impermissible. Nonetheless, Harlan

notes, there is substantial reason to refrain from making such a judgment, and, fortunately, the Court need not decide the question:[24]

> But, as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying moral purpose of its operations, but also the choice of means becomes relevant to any Constitutional judgment on what is done. The moral presupposition on which the appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication.

The first sentence of this passage reflects Harlan's now familiar way of treating general ideas: it is difficult and imprudent (if not impossible) to demand great rigor or precision in the handling of such ideas. For that reason it is desirable to seek out well-defined contexts, where the relevant issues are "sharpened and illuminated," rather than passing upon abstract propositions. The next two sentences tell us something more about the "moral soundness" which the State may legitimately pursue. The inculcation of moral soundness cannot involve the control or examination of belief. If, however, we are to make sense of a soundness which is in fact moral, we should note that the ensuring of this soundness may involve a fostering or teaching, if not control, of belief or of a way of thinking. The restrictions on the nature of the moral soundness the State can promote or cultivate are, on the account Harlan gives here, largely embodied in or determined by a set of restrictions on the means it may use to achieve or teach this soundness. We must turn, then, to Harlan's consideration of the means available to the State in Poe in order to get an answer to our question about the relationship between moral soundness and Constitutional purposes.

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24. Ibid. at 547.

The key to Harlan's reasoning about the State's choice of means is, I think, evident in the following crucial passage:[25]

> But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made. Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

The sort of regulation Connecticut attempts with its anti-contraception statute is, Harlan says, impermissible because that regulation interferes with the operation of an autonomous institution, marriage, which the State licenses and allows. This claim has a number of remarkable features. First, Harlan's reasoning implies that the idea of marriage has a meaning independent of the State's statutory definition of it: there are "intimacies inherent" in the institution of marriage which cannot be altered or determined by the state's definition. Were this not the case, Connecticut could reply to Harlan that its statutes (including the anti-contraception statute) stipulate and license a different conception of marriage (and a different sort of intimacy) than the one he has in mind. Second, the "intimacy of husband and wife" which is "necessarily an essential and accepted feature of marriage" is though a "sexual intimacy" not merely a participation in sexual intercourse conceived as a biological act. Were it the case that Harlan meant only that sexual acts were an

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25. Ibid. at 533.

essential part of marriage, it would be extremely difficult, in light of historical views of contraception, to argue that the acts inherent in the idea of marriage included sexual intercourse involving contraceptive devices. Moreover, it is clear from Harlan's opinion that he believes the sexual intimacy of the marriage to be interfered with not because the particular act prohibited is fundamental to marital intimacy but because the fact of regulation, or even the assertion of the capacity to regulate (making marital privacy contingent upon "the whim of the prosecutor"), denies the intimacy in question. This intimacy thus apparently involves not only a right to engage in physical sexuality but also a sort of autonomy or freedom which the State may not (except in unusual circumstances) regulate, control, or investigate. Third, marriage, and the sort of intimacy (and so autonomy and freedom) inherent in it is something the State not only <u>does</u> allow but in fact <u>must</u> allow.

We can, I think, best appreciate the ideas which explain and also unify these three aspects of Harlan's reasoning if we consider the idea of marriage in light of Harlan's way of thinking about general ideas. Marriage, like due process, justiciability, or the Constitution itself, is an idea not susceptible to a technically or scientifically precise definition; it is, like those other ideas, best articulated through an account of the purposes or wisdom it embodies. This way of thinking about general ideas begins to explain why it is impossible for the State to define marriage stipulatively; marriage already is an institution "pressed into the substance of our social life" and so has a meaning which emanates from its purposes rather than from any legal stipulation. A fuller explanation of this aspect and the other two

features of Harlan's account of marriage is discernible from the particular purposes of the institution of marriage.

While Harlan does not set out those purposes as explicitly and compactly as he does those of justiciability, he does say some things in his discussion of the nature and purposes of privacy which indicate his view of the Constitutional significance of marriage. According to Harlan, the Constitutional statute under review in Poe involves what "must be granted to be a most fundamental aspect of 'liberty, the privacy of the home in its most basic sense."[26] We learn later in the opinion that the privacy of the home is a "fundamental aspect of liberty" largely because of its relation to the institution of marriage; the home, Harlan tells us, "derives its preeminence as the seat of family life."[27] We can enhance our appreciation of what Harlan has in mind when he speaks of this family life and of Harlan's view of that life's relation to the Constitution by examining Justice Brandeis' statement, quoted in full and with approval by Harlan, on the nature and significance of privacy:[28]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment ...

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26. Ibid. at 548.

27. Ibid. at 551.

28. Ibid., quoted at 550. The original citation is Olmstead v. United States 277 U.S. 438, 478 (1928) (opinion of Brandeis, J., dissenting).

Though Brandeis' words are, I think, a bit carelessly chosen and ambiguous, this passage, read in light of its place in Harlan's opinion and of the tenor of that opinion, takes us a long way indeed from a right to engage in the sexual acts of one's choice. Privacy, apparently, finds its place within the background of Constitutional purposes because of the way it provides for the needs of "man's spiritual nature." This nature evidently includes (though it is not confined to) man's "zeal for opining," his quest to develop opinions about religion, politics, and other matters. Marriage and the family life that goes with it are a particularly important locus for this kind of speculation because they present the problem of education and so require not only forming such opinions but also acting on those opinions. Harlan refers to this point explicitly in the sentences following immediately after his statement that the preeminence of the home derives from its place as the seat of family life:[29]

> And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. Thus, Mr. Justice Brandeis, writing of a statute which made "it punishable to teach [pacifism] in any place [to] a single person ... no matter what the relation of the parties may be" found such a "statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do any police officer may summarily arrest them."

I asserted earlier that the upbringing of children was a matter evidently within the scope of the State's Constitutionally legitimate concerns. Harlan's quotation of Brandeis in this passage reminds us, however, that certain aspects of the educative enterprise must, because dependent upon the exercise of the speculative reason excluded from

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29. 367 U.S. at 551-552.

politics by the Constitution, be insulated against State control.[30] Reflection on the state's concern to ensure the (spirtual and material) welfare of children and its concern to limit speculative reason to the private sphere suggests one of the Constitutional purposes of marriage: to confine the exercise of the sexual powers to circumstances in which any children born of the sexual union will likely receive the kind of care and education necessary if they are eventually to enjoy a full sort of liberty.

As I noted earlier, however, a concern for the welfare of children is on Harlan's account only one aspect of the State's legitimate concern with responsible sexuality; the other aspect is a concern to regulate the use of the sexual powers. There is a similar duality in Harlan's view of the purposes of the privacy which protects the autonomy of the family life. Shortly after the passage just quoted, Harlan remarks that[31]

> Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.

The relation of this privacy of "marital relations" to Harlan's articulation (through Brandeis) of the purposes which inform the Constitution's guarantee of privacy is clear, I think, if one avoids confusing marital relations or sexual intimacy with mere sexual intercourse or mere physical sexuality. Certainly sexual intimacy will involve physical sexuality, and it may at times be nothing more than that. Sexual intimacy is, however, also an aspect of friendship of a

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30. For a related discussion, see pages 164-166 of this thesis.

31. 367 U.S. at 552.

special and unusually intense kind, and it will in general have a significance beyond physical fulfillment. To recognize sexual intimacy as an essential aspect of an especially intense association, union, or friendship of two people is to make evident its connection to the aim of providing for "man's spiritual nature" which, according to Harlan and Brandeis, gives rise to the Constitutional guarantee of privacy.

Yet if recognizing sexuality as something more than biological or physical union reveals the way in which protecting the privacy of marriage serves Constitutional aims, it also highlights the nature of the State's interest in regulating the use of the sexual powers. Because sexual relationships will involve a more concentrated combination of passion and interest than will other sorts of friendships, and because such relationships will, as a result of their relation to the creation of life and of their intensity, present novel and unfamiliar choices, the making of right judgments involving such relationships will be particularly difficult. The government envisioned by the Framers cannot control or substitute for the autonomous exercise of reason independent judgments require--to impose such controls or substitutes would destroy the liberty the Constitution aims to secure--but it can foster or protect institutions which serve as guides for those who want guidance. The existence of such guides will further the Constitution's aims both by providing a way for citizens to pursue their own (spiritual and material) happiness and by educating citizens about the nature of right action more generally so that they will be able to participate more fruitfully in the safeguarding of the Constitution's ordered liberty. The confinement of the use of sexual powers to lawful marriage thus serves Constitutional aims by preserving an institution which may guide the wise use of those

powers. The secular state, however, is not and must not become an examiner of consciences: the State can regulate sexual conduct in such a way as to protect institutions which provide guides to the handling of sexual relationships, but it cannot require that its view of what constitutes good judgment within the sexual activity it permits be accepted, endorsed, or put into practice by those who participate in that activity. Indeed, the confinement of sexuality to marriage does not guarantee a good sort of sexuality; those participating in the intimacies of marriage are at liberty to (and often do) reject or overlook the wisdom that the idea of marriage (purportedly) embodies.

It is now possible to give an account of the way of thinking which gives rise to the three rather remarkable assertions we noted earlier in Harlan's dispositive paragraph on the unconstitutionality of state interference with marital privacy. The institution of marriage has as its most important aim the provision of a sphere of autonomy within which two special forms of association, the educative relationship between parents and children and the intense sexual friendship or union of husband and wife, may flourish. The State may not regulate the details of either of these relationships (with exceptions to allow for the prohibition of crimes, such as forms of assault, which "though they may be committed anywhere, happen to have been committed in the home ...") for doing so would deny men and women the liberty to form and act upon religious and philosophical opinions, to form and participate in intimate sexual relationships, and to educate children in a way that takes into account the requirements of and the human need for religious, philosophical, and interpersonal commitments. Moreover, the State must permit marriage (defined by its aim of securing the sphere of autonomy just described) because

participation in sexual relationships and in the raising of children are important aspects of the pursuit of happiness and because procreation and the education of children are essential to the survival of the regime. The State may, however, take into account both that reasoning rightly about such matters as the raising of children or the forming of sexual relationships involves extraordinary difficulties, and also that good judgment in such matters may be quite important both to the happiness of its citizens and also to the health of the regime. The State may respond to the difficulty and importance of these judgments by regulating actions in such a way as to express and enforce a code of "moral soundness." This code will serve as a guide to reasoning about family life for those inclined to reason about such matters with the law's guidance. The code may (though it need not necessarily) foster and encourage rather than merely permit (though, for reasons just stated, it must permit) marriage. In short, marriage will necessarily involve a sort of intimacy which the State cannot define away; that intimacy will not be merely physical but will involve a certain sphere of autonomy; and the State must permit marriage.

We are at this point in a position to discern clearly the deep foundations upon which Harlan rests his judgment on both the matter of Consitutionality and the matter of justiciability in Poe. It is, I think, clear from Harlan's account of marriage that the Connecticut statute before the Court in Poe violated the protection of privacy (more specifically, of the autonomy of family life) implicit in the ordered liberty aimed at by the Constitution, not because the statute prevented married couples from using contraceptives (it seems, as a matter of fact, that it simply did not do that) but because it denied the autonomy of the marital relationship and so prevented married

couples from understanding and believing (and acting upon the belief) that their intimacy was an association of the sort the State could not legitimately control, judge, or investigate. It is also clear that on this view the mere declaration of the capacity to regulate is damaging even when not accompanied by an intent to regulate. The sort of freedom at stake here is not the sort that is important to everyone, but it is important to some people and it is Constitutionally protected for all people.

Moreover (to return, finally, to the point which led Harlan to pursue the merits of a claim that the Court dismissed as nonjusticiable), this kind of freedom was, I think, the legitimate Constitutional interest raised by the appellants in Poe. The form of the lawsuits, which were carefully crafted to create conditions where real harm would likely result if the appellants were denied the opportunity to use contraceptives, tends to obscure this point. The Connecticut residents who brought these cases to the Court did not bring them because they were unable to get contraceptives, and Harlan's dissent did not turn upon the claim that harm would result if contraceptives were denied them. It is, however, in light of the circumstances under which the cases were brought, entirely reasonable to think that the people who brought these suits were people unusually thoughtful about their personal relationships and their political activity (their participation in these suits speaks to the latter fact) and who might have found the state's judgment upon their use of contraceptives offensive or injurious. Not every offensive judgment of the state provides the ground for a Constitutional claim--indeed, most do not--but, as Harlan demonstrates, this particular judgment does.

The liberty Harlan's Poe dissent protects is not a liberty of a trivial kind. To begin with, though the particular interest actually infringed in Connecticut was one of concern only to a small, intellectually active part of the citizenry, Harlan's dissent, quite obviously, articulates a view of family life which bars not only the declaration of a capacity to enforce regulation of that life but also the actual enforcement of such regulation. But, more importantly, the integrity of the two institutions, marriage and law, which Harlan sought to vindicate is of particular importance to precisely that sector of the citizenry who felt their rights infringed by the Connecticut law, for it is those who are unusually thoughtful about their lives who are most capable of learning from law and marriage as guides (rather than merely submitting to those institutions as controls). It is also, however, the most thoughtful who are likely to reject the guidance offered by shabbily treated ideas or institutions, such as an institution of marriage which the State casually claims the power to regulate or a Constitution which is read as tolerating noxious and offensive laws so long as those laws are not noxiously and offensively enforced.

Thus I think that the interpretation of Mr. Justice Harlan's opinion I advance in this Chapter makes sense of his findings both on the question of justiciability and on the question of Constitutionality. Admittedly, much of the reasoning I have attributed to Harlan is far from evident on a first reading of the opinion, and I have in some cases (for example, the passage dealing with the state's power to regulate marriage) gone to some trouble to bring out what I think is the significance of passages that might easily have been interpreted in other ways. If Harlan did indeed want to say about

marriage and about the Constitutional question at stake in Poe all of what I have said on his behalf, then he certainly could have been more blunt and more direct. Nonetheless, there is a sense in which the reasoning I have set out in this Chapter is genuinely Harlan's own reasoning in his dissent in Poe. It is, I believe, reasonable to think that Harlan's impressions upon looking over the record in Poe were something like the following. Connecticut had on its books a law which said one thing but was enforced in a way that aimed at prohibiting a rather different thing (on the rare occasions when it was enforced at all). Certain Connecticut citizens found what the law said and did to be offensive and a misuse of legal institutions and, indeed, something about Connecticut's treatment of the contraception issue smacked of injustice and hypocrisy. Yet, on the other hand, the lawsuits which these citizens brought were, in at least one respect, disingenuous: the Connecticut law did not have the effect of making contraceptives unavailable to them, and thus they were hardly likely to suffer the injuries that might result were contraceptives in fact denied them. Harlan faced the task of reconciling these impressions. It was to this difficult task that Harlan brought the way of thinking that I have aimed to describe in this Chapter, and it is only by keeping this task in mind (and by acknowledging its difficulty) that an interpreter can hope to discern the sense and meaning of Harlan's more ambiguous statements. I think Harlan made great progress toward dispatching his task: if the account he left us is perhaps not always so clear or unambiguous as we might wish, it nevertheless succeeds in portraying well the crucial features of a rather elusive problem in Constitutional

politics. I have tried to discern the form of Harlan's reflections and to bring his project to completion, sharpening the contrasts and accenting the lines in the picture he provides us. While his ideas are, I hope, rendered clearer by my efforts, the ideas remain Harlan's own.

Chapter Two

Theory and Interpretation

VI.

Ronald Dworkin and the Idea of Interpretation

American Constitutional thought today involves two important disputes about interpretation, a theoretical and a practical dispute. The theoretical dispute is immediately evident from the pages of American law reviews; several recent articles have aimed at saying what interpretation is and what place interpretation has in American legal activity. The prominence of the idea of interpretation in American Constitutional scholarship reflects and gains sustenance from the extraordinary amount of attention the idea of interpretation has in recent years received from intellectuals in a wide variety of fields. Contemporary scholars have eagerly applied the idea of interpretation to explain the various aspects of life they study and to describe what they themselves do.[1] It is not at all clear, however, why these

1. For a brief discussion with references, see Owen Fiss, "Objectivity and Interpretation", Stanford Law Review 34 (1982), 739. See also the Texas Law Review's symposium on law and literature, Texas Law Review 60 (1982), 373-586; the University of Southern California Law Review's symposium on interpretation, forthcoming 1985; Robert Cover, "Nomos and Narrative", Harvard Law Review 97 (1983), 4; and the works by Ronald Dworkin listed in the next footnote. For more general discussions of interpretation, see for example W.J.T. Mitchell, ed. The Politics of Interpretation (Chicago: University of Chicago Press, 1983) and Clifford Geertz, Local Knowledge (New York: Basic Books, 1983).

appeals to the idea of interpretation should prove illuminating. The very pliability of the notion casts doubt on its utility: if interpretation in some sense describes nearly all of human activity, then what good can it possibly do us to describe law, or any other specific aspect of human experience, as being or depending upon a kind of interpretation? Indeed, interpretation seems at first to be a vague sort of idea, difficult to distinguish from such ideas as reading or understanding.

I would like to offer a conjecture which might explain why the idea of interpretation is so attractive to contemporary scholars. The activity of interpretation, as practiced in the humanities, involves an effort to discern, reveal, or make accessible the meaning or significance of a text or artwork. Contemporary scholars, including legal scholars, suspect or believe that much of contemporary thought has failed to grasp the significance of human experience; they hope that generalizing or invoking the idea of interpretation may help them to perceive and describe this meaning. To put this point another way, and to turn from the general interest in interpretation to the interest of the American Constitutional community in particular, attention to the theoretical dispute about interpretation in American Constitutional thought may help to address or to resolve the practical dispute about interpretation in American Constitutional thought. That practical dispute arises because Constitutional scholars disagree about the way of thinking appropriate to their own activity, the doing of Constitutional scholarship. The self-doubt and uneasiness I described in the introduction to this thesis is one indication of this disagreement. A second indication is that while the Constitutional community expresses great admiration for the judicial reasoning of

Justice Harlan, Harlan's way of thinking (which I believe to be the Constitutional way) is not in general characteristic of American Constitutional scholarship today: when contemporary scholars interpret the Constitution (or, more generally, Constitutional politics), they often practice a way of thinking different from Harlan's way. Interpretation is for these scholars something different from what it is for Harlan.

If my conjecture is correct, the benefits of studying the idea of interpretation will most likely emanate from the way of thinking that is characteristic of the activities that idea comprehends; this way of thinking might serve as a salutary corrective to ways of thinking dominant in philosophy, political science, and Constitutional scholarship, among other fields. There is, however, a certain ambiguity to the study of interpretation: references to interpretation in, for example, legal scholarship need not entail the modification or improvement of the way of thinking at work in legal scholarship but might instead involve the application of that way of thinking to the study of interpretation. Put otherwise, the attention legal scholars (among others) are giving to interpretation may result either in the extension of the interpretive way of thinking to legal problems or in the extension of legal scholars' current way of thinking to problems of interpretation. In the latter case, appeals to interpretation would respond to the contemporary unrest in Constitutional scholarship by apologizing for or justifying, rather than by altering or reforming, the prevailing way of thinking. For this reason we must look carefully at any particular legal scholar's treatment of the idea of interpretation, and for this reason the legal scholarship on interpretation provides a particularly interesting

context within which to study the nature and significance of comprehensive ways of thinking.

Ronald Dworkin has developed what is in my opinion the most carefully thought-out and well-described view of interpretation's place in legal activity.[2] Dworkin's prominence within the American legal community makes his account of interpretation all the more significant to American Constitutional thought. I aim in the pages that follow to make clear the meaning of the idea of interpretation in Dworkin's work. In my view, that meaning resides in the way the idea of interpretation becomes in Dworkin's writing a metaphor for a particular way of thinking. That way of thinking is, however, in my view not the way characteristic of interpretation in an aesthetic context but rather that characteristic of contemporary legal and Constitutional theory.

In the introduction to his fine essay "Law as Interpretation," Dworkin contends that "legal practice is an exercise in interpretation not only when lawyers interpret particular documents but generally," that "we can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature," and that "law, when better understood, will

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2. That account of interpretation is developed primarily in Dworkin, "Law as Interpretation", Texas Law Review 60 (1982), 527 (hereafter cited as 'Dworkin, "Interpretation"'; the essay also appears in The Politics of Interpretation, ed. W.J.T. Mitchell, p. 249); Dworkin, "My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More", in The Politics of Interpretation, p. 287; Dworkin, "'Natural' Law Revisited", University of Florida Law Review 34 (1982), 165 (hereafter cited as 'Dworkin, "Natural Law"'); and in a 373-page unpublished manuscript circulated at the University of Oxford under the title Law's Empire (5 September 1984 draft) (hereafter cited as 'Dworkin, Manuscript').

provide a better grasp of what interpretation is in general."[3] These statements justify, I think, two assumptions I will make in the course of my examination of Dworkin's idea of interpretation. First, I will assume that Dworkin intends to give or at least to begin a comprehensive or general account of what interpretation is, and not merely to give an account of a particular kind of interpretation suitable to law. Second, I will assume that, because for Dworkin "legal practice is an exercise in interpretation," we can learn about his idea of interpretation by investigating his idea of legal practice.

These two assumptions are, I think, assumptions which Dworkin himself would approve or endorse, and I think the assumptions are ones we must make if we are to take seriously the aims reflected in the statements just quoted. I would, however, like to clarify the first of these assumptions. It is clear that Dworkin intends to say something about what interpretation in activities other than law is; indeed, in Section II of "Law as Interpretation," Dworkin quite evidently aims to say something about what literary interpretation is. It is also true, however, that Dworkin studies interpretation in contexts other than law in order to say something about or to understand law. It would therefore by unreasonable to criticize his account of interpretation for ignoring aspects of literary interpretation which are irrelevant to legal activity. There are, however, two reasons why it will be helpful to our study of Constitutional thought to attend to the ways in which Dworkin's idea of interpretation departs from the practice of literary interpretation. First, by invoking the idea of interpretation and by using literary interpretation as an example, Dworkin apppeals to

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3. Dworkin, "Interpretation", 527.

understandings which most of us have developed largely through our experiences reading literature and examining art. By attending to which details of aesthetic experience Dworkin excludes from his idea of interpretation, we can understand better which details he includes and so see more precisely his meaning. Second, I think certain aspects of literary interpretation which Dworkin neglects or ignores are in fact helpful to the study of law and, more particularly, to the study of what the Constitution is and means. Moreover, while some of these details are not only absent from but incompatible with the form of interpretation Dworkin exemplifies and expounds, they are present in the way of thinking and form of interpretation Harlan practices and describes.

In the course of providing my interpretation of Dworkin I will put into practice a way of thinking and an idea of interpretation different from Dworkin's own. As a consequence, my disagreement with Dworkin over interpretation and ways of thinking will have a rather peculiar character. The details of that disagreement are complex and will emerge only in the course of my exposition of Dworkin's treatment of interpretation, but there is a fairly simple metaphor which might help make clear, without dense or tedious analysis, my way of thinking about Dworkin's work.

Imagine that a group of people is assembled in a ballpark on a Saturday afternoon. Imagine that they are there without any contractual commitment to any particular activity, without, for example, having entered the ballpark by purchasing a ticket to see a baseball game. There is among these people a pitcher, and he wants to spend the afternoon playing baseball. The pitcher issues the following challenge to his companions: "Nobody here," he says, "can hit my best

pitch out of this park." The pitcher's challenge appeals to the competitive instincts of those present and to the disposition of those inclined to love baseball. A game is quickly organized. The pitcher steps out to the mound and begins throwing, and the others take turns swinging at his pitches. The pitcher is quite good, and most of the hitters strike out. A few, however, make contact, and in rare instances one of them manages to hit the ball well enough to clear the fence. The pitcher brushes aside these home runs, saying in each case, "That pitch you hit was not my best pitch." Some of those present complain that the pitcher has simply defined his best pitch to be the one that does not get hit out, so that his challenge is a dishonest one. The pitcher is, however, good enough that his original boast and his explanation of the home runs both remain plausible, and so the game continues. There is one sense in which the pitcher's success is in doubt, for it is unclear whether or not he has made good on his original boast. There is also, however, a sense in which the pitcher is indisputably successful, for he is, as he wished, spending the afternoon playing baseball.

There is also among this group of people a pianist who, though he has some interest in baseball, would prefer to spend the afternoon playing music. Of course, the pianist does not need the cooperation of his companions in the way that the pitcher does, but he would like to entice some of them to join him, both because he thinks they would be happier playing music rather than baseball and because he prefers to study music in the company of friends. Thus when the pianist's turn at the plate comes, he does not step into the batter's box but instead sets up a piano in the on-deck circle. He aims to capture the imagination of some of those present. He must of course decide what

pieces to play. Given that he addresses an audience of ballplayers, his choice is obvious: he decides to improvise a set of variations designed to illustrate themes drawn from the game of baseball. He announces this intention to his audience and begins to play.

There is a sense in which the pianist says, if he makes baseball the theme of his piece, more clearly than the pitcher what it is the pitcher does. The pianist refreshes his audience's view of the game by representing to them aspects of its mood and character they might have let go unnoticed or unthought about. But on the other hand the pianist is quite obviously not the baseball player, in person or in attitude, and his performance in one sense states not what it is to be a baseball player but rather what it is to be a pianist.

There is thus a certain ambiguity to the pianist's performance. He claims, by daring to consider and develop various themes in his music, to know something about the attitudes proper to divers circumstances. These performances are, however, also marked by another attitude, different from those he purports to interpret for his listeners, and that is the attitude of one who studies and then speaks about (in this instance, through the language of music) various attitudes. Nonetheless, even the exemplification of the attitude of the pianist can teach those in the ballpark something about what the significance of baseball is, for the showing of this attitude reminds or informs the audience of the alternatives rejected through the makingof a commitment to play baseball and so tells what a commitment to playing baseball is.

The pianist thus contributes to his audience's understanding of what it is to choose to play baseball and thus to their understanding of the pitcher's challenge (though he obviously does not prove the

pitcher's boast wrong or meaningless). Most of the pianist's listeners will quite likely (since he plays to an audience of baseball players) value his performance (if indeed they value it at all) for the way it enhances the pleasure they find in a game they enjoy. A few, however, may be more deeply intrigued by the pianist's performance. They might reassess their commitment to baseball and begin to attend more seriously to the study of music. They might, in short, forsake the attitude of the pitcher in favor of the attitude of the pianist.

My interpretation of Dworkin's ideas about interpretation stands in some respects to Dworkin's ideas as the pianist's interpretation of what baseball is stands to the pitcher's challenge. I treat Dworkin's analysis of what interpretation is as an invitation to participate in or adopt a particular way of thinking, a way which I reject, just as the pianist treats the pitcher's challenge as significant because of the commitment to baseball it expresses (a commitment the pianist himself spurns). I do not aim to determine whether or not Dworkin performs the way of thinking he aspires to as well as possible (or even to determine whether a claim to do so would be verifiable), and the pianist does not aim to decide whether or not the pitcher's boast is true or honest. There is a very important sense in which my disagreement with Dworkin amounts to a showing or exhibition of contrasting ways more than to a confrontation over the validity of any particular proposition.

Nonetheless, the metaphor of the pitcher and the pianist is not entirely adequate to describe the disagreement between Dworkin and myself, for Dworkin and I in performing or exemplifying contrasting comprehensive ways of thinking aspire to a kind of comprehensiveness that performances of what it is to be a baseball player and what it is

to be a pianist do not. This aim of comprehensiveness is evident from, among other things, the fact that both Dworkin and I would characterize our own activity as "interpretation." There is as a consequence an aspect of direct confrontation to our disagreement; among other things we disagree about what interpretation is or means. One of my aims in this Chapter will be to make clear the nature of this disagreement. To put the point a bit roughly for the sake of brevity, Dworkin in my view fails to appreciate the way in which interpretation involves a respect for the integrity of the object it studies. It would, however, be a mistake to abstract this confrontation from the contrasting of ways within which it is located, for the differing ways of thinking Dworkin and I expound are, among other things, differing ways of thinking about what the disagreement between us is. Put otherwise, because my disagreement with Dworkin is in part a disagreement about how to say what things, including our particular disagreement, are, there is no way of formulating that disagreement which does not take a stand on the substantive questions at issue between us.

VII.

Interpretation as Metaphor

A.

Metaphor and Image in Philosophy

Dworkin's form of interpretation is in my view imbued with a certain philosophical outlook or comprehensive way of thinking. In order to identify that way of thinking and to indicate its import both for legal problems (in particular, those of American Constitutional law) and also for problems of interpretation more generally, I will elaborate a reading of Dworkin which focuses largely on the matter of attitude. We normally mean, when we speak of the attitude of some text or speech or comment, to call attention to the way it is phrased and presented. An attention to matters of presentation and attitude is most familiar to us in the reading of literature. Our judgment of a novel or play or poem does not hinge entirely or even primarily upon whether we agree or disagree with it; indeed, it sometimes makes little sense even to ask about the truth or falsehood of the work. The virtues of great literary works depend in large part on the forms of expression they invoke. Literary language, used well, not only communicates opinions but also evokes some attitude toward the various matters discussed. The audience of a play or the reader of a novel is moved rather than merely convinced; he is left not with a piece of abstract intellectual argument but rather with a sense of that argument's place in his or her own life, with not only the argument about something but also an attitude toward or way of thinking about the argument. Our assessment of a literary work will, I think, turn at least in part upon its sensitivity to the fine differences in the

attitudes various forms and images evoke in us.

We also pay close attention to the way ideas are expressed when we are conversing with intimate friends. Whenever we listen to a friend we are learning (if we listen carefully) about at least two things: we learn about the topic under discussion and we learn about our friend. When, for example, we discuss with a friend the morality of abortion, we can expect not only to deepen our understanding of that particular controversy but also to discover our friend's way of thinking about abortion, to discern more clearly his or her way of thinking about moral questions in general, and perhaps to learn of some of the personal experiences which helped to generate our friend's opinions. Each utterance in this conversation will have a dual sort of meaning, a meaning which in one sense bears upon the statement's topic but in another sense bears upon its speaker. In order to understand the second of these dimensions of meaning, we must attend closely to matters of atttitude and character; we cannot be content to distil a set of propositions from our friend's comments but must endeavor to grasp the reflections and concerns which led our friend to call those propositions, rather than some others, to our attention. We must, in short, discover how our friend's opinions about the matter under discussion fit into his or her comprehensive way of thinking about life. Often we can look to the rhetoric our friend employs and to the forms of argument he or she considers relevant in order to find clues to aid our attempts at understanding who that friend is.

Even conventional ways of reading legal scholarship do, to a limited extent, take into account matters of form and attitude. If, for example, we come across a collection of essays discussing the Constitutionality of reverse discrimination, we may well feel competent

to distinguish those which are thoughtful or judicious from those which are not, those which are tightly reasoned from those which are not, and those which are well-written from those which are not, without feeling able to decide which are true or right and which are false or wrong. Of course, we cannot judge an essay's worth as a piece of writing or reflection without some grasp of the substantive issues it addresses. We must have some idea of what the relevant arguments and views are if we are to decide whether or not some author has given them due consideration. In fact, we might feel inclined to say that there can be no reasonable or well-written essays which advocate certain positions because those positions are manifestly irrational; there is no such thing as a good or clearly thought-out case for them. But we should not exaggerate these difficulties. We in general do admire certain essays which reach conclusions we reject, and we likewise contemn certain essays which reach conclusions we embrace. Through uncertainty about the wisdom of our own views, or, at the very least, through an appreciation of the mistakes we ourselves made before reaching our present perspective, we recognize a certain justice in respecting the views of some who disagree with us and disdaining the views of others who agree with us. Much depends on the character of the essay, on its attitude to the matter under investigation, on the form it gives to the discussion that generates whatever conclusions are reached.

However familiar the notion of an attitude may be in these various contexts, we must have a more precise idea of what an attitude is and where its traces may be found if we are to go about discerning the attitude displayed or evoked by some particular work. Spelling out that idea is a difficult matter, and to some extent this project is

best undertaken by demonstration in the context of a specific example. The notion of an attitude is, however, familiar enough to allow me to make a few preliminary observations, and doing so may give the reader a better feel for what lies ahead.

I think that an attitude is what integrates a particular opinion or thought into a more general vision of the good life; it is, in a certain sense, the surface or appearance of some comprehensive way of thinking. Because the way of thinking is comprehensive, the author of an essay cannot specify it in detail, for doing so would amount to describing completely the good life. He can, however, exhibit a reflection or image of this way of thinking; that is, he can display to us something which is not his whole philosophy but has the look or form of that philosophy.

We might imagine several ways that an author might go about letting us in on the image of the whole that guides his own thought. He might, for example, tell us some story or remind us of some experience which, he claims, is an icon or representation of the whole (that is, of the good life specified in complete detail). Or he might instead refer to, without spelling out or recounting, some image he believes his readers already share and comprehend. It would seem, however, that in any event the image must extend through and manifest itself in the form and language of the author's work, for otherwise it would be local to some part of the essay and could not perform the integrative activity to which it aspires. If the author were simply to describe some image and then draw explicit correspondences between the image and his topic, the image would not govern the arguments used to bind image and topic. The essay might, for example, offer an argument contending that doing Constitutional interpretation is somehow like

doing classroom science without suggesting in any way that classroom science provides an appropriate image by which to understand the place of the argument itself within a more comprehensive vision of the good life. We can summarize the point of this paragraph by observing that there is (or at least there can be) a difference between a text which provides a metaphor for its topic and a text which provides a metaphor for itself and its context (I say "there can be" rather than "there is" in order to take into account those essays which are in some part about themselves.).

In some sense, then, a text will play out or develop rather than merely correspond to the central image or metaphor that suggests the place of its rather particular reflections in the larger whole. To speak a bit more plainly, the dominant image and attitude of the text will manifest themselves in its way of reasoning and its language, that is, in its way of speaking about things. The attitude in question may be quite complex, and so the way of speaking may display different aspects in various parts of the text. Justice Harlan's idea of "ordered liberty" is an example of the sort of central image or metaphor I have in mind: the idea represents and reflects at once both the form of reasoning Harlan employs throughout his opinion and also the way of life his judgment aims to secure and protect. The idea of ordered liberty attaches to and suggests the particular attitude Harlan displays, an attitude notable both for its moderation and for its seriousness.

There is of course much more that might be said about attitudes and images, and much of what has already been said stands in need of clarification. I think, however, that the remarks of this subsection provide an adequate foundation for the interpretation that follows, and

that this specific example will in turn do much to illuminate the general reflections presented in this subsection.

B.

Dworkin's Interpretive Attitude

I believe that the meaning and significance of Dworkin's idea of interpretation derives largely from an attitude, which I will refer to as "public-spirited individualism," that it evinces, inspires, and describes. The idea is, in my view, a comprehensive and illuminating metaphor for Dworkin's way of thinking. My aim in this subsection is to render clear the metaphorical character of Dworkin's idea of interpretation. I will pursue this aim by examining closely three examples which figure prominently in Dworkin's study of law and interpretation--the interpretive tradition of courtesy, the chain novel, and the chess referee--for I believe that it is largely through its place in such examples that his idea of interpretation becomes meaningful.

I begin with the example of courtesy because while it is the most recently formulated of the three it is also, I think, the one most carefully crafted to attach a certain attitude to the idea of interpretation. Dworkin presents the example this way:[1]

> Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of

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1. Dworkin, Manuscript, pp. 40-41. A precursor to this example exists in "The Model of Rules II," where Dworkin uses, in order to discuss the relation between social practices and normative choices, the example of church-goers who recognize and argue about an obligation to remove their hats on entering a church. Taking Rights Seriously (London: Duckworth, 1981), pp. 49-58. Dworkin takes the hats-off example from H.L.A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), p. 121; Hart, as Dworkin points out, uses the example for a purpose different from Dworkin's.

> courtesy," on a certain type or range of social occasions. They say, "Courtesy requires that peasants take off their hats to nobility," for example, and urge and accept other propositions of that sort. For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But then--perhaps slowly--all this changes. Everyone develops a complex "interpretive" attitude towards the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy must have some point if it is to be continued, that is, that it must serve some interest or purpose or value or principle that can be stated independently of just describing the rules that make it up. The second is that the requirements of the practice--the behavior that is called for in virtue of it--are not necessarily or exclusively what they have always been taken to be, in every detail, but are instead sensitive to that point so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point.

Dworkin picks up the thread of this story again a few pages later in his manuscript:[2]

> Suppose that before the interpretive attitude takes hold in both its dimensions everyone assumes that the point of courtesy lies in respect to social superiors .... When the full interpretive attitude develops, however, this assumed point acquires critical power, and people begin to demand forms of deference, under the title of courtesy, previously unknown, or to spurn or refuse forms previously honored, with no sense of rebellion, but instead claiming that true respect is better served by what they do than by what others did. Interpretation folds back into the practice altering its shape, and the new shape encourages further re-interpretation, so that the practice changes dramatically though each step in the progress is interpretive of what the last achieved.

Dworkin thus characterizes interpretation by reference to a certain attitude, what he calls the "interpretive attitude." The observations I wish to make about this attitude are simple and straightforward. First, interpretation and the attitude accompanying it are in the account just quoted bound up with the public exchange of claims. Second, these claims are made in defense of public behavior. Interpretation is thus in this example the activity of people who think they may be put on the spot by an audience of equals. It is, in other

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2. Ibid., p. 49.

words, the formulation of responses to the question "What do you have to say for yourself?," and the responses are answers addressed to people who listen knowing that they too may be put on the spot and asked to justify their judgment of the speaker's remarks.

Interpretation so conceived is emphatically public. It is public not only in the superficial sense of being exposed to general view but also in the more fundamental sense of denying intimacy, for it pictures interpretation as the presentation of ideas to an audience that is critical rather than sympathetic, challenging rather than accepting or welcoming. The interpreter is not invited to share his impressions with friends who assume his perceptions are worthy of sympathy but is rather commanded to defend his convictions before a panel of fair judges. He must earn, and cannot depend upon, acceptance. It is, I think, no accident that Dworkin settles upon courtesy, the medium for correct public interactions among strangers, to explicate his idea of interpretation. The attitude that emerges from this explication is "public-spirited" in its denial of intimacy. It is "individualist" in the way it stresses the aim of vindicating one's own view over the aims of learning from others or of participating in a common educative project.

Of course, one can object that I am focusing upon the wrong elements of Dworkin's example. One can point out that although he uses the word "attitude," he immediately explains that this attitude consists of a pair of assumptions, something that seems far different from what I have been using "attitude" to describe. And one can add that although Dworkin talks about a public exchange of claims he takes

care to describe interpretation in ways that exclude the mention of this exchange. He says, for example, that[3]

> Interpretation is an activity. It is the activity of trying to impose coherence over data or material tentatively assumed to be amenable to this activity.

and that[4]

> in normal cases interpreters assume, in the particular claims they make, that the most general point of the activity of interpreting is to make, of the material being interpreted, the best it can be of the enterprise to which it belongs.

In summary, the objection concludes, I have erred by retaining the spurious intimations of Dworkin's examples rather than converting his descriptions into the most precise set of technical propositions they admit.

This objection is a reasonable one, and I cannot hope to disprove or refute it. I could of course try pointing out, as I will do later in this paper, that Dworkin's description of law is filled with images of contests, competitions, and public displays, images appropriate to the attitude I just described. But this response would hardly satisfy those inclined to make the objection we are now considering, for they would maintain I was simply repeating my error: I would (in their eyes) be guilty of extending my fascination with the spurious connotations of words from one example to Dworkin's rhetoric more generally.

My response is in fact far simpler. My fascination with the connotations and metaphorical associations suggested by Dworkin's prose is objectionable only if those connotations and associations are in

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3. Ibid., p. 42.

4. Ibid., p. 43.

fact spurious. Perhaps they are so, but we cannot simply assume they are. In order to decide whether or not these connotations are spurious we must first discover what it means to make those connotations central to the meaning of Dworkin's writing, and that is an aim of this Chapter.

I would like to take up now Dworkin's story about the chain novel. He employs this example in three works, and in all three he introduces it by saying that he believes careful consideration of interpretation's place in literature will clarify interpetation's place in law. Thus in "'Natural' Law Revisited" Dworkin writes[5]

> Indeed, the picture of adjudication I have just sketched draws on a sense of what interpretation is like in ... various activities, and I shall try to explicate the picture through an analogy to literary interpretation. I shall, however, pursue that analogy in a special context designed to minimize some of the evident differences between law and literature, and so make the comparison more illuminating.

The activity Dworkin asks us to imagine is fairly easy to describe. Several novelists work together to produce a novel. One novelist writes the opening chapter, another writes the next, yet another writes the third, and so on. Each novelist in the chain must read the chapters preceding his and then write his own chapter in a way that he thinks will make the continuing novel the best literary work it can be.

My observations about this example are again straightforward. The special context Dworkin invokes to study literary interpretation excludes certain aspects fundamental to the idea of interpretation in literature; in particular, it renders literary interpretation and the literary enterprise in general far more public than they are in less

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5. Dworkin, "Natural Law", 166; see also Dworkin, "Interpretation", 541.

contrived settings. In one sense the public character of the project Dworkin depicts is obvious, for what is usually the expressive act of a single individual becomes, in his story, the collective enterprise of a group of people. Yet the pervasive character of this denial of the private becomes clear only if we attend to the details of Dworkin's account. He says, for example, that the group of novelists involved in the chain "is engaged for a particular project" and that these novelists have an "assignment."[6] The image is contractual; writing is no longer purely or primarily the satisfaction of desire or the sharing of an idea but is instead the fulfillment of an obligation.

Moreover, the sort of interpretations Dworkin describes as he continues his story are interpretations that translate the developing novel into a theory. In some instances this identification of interpretation and theorizing is explicitly present in Dworkin's analysis. He writes, for example, that[7]

> there is no radical difference but only a difference in the level of abstraction between offering a theory of interpretation and offering an interpretation of a particular work of art.

The identification is much more pervasively present, however, in Dworkin's inattention to the matter of style. The omission of any serious consideration of style is especially telling since nothing does more to unify a literary work into a single whole. No doubt the most

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6. Dworkin, "Interpretation", 541, 542; also Dworkin, Manuscript, pp. 203, 204.

7. Dworkin, "Interpretation", 534 (emphasis added). A second example occurs on page 204 of Dworkin's manuscript:

> [The chain novelist] must take up some view, as I said, about the novel in progress, some working theory about its characters, plot, genre, theme and point, in order to decide what counts as continuing it and not beginning anew.

(emphasis added).

difficult and most crucial task of a chain novelist would be to replicate the diction, the cadence, and the rhetorical patterns of his predecessors.[8] Yet Dworkin makes the activity of interpretation hinge not upon immersion in and absorption of language, but instead on extracting the meaning, construed (in his example) as a sort of moral or message or commentary, from the novelistic prose and translating it into some public language, a language which is technical rather than literary and which is impersonal rather than stamped with the particular way of thinking of a particular author. Of course, the interpretation produced by this translation might well recommend that the chain novelist mimic the style of his predecessors. There is a major difference, however, between saying that the best interpretation of a work will likely require someone who wishes to continue this work to copy or to imitate the author's language, and saying, as someone more attentive to matters of rhetoric, imagery, and style might wish to do, that interpretation <u>is</u> in a very fundamental way a matter of learning and speaking the author's language. The latter description makes interpretation depend upon preserving and learning the attitude manifested in the author's own prose while the former makes interpretation a way of subordinating the author's work to another

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8. The philosopher of art Nelson Goodman contends that a "style is a complex characteristic that serves somewhat as an individual or group signature" and that "the style consists of those features of the symbolic functioning of a work that are characteristic of author, period, place, or school." Goodman, "The Status of Style" in <u>Ways of Worldmaking</u> (Indianapolis: Hackett Publishing Company, 1978), pp. 34-35.

attitude, the attitude exemplified in a critical language of public claims.[9]

The relation between public debate and Dworkin's version of literary interpretation emerges again through his references to interpretation as the province of "critics."[10] The word is ambiguous; in its most general sense it means any reader, but in a more specific sense it refers to those involved in a certain scholarly or cultural debate. The difference between these two senses of the word is significant. For the first sort of critic, interpretation may be primarily a matter of enhancing his or her own appreciation of the aesthetic experience offered by some work of art; interpretation might well for this critic be a private activity. For the second sort of critic, however, interpretation must be in large part the preparation and articulation of public claims. Interpretation so conceived is, once again, emphatically public, and it is this second sense of "critic" that Dworkin's discussion invariably calls to mind.

The final example of the three I intend to consider is drawn from Dworkin's "Hard Cases" article, a work significantly older than those discussed thus far. In telling the story of the chess referee, Dworkin aims to show how "hard cases may arise that must, in the nature of the

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9. For a view of interpretation compatible with what I take to be the literary form of interpretation, see James Boyd White, "Law as Language", Texas Law Review 60 (1982), 415, especially at 429. See also his When Words Lose Their Meaning, especially Chapter One. I do not intend when I speak of "the literary form of interpretation" to speak of what all interpreters of literature do but rather to describe a form of interpretation which has some claim to be the ideal form of interpretation to which some or most readers aspire. For further discussion of this topic, see pages 109-113 and 125-129 below.

10. See for example Dworkin, "Interpretation", 530-536.

case, be supposed to have a right answer."[11] The referee, presented with a difficult question about the rules governing forfeiture of tournament games, must decide in favor of one of two contestants. He responds to his predicament through an activity that resembles very closely what Dworkin in later articles describes as "interpretation." As noted earlier, Dworkin claims that law generally is "an exercise in interpretation," and, since the "Hard Cases" article is of crucial importance to Dworkin's development of his picture of what law is, I think we can justifiably turn to the example of the chess referee in order to refine our understanding of Dworkin's idea of interpretation. We should take care, however, not to confuse the claim that the example of the chess referee can help us to understand the meaning of Dworkin's idea of interpretation with the rather different claim that Dworkin uses the example to define interpretation. Dworkin does not in fact aim by this example (as he did with the first two we have considered) to say what interpretation is; he in fact uses the term "interpretation" only three times in the course of the example. The example does make a contribution to Dworkin's definition of interpretation, but the contribution is an oblique one: Dworkin elaborates the idea of interpretation not only in the context of the examples we have been considering but also in the context of legal activity, and the example of the chess referee helps to constitute Dworkin's picture of what law is.

The chess referee is, I think, a "man-on-the-spot." He acts in a public forum, forced by circumstances to make a decision and to

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11. Dworkin, "Hard Cases", in Taking Rights Seriously (London: Duckworth, 1981), pp. 81, 104.

anticipate that, whichever way he decides, he will have to justify his decision to the losing contestant. The peculiarity of the referee's situation emerges more clearly if we compare his circumstances to those of another sort of official, someone like a league commissioner, faced with an identical question. Rather than pursuing Dworkin's chess example, I would like to illustrate this contrast by recounting a recent incident in major league baseball. In a game played in New York's Yankee Stadium on 24 July 1983, Kansas City third-baseman George Brett hit a two-run home run off the Yankees' Rich "Goose" Gossage with two out in the ninth inning to give the Royals a 5-4 lead. Yankee manager Billy Martin and his coaching staff leapt from the dugout to protest: Brett, they argued, had covered too much of his bat with pine-tar. The Yankees did not claim that the excess pine-tar had affected Brett's ability to hit the ball; they alleged only that the bat was illegal and that the Kansas City home run should therefore be disallowed. Home-plate umpire Tim McClelland found that the bat did indeed have too much of the tar on it and ruled in favor of the Yankees; Brett was declared out and his home run erased. The Royals lost the game by a 4-3 score as a consequence, and so appealed McClelland's decision to American League President Lee McPhail, claiming that the umpire had wrongly interpreted the rules determining the penalties for illegal bats.[12]

In the days that passed before the president's decision, the pine-tar controversy became a matter of national discussion. Baseball fans debated the merits of the arguments advanced by the Yankees and

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12. "Brett Homer Nullified, So Yankees Win", New York Times, 25 July 1983, Sec. 1, p. A1.

Royals. New York Governor Mario Cuomo commented (with apparent approval) that Yankee manager Billy Martin had "hung around with lawyers so much that he thinks like one." Reporters provided accounts describing how players used pine-tar and how the Yankees had noticed the infraction. The New York Times ran an editorial discussing Ronald Reagan's foreign policy in terms of the pine-tar incident and comparing the United States Constitution to the baseball rulebook. Brett's bat was brought to the Park Avenue offices of the American League for inspection. Eventually, on 28 July, McPhail issued a ruling reversing McClelland's decision and upholding the home run. The final four outs of the game were played on 18 August; Kansas City held its lead and won the game, 5-4. Sportswriter George Vecsey, looking back on these events after the controversy had run its course, remarked that the dispute became a "litmus test of the character and philosophy of the American people, dividing baseball fans and other maniacs into liberals and conservatives, humanists and legalists."[13]

In a sense the situation of the umpire and the situation of the league president were quite similar, for they answered the same question, and both assumed that the hard case they decided had, by its nature, a right answer. Yet in another sense their situations were very different, for the question had a different character in these two instances and so called for different attitudes. McClelland's ruling

13. "Fans Savor Game's Fine Print", New York Times, 25 July 1983, p. C5; "Pine Tar Popular Because it Grips", New York Times, 29 July 1983, Sec. 1, p. A16; "Yankees, Bats and Nicaragua", New York Times, 26 July 1983, Sec. 1, p. A20; Ira Berkow, "Batgate: The Gun Doesn't Smoke", New York Times, 26 July 1983, Sec. 2, p. B5; "Kansas City Wins Protest on Canceled Homer", New York Times, 29 July 1983, Sec. 1, p. A1; "Text of League President's Ruling in Brett Bat Case", New York Times, 29 July 1983, Sec. 1, p. A16; George Vecsey, "A Judge Ends the Agony", New York Times, 19 August 1983, Sec. 1, p. A13.

had to be quick and emphatic. His task was to choose among two contestants, one of which had to lose; his job was to officiate the particular game in progress. McPhail's ruling, by contrast, had to be judicious and firm. His task was to settle a controversy that now divided the baseball community, and to do so in a way that convinced people that major league baseball had the sort of qualities they respected and desired in a sport.[14]

Oddly enough, the league president, though he clearly addressed a larger audience than did the umpire, spoke in circumstances that admitted greater intimacy. For while the umpire spoke to contestants, to people who for the purposes of the particular game he officiated were (and thought of themselves as) enemies, the president spoke to the baseball community, people related to each other not by their differences (as were the Royals and Yankees) but by their shared commitment to the game of baseball. McPhail addressed people who might be called friends, at least in the sense that they considered themselves friends of baseball and expressed, to some extent, a loyalty to certain ideals of good sportsmanship and good play.

Of course, the Royals and Yankees also shared in this community, and, of course, the baseball community that heard the president's decision included fierce partisans of the Royals and Yankees who cared more about the contested game than about the relevant ideals. My point is only that the differing circumstances of the umpire and the president made it reasonable for them to view the question before them differently, to take a different attitude toward the decision they had

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14. See for example the essay by Sydney Schanberg, "Something You Can Count On", New York Times, 30 July 1983, Sec. 1, p. A21.

to make. Both men knew their rulings would be publicly examined, but the umpire had to anticipate a sort of hostile scrutiny that the president might escape. The umpire addressed two communities, the Royals and the Yankees, to which he did not belong, and had to declare in favor of one community at the expense of the other. He presided over a forum for public competition, a celebration of opposition rather than community, and the forum's emphasis on immediate action ensured that the differences which separated the players would overwhelm the bonds that joined them. The president, by contrast, enjoyed an opportunity to decide the question after some deliberation, and to speak to a community to which he himself belonged. American League umpire Nick Bremigan in fact drew attention to this distinction in an article he wrote explaining the predicament faced by the umpires in the Royals-Yankees game:[15]

> Umpires are not afforded the luxury of a period of deliberation of several days, being allowed time to receive and evaluate advice and input from a myriad of sources before determining whether the spirit and the letter of the law are in accord with each other. What we have here is a classic case of the umpires being caught in the middle, armed only with the confusing set of rules with which we are sent out each day to sit in judgment.

The chess referee, like the umpire but unlike the league president, is a "man-on-the-spot;" he is forced to decide quickly and to justify his decision to a group of people who are not in any relevant sense his friends. He joins the chain novelist and the practitioner of courtesy in performing a kind of interpretation that is fundamentally public and fundamentally competitive in spirit. In doing so he displays an attitude which is, I think, intrinsic to Dworkin's

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15. Nick Bremigan, "How Baseball Became Unstuck by a Rules Dispute", New York Times, 7 August 1983, Sec. 5, p. S2.

discussion of law as interpretation and which is, I think, of crucial importance to Dworkin's image of interpretation and of the legal enterprise.

C.

The Rhetoric of Public Argument

It is of course not surprising that the public would figure prominently in a description of law, for law is quite evidently a public institution, at least in the sense that it involves the participation of the entire populace of a country. Yet, as I tried to indicate by my comparison of the league commissioner and the umpire, this generality does not exclude the possibility of an element of intimacy in legal thought and discourse; a large group need not be a group of strangers (the people in the group might be, in some sense of the word, friends, at least insofar as they share in some kind of community). To put the matter another way, a public institution need not be a public-spirited institution. Indeed, the mention of "interpretation" might at first seem to promise to preserve a place for the private. As Dworkin observes, "interpretation ... has a large place in literary criticism, history, philosophy and many other activities."[16] Literature, history, and philosophy are all fields which concern themselves (at least among certain practitioners) with human thought, desire, faith, and feeling, with weakness and with aspiration, in a way that does not merely analyze but rather comprehends, recalls, and elicits the private side of human experience.

16. Dworkin, "Natural Law", 166.

Interpretation is not, however, local to the humanities. We may also speak of scientists interpreting their findings. And indeed, while Dworkin never mentions interpretation's role in science, his diction is often better suited to scientific interpretation than to humanistic interpretation. He tends, for example, to describe the object of interpretation as "data," a word more at home in a scientific than in a literary or philosophic context. Dworkin not only uses "data" in his general remarks about interpretation, but also imposes it upon his picture of literary interpretation:[17]

> An interpretation must fit the data it interprets, in order not to show the novel as sloppy or incoherent, and it must also show that data in its best light, as serving as well as can be some proper ambition of novels.

Other passages link interpretation to a number of words with a scientific resonance: for example, "I want to use literary interpretation as a model for the central method of legal analysis ..."[18] Science is a paradigmatically public intellectual discipline; it speaks a language that is impersonal and technical and so admits no intimacy.[19] The scientist desires to articulate and communicate a sort of explanation which commands public recognition and assent. The scientist's attitude is public-spirited because contemptuous of those

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17. Ibid., 170 (emphasis added).

18. Dworkin, "Interpretation", 541 (emphasis added).

19. Michael Oakeshott expresses a compatible view of science in his essay, "The Voice of Poetry in the Conversation of Mankind:"

> Scientists do their cumulative best to inform us about the world, but scientia is the activity, not the information, and the principle of this activity is the exclusion of whatever is private, esoteric, or ambiguous.

Rationalism in Politics (London: Methuen, 1981), p. 215.

forms of understanding which depend upon friendship and intimacy. (In speaking thus of science, I speak metaphorically in order to talk about an attitude which I think is characteristic of most of the books and journals the reader will find in science libraries. This attitude has, however, a powerful appeal, and has infected or inspired much work not generally labeled scientific, so I do not mean to restrict my remarks about science to the books and journals found in science libraries. On the other hand, many of the greatest (and a few of the lesser) scholars who call themselves scientists in fact reject (in practice if not in theory) the "scientific" attitude, so I do not mean my remarks about science to apply to everything one might find in a science library.) It is the publicity of scientific interpretation rather than the intimacy of humanistic interpretation that Dworkin builds into his image of the law.

The connection between interpretation and public discourse manifests itself yet again in the place of "theory" in Dworkin's language of law. I noted in my discussion of the chain novel that interpretation often seems in Dworkin's writing to involve translating some text or practice into a theory; theory, in turn, is for Dworkin bound up with the ideas of argument and justification. Passages like the following ones suggest that Dworkin understands theorizing and arguing to be very similar activities.[20]

> Noninterpretive <u>theories</u> are those that emphasize an especially abstract statement of original intentions (or could easily be revised so as to make that emphasis explicit with no change in the substance of the <u>argument</u>). Their <u>argument</u> is distorted by insisting that they do not rely on any conception of original intention at all.

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20. Dworkin, "The Forum of Principle", <u>New York University Law Review</u> 56 (1981), 499, 504 (emphasis added in both passages).

> If the Court cannot make the judgments about process Ely recommends without making the judgments about substance he condemns, then his own arguments will subvert his own theory. Can Ely's argument (or any other version of a Carolene Products theory) survive this challenge ...

I do not, of course, mean by these examples to suggest that Dworkin identifies theory with argument. It would be better, I think, to say that he regards theory as the most pure form of argument, a form, which because cleansed of metaphor and personal eccentricity, puts things most plainly before the eyes of the reader. It is also pure in the sense of being argument fit for public display (as personal, ad hominem argument would not be).

In any case, the vocabulary of theory and argument permeates Dworkin's image of the law. In his "The Forum of Principle," for example, the word "theory" occurs 132 times and the word "argument" 86 times in the article's fifty pages. Moreover, the two words are conspicuously absent from the pages of that article where Dworkin discusses legislative activity; they rise to prominence whenever he discusses legal practice or legal theory (including his own work).

The overtones of contentiousness and public argument introduced by Dworkin's reliance on words like "argument" and "justification" are reinforced by the allusions to competition that occur in his writing. His article "The Forum of Principle" provides a striking example, not only in its title but also in its closing sentences:[21]

> We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice.

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21. Ibid., 518.

This example may perhaps be the most obvious one, but it hardly stands alone. Dworkin writes, for example, that our legal system aims to make us a sort of community where politics

> is a theater of debate about which principles the community should adopt as a system, which view it should take of justice, fairness, and due process ...

and that "interpretations struggle side by side with litigants before the bar."[22]

These are references to what is not only confrontation and opposition but also competition designed for public consumption, a kind of contest suitable for spectators. It would, I think, be difficult to overstate the power of the theme of public acceptability in Dworkin's rhetoric. It extends even to the details of his examples, which are the stuff of a cultural taste that is respectable and elite. References to Dickens and Shakespeare are frequent, and in his discussion of justice Dworkin distributes not bread or clothing but plovers' eggs and claret. Even sexuality appears cloaked in a mantle that hides whatever might be shocking (whether because passionate or because obscene): Dworkin mentions sexual behavior in "'Natural' Law Revisited" but does so by reference to competing interpretations of Hamlet and so ensures his commments will acquire the respectability of high-brow culture.[23] This attention to cultural standards is entirely appropriate to an attitude that stresses competition at the expense of friendship, spirited debate at the expense of intimate confidence, the public at the expense of the private.

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22. Dworkin, Manuscript, pp. 174, 177.

23. Dworkin, "Natural Law", 167, 174; Dworkin, "Interpretation", 530; Dworkin, "What is Equality? Part 2: Equality of Resources", Philosophy and Public Affairs 10 (Fall, 1981), 285.

VIII.

Interpretation as Form

In the preceding Section I attempted to show the ways in which Dworkin's idea of interpretation represents or describes a comprehensive way of thinking and to sketch that way of thinking. In this Section I will aim both to show how this way of thinking governs Dworkin's own writing and, in doing so, to add to my account of what that way of thinking is. We should, of course, not be surprised to find that the interpretive way of thinking which Dworkin says is characteristic of legal activity would inform his own thought, for jurisprudence is in Dworkin's view simply the more general or abstract part of law.[1]

Dworkin's treatment of metaphor and attitude is a particularly important example of the way the attitude associated with his idea of interpretation governs his work. Dworkin in fact says a great deal about the place of metaphor and attitude in his writings. He is often quite openly hostile to metaphorical explanation. The following passage is a typical example:[2]

> In fact, when good judges try to explain in some general way how they work, they search for figures of speech to describe the constraints they feel even when they suppose they are making new law, constraints that would not be appropriate if they were legislators ... Hercules must not rest content with these famous metaphors and personifications, but he must also not be content with any description of the judicial process that ignores their appeal to the best lawyers.

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1. Dworkin states this view on page 79 of his manuscript.

2. Dworkin, "Hard Cases", p. 112.

Hercules and Dworkin respect prominent metaphors in the sense that they assume those metaphors contain some wisdom worth preserving, but they denigrate metaphor as a form for such wisdom; they aspire to a nonmetaphorical account (which Dworkin tends to call a theory) of metaphorically expressed ideas.[3]

Dworkin's way of thinking about metaphor and attitudes is also evident from the way he deals with opinions incompatible with his own ideas. Dworkin tends to respond to such views by translating them into theories, and so arranging a direct confrontation or contest between his ideas and those of his "rivals" or "critics." Metaphorical or stylistic peculiarities are smoothed over and eliminated. The following passage illustrates well the character of these efforts at translation:[4]

> "The law is the law. It is not what judges think it is, but what it really is. Their job is to apply it, not to change it to fit their own ethics or politics." This is the anthem of the legal conservative, and also of the decent citizen of good common sense. Read word by word it says almost nothing, certainly nothing controversial for us .... But this popular slogan, however carelessly drafted means something more than banality; it stands for an attitude that is important and controversial. We should begin our study of conceptions of law here. What conception does the popular conservative position really express?

On the one hand, Dworkin here recognizes that there is an attitude characteristic of the view of law he intends to examine, and that this attitude is somehow essential to the meaning of that view. On the other hand, he regards the language expressive of that attitude as

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3. In response to an earlier and shortened version of this Chapter presented in seminar at the University of Oxford, 6 February 1985, Dworkin commented that he believed that "metaphor should disappear at the level of theory."

4. Dworkin, Manuscript, p. 99 (emphasis added).

"carelessly drafted" and believes that the attitude is at bottom a "conception," something best expressed in his own language and something very much like a theory.

Dworkin's general preference for theory over metaphor does not keep him from mixing a vocabulary of attitude and image with his more prominent vocabulary of theory and conception. He writes, for example, that[5]

> the underlying issue is simply one of comparing two pictures of the judicial past to see which offers a more attractive picture, from the standpoint of political morality, overall.

A more provocative instance occurs late in his manuscript:[6]

> But interpretation, properly understood with an eye to its point, is itself an enterprise of optimism, and the bias, though hardly irredeemable, is inherent in the idea of law.

Dworkin, then, does not disdain metaphor completely; he employs figurative language in his own work and he recognizes a need to attend to the metaphors familiar to legal discourse. He finds no satisfaction, however, in metaphorical form; he treats metaphor as an impure expression of theory, and so attempts to translate it into his own language, a language of public competition and argument. This thirst for translation is hardly surprising if we consider the nature of Dworkin's form of interpretation: left in their own form, metaphor and attitude promote a spirit of intimacy. Metaphor, by its enigmatic character, invites and emphasizes understanding rather than judgment, and attitudes defy attempts at refutation. Differing metaphors and attitudes generate contrasts rather than competition; there is often no

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5. Dworkin, "Natural Law", 172; see also the closing paragraphs of that article.

6. Dworkin, Manuscript, p. 366.

need, and sometimes even no way, to decide that one metaphor or attitude is in every sense superior to available alternatives. Once subordinated to theory and to Dworkin's form of interpretation, however, metaphors and attitudes become less explosive: they are then meaningful only insofar as they provide sources of public claims and arguments, and the contrasts they evoke are merely precursors to a more decisive sort of opposition.

Dworkin's treatment of metaphor and attitude is important for two reasons. First, there is, I have tried to suggest, good reason to think that metaphors and attitudes may be indications of or aspects of comprehensive ways of thinking. Attempts to translate these metaphors and attitudes into theories therefore may involve a substantial risk that the meaning or significance of the ideas they express will be lost or distorted, for the very comprehensiveness of a comprehensive way of thinking makes theoretical specification or definition of such a way difficult and perhaps impossible. As I tried to show in the Chapter One, the risks inherent in the project of translation led Harlan to regard as imprudent any quest for scientific precision in the abstract treatment of general ideas and to stress the need for reasoners to rely upon guides. Second, Dworkin's response to metaphor and attitude (a response which recalls his inattention to matters of style in his chain novel example) highlights the differences between, on the one hand, the form of interpretation practiced by Dworkin and, on the other hand, literary interpretation. Literary interpretation pays great attention to matters of style, metaphor, and imagery, to, in short, the elements which make the language of some text distinctive and noteworthy, while Dworkin's account of interpretation appears to attach little significance to such matters. The aim of literary interpretation (when

done well) is largely, I think, to preserve and make accessible the language it studies; it endeavors, in other words, to prepare the reader to "have another look" at the text. The literary form of interpretation guards the peculiarities of textual language; interpretations explicate but can never substitute for the language of the text itself. Dworkin's form of interpretation, by contrast, reads distinctive language by translating it into his own language. We can, I think, justly say that one attitude emphasizes the integrity of the text while the other emphasizes the integrity of the interpreter; put otherwise, the literary view of interpretation stresses the virtue of sympathy while Dworkin's view stresses the virtue of integrity.

Dworkin's critique of external skepticism in the manuscript for his forthcoming book illustrates well the nature and implications of the form of interpretation he practices. Dworkin begins his assault on skepticism with a denunciation of metaphor:[7]

> When I first described these second-order beliefs a moment ago, I used a series of metaphors. That is how external skeptics construct the silly positions it is then so easy for them to

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7. Dworkin, Manuscript, p. 64. According to Dworkin, the external skeptic is one who believes that "there is something very wrong with the enterprise of interpretation (at least as I have described it) as a whole, not simply with particular issues or arguments within it." "Natural Law," 174. Dworkin takes care to distinguish external skepticism from "global internal skepticism," a position which challenges or argues against the validity of the interpretive enterprise from within that enterprise. See, e.g., ibid., 177.

I have doubts about certain aspects of Dworkin's characterization of external skepticism. For example, Dworkin writes that

> The external skeptic supposes he can check all interpretive judgments against some external reality whose content is not to be determined by arguments of the sort made familiar by the practice but which is to be apprehended in some other way.

("Please Don't Talk About Objectivity Any More", 302). I would agree that the observations and claims of the skeptic are grounded outside the interpretive way of thinking, but question whether the skeptic in fact asserts access to an "external reality" of the sort Dworkin mentions.

> demolish. ... We must now insist on something more than metaphors: we must ask how these tropes could be unpacked into genuine non-metaphorical claims about how the world is ... Can [the external skeptic] do this? Can he translate the metaphorical statements that sound so silly, about meanings and values being part of the "fabric" of reality, into some proposition that anyone who thinks interpretations can be right or wrong actually believes? If not, then he has no right to his confidence that the right-wrong picture is a mistake.

He proceeds to argue (convincingly, I think) that external skepticism makes no sense if denied its metaphorical form. I think, however, that this conclusion is less significant than Dworkin thinks it is, for, it seems to me, skepticism may be fundamentally metaphorical without being untenable. In fact, I suspect the true skeptic would respond to Dworkin's challenge by shrugging it off: "Why bother to look for a nonmetaphorical translation? How can we know, really and objectively, whether there is one or has to be one?" The true skeptic speaks this way not because skeptics are irrational but because skepticism is at bottom an attitude rather than a theory, and so is not subject to refutation. Indeed, the idea that skepticism is, or is inseparable from, an attitude is, I think, immediately plausible, not only because we often speak, in everyday conversation, of "skeptical attitudes," but also because Dworkin's own references to skepticism often bestow it with the character of attitude. Thus he writes, for example, that[8]

> This is the <u>language and spirit</u> of what I called, in Chapter 2, external [skepticism] ...

It is possible to state my point in another way. A skeptical attitude or way of thinking calls into question the efficacy or power of reason. Dworkin aims to refute skepticism by showing that it is self-contradictory or unintelligible. This refutation is, however,

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8. Dworkin, Manuscript, p. 238 (emphasis added); see also, for example, Dworkin, "Natural Law", 176.

unconvincing to the skeptic, who views the "refutation" of (what is for him) a right view in this way as additional evidence of the unreliability or inadequacy of reason, an unreliability which is fundamental to his account of what the world is. Dworkin shows by his effort at translation only that it is impossible to formulate a defensible representation of external skepticism within his own way of thinking, a result which is not surprising given that Dworkin's way of thinking denies the skeptic's view of reason and overlooks the importance of form in comprehensive accounts. The point I am making here is at least as old as Plato and has recently been formulated by, among others, the hermeneuticist Hans-Georg Gadamer:[9]

> That the thesis of scepticism or relativism refutes itself to the extent that it claims to be true is an irrefutable argument. But what does it achieve? The reflective argument that proves successful here falls back on the arguer, in that it renders the truthfulness of all reflective argument suspect. It is not the reality of scepticism or of truth-dissolving relativism, but the claim to truth of all formal argument that is affected.

The failure of many scholars to recognize that skepticism is a comprehensive way of thinking and so inseparable from a particular form or way of expression in fact threatens to do more damage than skepticism itself. The threat arises in the following way. Some ethical, political, and legal theorists, believing both that skeptics have something important to say about modern thought (on this point these theorists are right) and that all worthwhile things can be said in the conventional forms of contemporary scholarship, have attempted to formulate skeptical claims in the theoretical language which

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9. Hans-Georg Gadamer, Truth and Method (London: Sheed & Ward, 1979), p. 308-309. I have added the hyphen between "truth" and "dissolving;" in the text as printed by Sheed and Ward the two words are separated by a space.

dominates modern scholarship. Other theorists, believing that skepticism is wrong (about this point, these theorists are right), have responded that these formulations are in fact self-refuting, and that skepticism is therefore untenable (on this point, the theorists are wrong). The first set of theorists, realizing that these counter-arguments are by their own standards successful but nonetheless do not really respond to the ideas that motivated their first efforts (they are right on both scores), are tempted to conclude that reasoned discussion is inefficacious or unreliable (on this point they are mistaken) and thus to become (or at least to mimic) skeptics themselves. As a consequence of this process, we see the odd phenomenon reported by Owen Fiss in remarks I quoted in the preceding Chapter: nihilism is, in Constitutional jurisprudence among other fields, at once "unsound" and influential. The unhealthy result of all this activity is that much time is wasted discussing whether or not reasoning is good while the more important question, "What reasoning is good reasoning?," is neglected.

I wish to stress that I think skepticism is wrong and that there are ways of dissuading avowed skeptics of their skepticism. In particular, one may respond to a skeptical way of thinking by exemplifying an alternative way of thinking. The skeptic may see or discern the goodness of this alternative (if the alternative in question is in fact good) and abandon skepticism for the alternative way of thinking. In short, I recommend treating skepticism not by a negative attack aimed at demonstrating that it is impossible to be a skeptic but by the (positive) construction or showing of something better than skepticism. I think that Dworkin himself exemplifies a way of thinking both different from and better than the skeptical way of

thinking, though this alternative is, in my opinion, neither the best nor the most appealing alternative.

The importance of a particular attitude to Dworkin's own thought is evident in his treatment of skepticism for, although he treats skepticism as a theory or a substantive position susceptible to restatement in his own language and aims to refute it, what emerges most clearly from his discussion of skepticism is not so much a refutation of a skeptical theory but the presentation of an alternative to the skeptical attitude. The following passage from Dworkin's manuscript is particularly interesting:[10]

> But though I believe my interpretive convictions, along with my moral and aesthetic ones, would be different had I been raised very differently, or in very different times, I also believe, with equal force, that the culture and training and processes of reflection and observation are better, sounder, than they would have been had I lived differently or in other times. That may sound arrogant, but it is true, for you as well as me. For the arrogant-sounding assumption is part of the convictions we hold; we cannot think these better, as we do, unless we also think that the way of life that produced them for us, is a decent, sensible way to acquire convictions of this kind.

In these sentences Dworkin's understanding of the relationship between attitude and theory is once again of great importance. He mentions and admits an attitude, a kind of arrogant (or at least arrogant-sounding) attitude, which distinguishes him from the skeptic, but he identifies that attitude with a particular substantive claim. That claim, he suggests, is presumed by anyone who holds convictions; it is a prerequisite for deciding between right and wrong, or true and false.

We can at least imagine what it would mean to separate attitude and theory in this case. It certainly is true that in order to have anything that might properly be called convictions, or simply to

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10. Dworkin, Manuscript, p. 69.

participate in arguments or to make decisions, we must have some faith in the ability of our own circumstances and training to render us capable of discerning things well. Nonetheless, we do not have to spend all of our time arguing and deciding and so have opportunities for reflection and contemplation, moments when we may re-examine and call into question our own convictions or way of thinking. There are various ways we may undertake these re-assessments of our ways of thinking; conversing with loyal friends and reading philosophic texts are two important ways. The amount of time we spend in this sort of contemplation, and the way we undertake it, will depend, I think, on attitude. A skeptical attitude will provide little incentive either to contemplate or to argue. An attitude tinged with arrogance may incline one toward argument rather than contemplation, for those who are arrogant are more interested in demonstrating the virtue of their own convictions than in appreciating the virtues of others' convictions. A more humble attitude will prefer, when possible, to devote itself to understanding rather than to judging the beliefs and attitudes it encounters. Those who prize humility might well reject what Dworkin says is undeniable, that the "culture and training and processes of reflection and observation are better, sounder, than they would have been had I lived differently or in other times." Those who do disavow this belief might well devote their lives, to the extent possible, to the careful examination of speeches and writings drawn from perspectives different from their own, assuming, as a matter of attitude, that these perspectives might allow an access to a wisdom that their own perspective denies them. (Of course, humility is not the same as timidity; it excludes neither pride nor passion. To desire opportunities for contemplation is not to forget that some

circumstances afford no such opportunities.)

The arrogant and the humble might well answer differently a rhetorical question Dworkin poses in his article "The Forum of Principle:"[11]

> Then we discover that the Framers themselves would have reached a different decision about that issue in our place. Why should this make a difference to us? Why is it not simply our view against theirs on a complex issue of political theory, so that if our reasons are good we should not abandon these reasons just because people in another age would have disagreed?

The substantive position Dworkin urges is incontrovertible; certainly we should not abandon good reasons just because some others would disagree. The humble reader might, however, object to the arrogant attitude implicit in the rhetoric that gives expression to the position in question. We owe the Framers a certain respect, he might suggest, and if we find that what we think of as good reasons are reasons they would reject, then perhaps our reasons are not so good as we thought. Humility encourages and depends upon a kind of deference, for it assumes that the convictions of others may well have something to teach us about the deficiencies of our own way of thinking. Harlan's way of thinking, with its emphasis on the importance of guides to Constitutional interpretation, involves a rational, nonmechanical deference of this kind.

Of course, it remains possible that attitudes are nothing more than theories in need of articulation. One could translate everything I have just said about contemplation and argument and arrogance and humility into Dworkin's language of interpretation, and show how any reader, pressed to explain or defend his approach to diverse views,

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11. Dworkin, "The Forum of Principle", 495.

would articulate (or at least be seen to hold implicitly) some theory that guided his interpretation of particular works. But this sort of reasoning begs the fundamental question at issue: it simply assumes that attitudes are theories, for by pressing the reader to give a public account of his or her attitude the process of translation foists upon the reader the attitude of Dworkinian interpretation, the attitude of the "man-on-the-spot." On my view, this sort of translation will distort the reader's ideas, for I believe that it is impractical and perhaps impossible to reduce attitudes to theories. I cannot prove this claim, but I can at least demonstrate or exhibit a way of thinking which is faithful to it and allow the reader to see better what it would mean to accept or reject the claim.

Dworkin concludes his assault on skepticism with a paragraph which is essentially a summation of his own attitude.[12]

> We must continue our study of interpretation, and of law, in that spirit. I shall offer arguments about what makes one interpretation better than another, and about what account of law provides the most satisfactory interpretation of that complex and crucial social practice. .... You must then ask yourself whether it is your opinion as well, and if it is you will have agreed that my arguments and conclusions are sound and that others, in conflict, are unsound and wrong. If it is not, then it falls to you to say why not, to match my arguments or naked convictions with your own ...

One could hardly hope for a better statement of the credo of public-spirited individualism, the attitude of the "man-on-the-spot." That attitude, unlike the attitude of the scientist, does not aim at detachment from the personal or private but rather at making the private publicly presentable: the "man-on-the-spot" defends himself before an audience. There is a tinge of arrogance to this esteem for

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12. Dworkin, Manuscript, p. 75 (emphasis added).

public competition and display, but that should not lead us to underestimate the powerful appeal of this attitude: it is the attitude of the competitor, the winner, the champion, an attitude we often (and with good reason) admire.

The attitude characteristic of Dworkin's form of interpretation is, I think, evident in his work quite comprehensively. For example, the title to the appendix to Dworkin's first book,"A Reply to Critics," might well be taken as a description of all his essays, for nearly all are written in the spirit of competition, of attack and defense, and nearly all do reply to real or imagined critics. Thus Chapter Two of Taking Rights Seriously begins by identifying an opponent (the "nominalists"); Chapter Three meets the charges of critics of the preceding chapter, and Chapter Five again begins by identifying an enemy (judicial conservatives). Very few of Dworkin's essays on legal reasoning develop in any other way. "Natural Law Revisited," for example, responds to those who have associated Dworkin with the natural law tradition; "Is Wealth a Value?" and "Why Efficiency?" to the law and economics theorists;[13] and "The Forum of Principle" to the Framers' intent and process schools of constitutional interpretation. Moreover, many of these essays proceed by imagining, quite explicitly, and responding to the objections a critical or hostile reader might raise. Thus "Natural Law Revisited" is organized into sections titled, "Is it Delusion?," "Is it Undemocratic?," and "Is it Crazy?".

Dworkin's article "Law as Interpretation" is however a significant exception to the pattern described in the two preceding

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13. Dworkin, "Is Wealth a Value?", Journal of Legal Studies 9 (1980), 191; Dworkin, "Why Efficiency?", Hofstra Law Review 8 (1980), 563.

paragraphs.[14] Though Dworkin characterizes his essay as an argument, he does not make clear whom he is arguing against. We might suppose, in light of the essay's place in Dworkin's works, that it responds to the arguments of his traditional critics, the positivists and the skeptics, or, more generally, to anyone who would reject his way of thinking about law. There is, however, little in the form or substance of the essay that constrains it to play the role of a competitor in a sort of theoretical contest. Indeed, much of the essay seems to reflect a less contentious attitude: the article is essentially an investigation of what interpretation is. We find, for example, Dworkin writing that

> If interpretation is to form the basis of a different and more plausible theory about propositions of law, then we must develop a more inclusive account of what interpretation is .... We must study interpretation as a general activity, as a mode of knowledge, by attending to other contexts of that activity.

and indicating that he does not wish to take sides in debates among literary critics about what interpretation is.[15] He instead articulates quite early what he admits is an apparently trivial insight, and the remainder of the essay unfolds the meaning and implications of this insight.

I do not mean to suggest that Dworkin in "Law as Interpretation" abandons the attitude (public-spirited individualism) which I think his writing exemplifies. What I would term an "insight" Dworkin calls a "hypothesis;" what I would term "reflections" Dworkin calls an

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14. Dworkin's "Hard Cases" essay shares some of the characteristics of "Law as Interpretation" and is in similar ways an exception to the pattern discussed in the text above.

15. Dworkin, "Interpretation", 529, 530.

"argument." And while I would refer to his account of interpretation as a metaphor or image Dworkin would prefer to describe that account as a theory. While I stress the metaphorical aspect of his work, the way his ideas and claims are inseparable from the setting out of a picture which offers a contrast (rather than a simple confrontation) with other ways of thinking, Dworkin insists that his work is the articulation of a general theory, a public claim or argument directed not at any specific critic but at everyone. My reading does not disregard Dworkin's claims to present theory rather than metaphor but instead discovers the meaning of those claims in the way they contribute to and participate in a particular metaphor. Put most bluntly, my view is that Dworkin's idea of "theory" is in fact a metaphor for a particular kind of metaphorical language, a kind which reflects the attitude of public-spirited individualism.

IX.

Interpretation and the Constitution

The reading of Dworkin proposed in the two preceding sections holds that a certain attitude, an attitude which celebrates public competition, is of fundamental importance to his work. That attitude has a very powerful appeal. The spirit of competition dominates American life. It is reflected not only in our love of sports and contests but also in our attitudes toward politics and social activity. This competitiveness may sound rather base, but we should not underestimate its virtues. The quest for public praise and respect, for glory, may well inspire very worthy endeavors. Indeed, even our contempt for competitiveness and arrogance may itself arise in part from a desire for public recognition of our goodness.

The attitude of public-spirited individualism occupies a prominent place in the intellectual sphere as well. As I observed earlier, this attitude bears a certain resemblance to the scientific attitude as a consequence of its esteem for the public. Public-spirited individualism thus is very attractive to those scholars whose fields investigate activity which participates in the private, intimate, or communal aspects of human life but who aspire to imitate the successes of the sciences. In fact, I think this attitude dominates many humanist disciplines today, and political and legal theory are among these. These two fields have come to be seen as purified arenas for the public exchange of claims, the same sort of claims made, though often in less respectable form, in political and legal debates. The ethic of modern scholarship is competitive: it

inspires contentiousnes and a bit of arrogance, for it asks scholars to stake out their own view and to refute contrasting views.

The strength of public-spirited individualism may perhaps make it look uncontroversial in certain contexts. How could Dworkin's jurisprudence not be a reply to critics? How could legal discourse be anything other than a language for the publicly-respectable exchange of personal claims? There are however alternatives to the prevailing attitude, alternatives which already play quite important parts in our intellectual and political activities, and we should recognize that the virtues of public-spirited individualism are indeed open to question. The attitude is, for example, foreign to the interpretation of good literature by (at least some) people who love such literature. It seems to me that interpretation is in this (perhaps quite rare) context the enterprise of people who share a desire to understand a common text. By talking to each other about this text, these readers help each other to discern its structure, style, and themes. When each reader returns to the text, his or her reading of it is enhanced by the insights of other readers. There is, I think, an element of friendship, of mutual support and an attempt at mutual understanding, to this activity. It is, moreover, an activity which respects and preserves the integrity of the text, in that the interpretations do not purport to substitute for or restate exactly the text itself. James Boyd White describes well this form of interpretation when he says that,[1]

> In the process of coming to know a text, readers can assist one another. With such an aim I have recently written an article on the Iliad. If you read it, I know that it will not make your

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1. White, "Law as Language", 429.

> Iliad identical with mine, and it is not my object to do so. What I do hope is that the process by which you check what I say against that text, both as you remember it and as you reread it, will help you establish a better understanding of it and a deeper relation with it.

Interpretation of this sort, unlike the interpretation Dworkin describes, is more cooperative than competitive: the interpreters share the aim of comprehending and learning from the text they study, and so seek to help each other rather than to outdo each other. It seems to me that the attitude (toward both the text and the other interpreters) natural to this form of interpretation, the interpretation of fine literature by people who love fine literature, is one of openness and humility, of a willingness to learn, and of the friendly participation in a shared endeavor.

I do not, of course, mean what I have said to apply to the reading of everything that might be called literature, or even to every reading of what ought to be called literature. The most that I would claim is to have described a form of interpretation which does, even if perhaps rarely, take place when people who love good literature read good literature, and which has some title to the name of literary interpretation. I think, moreover, that this form of interpretation calls to our attention aspects of interpretive activity which are lost in Dworkin's account of interpretation and which are important to our thinking apart from the reading of what we normally regard as literature. Indeed, the attitude I just described may be of more importance to the reading of great philosophical texts than to the reading of most novels: such works demand a certain humility from the reader, a willingness to accept their authors as teachers rather than an insistence upon treating them as critics. The humility of friendship provides better access to philosophical insights than does

the arrogance of competition; the philosophical attitude is, I think, more private than public.[2] Indeed, Dworkin's own jurisprudence seems, if we accept the interpretation developed in the three preceding sections of this thesis, to rely at times on a sort of communication more appropriate to friendship and intimacy than to competition. According to my interpretation, Dworkin sets before the reader an attitude, a comprehensive way of thinking about legal discourse. The comprehensive aspirations of Dworkin's philosophy make demands upon the reader's understanding similar to those made by loyal friendships: Dworkin's works ask the reader to suspend his or her attitude toward legal activity and legal philosophy in favor of Dworkin's own just as loyalty to a friend will often require us to abandon (if perhaps only temporarily) our own perspective on the world in order to see things the way our friend does.

I think that there is also a place for the private in Constitutional discourse. I tried in my discussion of the pine-tar controversy to show how a public (in the sense of exposed to general view) decision, even a decision adjudicating the claims of competing parties, might have an intimate or communal aspect. No doubt most legal writing will resemble the umpire's decision more closely than it will the league president's; the judge's primary task will be to declare a winner, and he will speak to people who consider themselves competitors rather than friends. However, in important Constitutional cases and in legal scholarship the character of the issue changes. In

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2. For a discussion of the attitude appropriate to the reading of philosophic texts, see Allan Bloom, "The Study of Texts", in Political Theory and Political Education, ed. M. Richter (Princeton: Princeton University Press, 1980), p. 113.

these instances the judge or scholar speaks to and for a community, and his or her responsibility involves investigating what the good is for that community. Virtues of understanding and reflection grow in importance, equalling or surpassing virtues of judgment and decisiveness in significance. Legal activity in these instances seems to me to involve a philosophic aspect, an aspect which is perhaps present but certainly less visible at other times.

The Constitutional way of thinking exemplified by Mr. Justice Harlan in his dissent in Poe v. Ullman allows for such private or intimate aspects of Constitutional politics. The private element of Constitutional politics is, for example, reflected and respected by Harlan's adoption of a form of reasoning which assumes and depends upon the existence of purposes (more particularly, "Constitutional purposes") shared among the readers of the opinion. Harlan's efforts to preserve the unique language of the Constitutional text also affirm the private or intimate aspect of Constitutional politics: these efforts draw upon a sort of humility and indicate a willingness to accept the Constitution as a teacher or guide. These two elements of Harlan's way of thinking are related, for the Constitution serves as a guide to or teacher of, in particular, the Constitutional purposes (and the Constitutional way of thinking) which (on the account of Constitutional politics given by that way of thinking) unite the American nation into a community.

Harlan's way of thinking resembles the literary form of interpretation in another respect, for we are acquainted, in the projects of searching for the meaning or significance of a novel or play or poem with the idea of "having another look." If at first you do not see what I am talking about in an interpretation I offer you,

then I will ask that you at least have another look at the artwork before you discard my ideas. I pointed out in Chapter One that this notion of "having another look" and, more generally, a view of reason that takes reason to be in some respects a kind of discerning which is underived in the way that vision is underived, are reflected in the form of Harlan's opinion and in his treatment of general ideas.

Dworkin's work on interpretation is, however, in any case for two reasons a contribution to American Constitutional thought of the first importance. First, by exemplifying and describing a way of thinking different from Harlan's way, Dworkin helps us to understand what it would mean to accept Harlan's way of thinking (for he demonstrates an alternative that we would, by choosing Harlan's way, reject). Second, the particular alternative he exemplifies and describes is, if not the Constitutional way of thinking, still a powerfully appealing way. Indeed, Dworkin claims that his idea of interpretation captures the way in which most legal thinkers today do think, and, in my opinion, he is to a great extent correct in this claim. Dworkin's way of thinking is a purified and refined version, what one might call an idealization, of the sort of thinking most prevalent in the American Constitutional community. It is, moreover, at least possible that the citizens of the United States are united into a community only by a shared commitment to the way of thinking reflected in public-spirited individualism, or that those citizens do not in fact form a community of a sort which might sustain or generate the kind of intimacy I have been describing. As such, one might plausibly claim that Dworkin's way of thinking comprehends better than does the way of the Constitutional document itself the significance of modern political and scholarly debate and discussion of the Constitution's meaning and point: to say that the

meaning of the Constitution is inseparable from a particular way of thinking. is not to say that this way of thinking best comprehends the meaning of contemporary discussion of what the Constitution means or that this way of thinking is the best way for the practitioner of Constitutional politics to adopt. On the contrary, the question of whether the Constitutional way of thinking remains (or, for that matter, ever was) appropriate to the practice of Constitutional politics is, in my opinion, a question of paramount importance for American Constitutional scholarship.

Chapter Three

Science and Ideology in American Constitutional Politics

X.

The Scholarship of Robert Cover

While Ronald Dworkin and John Marshall Harlan exemplify and describe different ways of thinking, they appear to agree that there is in fact a single best way of thinking appropriate to the practice of American Constitutional politics. One influential strand of contemporary American Constitutional thought asserts, however, that there is no single comprehensive way of thinking or way of life which unites the American regime or which is the uniquely Constitutional way. This strand of thought takes the message of the Warren Court's corpus juris, with its emphasis upon the protection of minorities and politically weak or disadvantaged groups, to be that the American regime is so profoundly fragmented that no single or unique basis for Constitutional meaning remains (if ever there was one). My aim in this Chapter is to identify and inquire into one comprehensive way of thinking present in this strand of American Constitutional thought by looking closely at the work of Robert Cover,[1] one of the most eloquent

1. I will focus upon Cover, "Nomos and Narrative", Harvard Law Review 97 (1983), 4, but will also draw upon Cover, "The Origins of Judicial Activism in the Protection of Minorities", Yale Law Journal 91 (1982), 1287 (hereafter cited as 'Cover, "Judicial Activism"') and Cover, "The Left, the Right, and the First Amendment: 1918-1928", Maryland Law Review 40 (1981), 349 (hereafter cited as 'Cover, "First Amendment"'). See also Cover, Justice Accused: Antislavery and the Judicial Process (New Haven: Yale University Press, 1975).

and perspicacious expositors of that strand of thought.

Cover's recent articles consider in a serious and careful way some of the major questions confronting constitutional scholars: What is legal meaning? What is the form of tolerance proper to the United States as a liberal regime composed of diverse social communities? What is the significance of the intense debate over the Court's anti-democratic characteristics? What is the place of ideology in the American regime, and what part does the Court play with respect to this ideology? These questions are serious questions, and their sheer weight and importance would alone justify giving Cover's work close attention. Yet, as even a quick glance at the language and references in the opening pages of Cover's "Nomos and Narrative" reveals, Cover's thought also demands attention because of its striking originality, its willingness to borrow insights from psychology, sociology, theology, and other fields too often neglected by legal scholars.

I will in this Chapter focus my attention upon Cover's essay "Nomos and Narrative," though I will also draw upon other of his recent works. I intend to set out an interpretation of "Nomos and Narrative" which finds at the center of Cover's thought a teaching about what science is, what ideology is, and what the place of these two is in American Constitutional politics. In particular, Cover's teaching holds, I think, that both science and ideology are radically partial, partial in the sense of being incapable of standing alone as the foundation of a citizen's comprehensive understanding of political things. As partial (but essential) aspects of constitutional politics, they are themselves among the political things a comprehensive way of thinking must encompass; Cover's teaching describes and exemplifies a particular way of thinking capable of this comprehensiveness, a way

based upon a particular understanding of reason and the nature of meaning.

Section XI sketches the concerns and claims which structure Cover's exposition in "Nomos and Narrative." Section XII prepares for a more comprehensive and penetrating reading of Cover's article by appealing to the work of the anthropologist Clifford Geertz in order to clarify Cover's understanding of legal meaning. Section XIII returns to "Nomos and Narrative," using ideas developed in the preceding section to enrich the reading begun in Section XI.

XI.

"Nomos and Narrative:" Tolerance and the Nature of Legal Meaning

Cover's principal concern in "Nomos and Narrative" bears upon questions about the relation between tolerance and justice, or, put otherwise, about what tolerance is a just tolerance. The questions are old ones, but Cover recasts them in new form by subordinating them to questions about the nature and genesis of legal meaning. Cover's idea of meaning is, I think, both crucial to his thought and difficult to understand; the next section of this thesis is, therefore, devoted to making it more accessible. In brief, Cover stresses that "meaning" indicates not only "incidence" or "requirement," but also something along the lines of "significance" or "import." Legal meaning comprises not only a set or web of binding precepts, but a way of living in which those statements of requirement become significant to us by virtue of their relations to our visions of the ethical world.[1]

Cover develops the idea of a nomos, a kind of normative world, to describe the cultural forms or ideational wholes which encompass both aspects of legal meaning. On Cover's description, it is a narrative which integrates the elements of a particular nomos--reality, utopia, and precept--and which one must know and understand to realize the significance of those precepts as signs that make up a way of life rather than merely as demands to be obeyed. Narratives thus determine the relation between incidence, significance, and environment. Much of Cover's essay aims at saying what narrative is and what a nomos is, and

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1. Cover, "Nomos and Narrative", 4-11.

it would, I think, be imprudent to try to abstract a concise definition of either idea from his writing, but the following passage does indicate the sort of normative world Cover has in mind and the place of narrative in such a world:[2]

> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse--to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape this location in a normative universe, nor can prescription, even when embedded in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.

Cover points out that courts construe not only the incidence or prescriptive point of legal texts but also their significance, for by interpreting those texts and giving them practical effect judges either grant state authority to or withhold state authority from particular visions of the good. Judges, because they wield the power of the state, declare the consequences entailed by commitment to particular narratives, and by doing so define, construe, and enact their own commitments or lack of commitment.[3] Viewing matters of Constitutional adjudication in these terms enriches the problem of the limits of state authority, for the limits involved are recognized to bound not only action (e.g., can an American man have two wives?) but also interpretation (e.g., can American citizens inhabit a nomos where marriage is fundamentally a polygamous relationship?).

As I understand Cover, judicial interpretation of legal meaning in the United States engenders, in his view, two problems. First,

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2. Ibid., 5.

3. Ibid., see for example pages 47, 60, 67.

there is the problem of ascertaining the place of the statist or official nomos among the other nomian worlds present in the American nation. Judges, and government officials more generally, through their accounts define a particular nomos which possesses no primacy over or superiority to the normative worlds inhabited by other interpreters of the Constitution. We should avoid carelessly assuming this "statist" perspective on the law, for, in Cover's words, "the nomos of officialdom is ... as particular as that of the Amish."[4]

The second problem raised by judicial interpretation is that of determining "the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities."[5] This problem arises because the judicial exercise of state power threatens to discourage interpretive activity and curtail the growth of legal meaning. In Cover's rather provocative language,[6]

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that this one is law and destroy or try to destroy the rest.

Cover's talk of violence, coercion, and statism gives these problems a rather novel and somewhat revolutionary sound, but I think these issues nevertheless reflect rather old concerns, concerns in fact similar to some of those addressed by Harlan's opinion in Poe v.

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4. Ibid., 33. For discussion of related points, see pages 164-166 and 169-173 below.

5. Ibid., 44.

6. Ibid., 53.

Ullman. Cover recognizes that interpretation and so the perception or creation of meaning depends not only upon reason but also upon will in the form of commitment. On this point he is at one with, among others, Harlan; I stressed in the course of my interpretation of his opinion the importance of purposes, on his view, to understanding. Moreover, Cover, like Harlan, holds that a certain aspect or form of thought that goes into making up or constituting a meaningful human life has been placed outside of political control. In Harlan's case, this aspect or form is speculative reasoning, the exercise of which is allowed to citizens and protected against political manipulation. In Cover's case, what is excluded from political determination is narrative:[7]

> We exercise rigid social control over our precepts in one fashion or another on a national level .... But the narratives that create and reveal the patterns of commitment, resistance, and understanding--patterns that constitute the dynamic between precept and material universe--are radically uncontrolled.

Yet if there is a certain harmony between Cover and Harlan on these points, there is also a disagreement of great import. For while Harlan recognizes both that "unguided speculation" is a form of reasoning unsuitable to American politics and that the private exercise of such reasoning enjoys Constitutional protection, he does not conclude that the American Constitution or state must be silent on the issues such reasoning would address. On the contrary, inculcating a certain limited sort of "moral soundness" is according to Harlan a proper object of the state; the state is limited, however, in the means by which it may pursue this aim. Reflection on these means in fact yields, as I tried to show in Chapter One, a particular vision of what

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7. Ibid., 16-17.

the good life is, a vision embodied in the Constitutional way of thinking exemplified by Harlan and aptly described as "ordered liberty." Thus the restrictions or limitations on the means by which the American government may teach moral soundness do not compel neutrality on ethical questions but rather are expressive of a particular view of ethics.

As I understand Cover, he means by asserting that narrative is in the United States "radically uncontrolled" to claim not simply that the means by which the American state may pursue ethical aims are limited but that the state can hold no authoritative vision of what the good life is. Narrative is radically uncontrolled not only in that the government may not permissibly compel conformity to a particular narrative and is limited in the ways in which it may teach any narrative, but, more fundamentally, that there is not any single American or Constitutional narrative to teach.[8] As Cover recognizes, this radical exclusion of narrative from political determination is highly problematic, for government exercises will or force, and will or force when sundered from the sort of interpretive reasoning that generates narrative and so comprehends willful action within a meaningful whole are, or at least are difficult to distinguish from, sheer violence. The government exercise of force is however, as Cover recognizes in a paragraph which follows immediately after one quoted above, unavoidable:[9]

> ...judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert

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8. See pages 169-173 below.

9. Cover, "Nomos and Narrative", 53; the preceding paragraph is quoted at note 6 of this Section.

> a regulative function that permits a life of law rather than violence. The range of the violence they could command (but generally do not) measures the range of the peace and law they constitute.

We may note that Cover and Harlan are here again at one: liberty must be reigned in or ordered by government in order to secure peace, without which the benefits of liberty are unenjoyable. The need for a reigning in or ordering creates, however, special problems on Cover's view, for it leaves judges (and state officials more generally) with a choice between violence or the creation of a radically unauthoritative and particular narrative. The difficulties this choice creates for judges are, I think, discernible in the following remarks by Cover:[10]

> Were there a single, statist corpus, a state school, a state understanding--Spartan eunomia--we might imagine a rather simple participation-protecting rule to guarantee universal access to the process. In our own complex nomos, however, it is the manifold, equally dignified bases of legal meaning that constitute the array of commitments, realities, and visions extant at any one time.

If these varied "bases of legal meaning" are indeed "equally dignified," it becomes difficult to find a nonarbitrary way for the judge to choose among these bases. To put this point another way, in the absence of any single comprehensive American or Constitutional narrative, it is difficult to identify the "we" speaking in the paragraph just quoted or to say what "our own nomos" is or means.

I believe that Cover's way of formulating the problems of toleration, and the solution to them he proposes, follows from a particular view of reason. In Section XIII I aim to set out and explain that view of reason. Before undertaking this exposition, I would, however, like to consider at greater length Cover's idea of legal meaning.

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10. Ibid., 66.

XII.

Meaning as Way of Life

A.

The Idea of a Way of Life

Robert Cover's understanding of meaning is rich and complex. He takes great pains to distinguish his view of legal meaning from views which would identify it with the practical point of binding precepts:[1]

> Legal precepts and principles are not only demands made upon us .... They are also signs by which each of us communicates with others .... The sense that we make of the normative world, then, is not exhausted when we specify the patterns of demands upon us, even with each explicated by Hercules to constitute an internally consistent and justified package.

Cover's idea of meaning is perhaps best summarized in his statement of the sort of comprehension of significance one needs to inhabit a nomos: "To inhabit a nomos is to know how to live in it."[2] Meaning denotes not only patterns of requirement and demand but also more comprehensive ways of life.

While Cover's exposition of his notion of meaning is, I think, both vivid and precise, it is also enigmatic and difficult to comprehend. This difficulty arises in large part because we rarely put reflective distance between ourselves and our own way of life; while we (by practical necessity) consider particular demands upon us in light of other demands that might have been, but were not, made, it is much rarer (and much harder) to contemplate our own way of life in light of

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1. Cover, "Nomos and Narrative", 8.

2. Ibid., 6.

an awareness of other ways of life we might inhabit but do not. As a consequence we tend to be blind to the sort of meaning which distinguishes different ways of life.

The problem is not that it is impossible to offer definitions of the concept of meaning Cover employs. At least two definitions are implicit in the passages I have already quoted. Nomic meaning is the kind of meaning which defines and distinguishes particular ways of life. Nomic meaning is the kind of meaning which situates the demands of legal precepts within a structure of signification and so makes them signs. Additional definitions could be distilled from the pages that follow. Nomic meaning is the particular logic that structures a particular discourse. Nomic meaning is the template which integrates particular observations or statements into a comprehensible whole. The problem is not that defintions are lacking. The problem is that these definitions are impossible to appreciate or comprehend without the right kind of distance from our own way of thinking. Instructions about where to look, no matter how carefully crafted, are of little use to a man whose vision is blocked.

It is the business of anthropology to study and comprehend ways of life different from our own, so it would seem reasonable to appeal to that discipline in order to restore the distance we need to appreciate Cover's view of meaning. I intend, in particular, to turn for three reasons to the work of Clifford Geertz. First, Geertz has addressed explicitly issues of direct relevance to this thesis. Second, his work is unusually insightful and perspicacious. Third, Cover himself cites and relies upon Geertz's work.

For Geertz, anthropology is ethnography, what he calls "an elaborate venture in ... 'thick description,'" the kind of description

which sorts out structures of signification and so is capable of, for example, identifying an eye movement as a twitch or a wink or a parody or even a rehearsal of a parody according to its context.[3] Anthropology is on this view an interpretive enterprise which attends to the meanings which constitute particular cultures.

Geertz conceives of the study of meaning as the study of symbolic structure. The interpretive anthropologist attends to a culture's way of thinking, but this way of thinking, "though ideational, ... does not exist in someone's head; though unphysical, it is not an occult entity." According to Geertz:[4]

> thought consists of the construction and manipulation of symbol systems which are employed as models of other systems, physical, organic, social, psychological, and so forth, in such a way that the structure of these other systems--and, in the favorable case, how they may therefore be expected to behave--is, as we say, "understood."

The science of anthropology thus depends upon a science of symbol-systems; it is from this latter science that the ethnographer draws the concepts which constitute his analytic framework. These concepts allow the anthropologist to comprehend and describe how "the various sorts of cultural symbol-system are extrinsic sources of information, templates for the organization of social and psychological processes."[5]

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3. Clifford Geertz, "Thick Description: Toward an Interpretive Theory of Culture", in C. Geertz, The Interpretation of Cultures (London: Hutchinson, 1975) pp. 5-8.

4. Geertz, "Thick Description", p. 10; Clifford Geertz, "Ideology as a Cultural System", in Ideology and Discontent, ed. D. Apter (New York: The Free Press, 1964), p. 61 (the essay is also reprinted in Geertz, The Interpretation of Cultures).

5. Geertz, "Ideology as a Cultural System", p. 63.

Geertz provides a simple metaphor for the kind of meaning that different structures of signification, different cultures, or different nomian worlds embody. This kind of meaning is something like the meaning of a road map; it orders and relates points in unfamiliar terrain by providing an image of a conceptually-structured whole within which those points are parts.[6] Of course, the appropriateness or value of any particular map will depend upon the information we have already (knowledge of soil types or elevations or road names), the map-reading strategies we possess, and the purposes we have (are we searching for oil or trying to negotiate the network of roads connecting Arlington and Baltimore?) Maps, and likewise cultural symbol-systems, will have to be sensitive to differences in human learning and human purposes.

The points a cultural symbol-system collects together are not physical locations or details but events, actions, behaviors, and institutions, and the wholes into which the system collects these points are not geographical but ethical. As such the systems serve as "extrinsic sources of information in terms of which human life can be patterned."[7] They bear a deep resemblance to what I have termed comprehensive ways of thinking and characterized by reference to attitudes, for, like those ways of thinking, cultural symbol-systems provide the background or context within which particular statements are meaningful, within which acts become signs and so make thick description necessary.

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6. Ibid., p. 62.

7. Ibid.

For Geertz (and for Cover and me as well), the study of this kind of meaning involves an acute sensitivity to the problem of translation. The ethnographer's rendering of unfamiliar discourse must achieve a delicate mixing of sensitivity to the view one is portraying with scientific or professional distance from that view. Descriptions of a culture must be cast in terms of the constructions "we imagine [inhabitants of that culture] to place upon what they live through," but the descriptions (of events, actions, social institutions) must not be themselves part of that culture.[8] What results is a special sort of translation where meaning is found rather than lost:[9]

> "Translation," here, is not a simple recasting of others' ways of putting things in terms of our own ways of putting them (that is the kind in which things get lost), but displaying the logic of their ways of putting them in the locutions of ours.

The aim of all this rendering and translating is to make difference comprehensible without denying its difference. Anthropology so conceived is a difficult kind of comprehension wherein[10]

> particular imaginations are shadowed by others standing off in the cultural and temporal distance; ... what happens, recountings of what happens, and metaphoric transfigurations of recountings of what happens into general visions, pile, one on top of the next, to produce a state of mind at once more knowing, more uncertain, and more disequilibrated ...

The anthropologist's or translator's mind is at once more knowing, more uncertain, and more disequilibrated because the project of translation presents us with the formidable task of describing one way of seeing

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8. Geertz, "Thick Description", p. 15.

9. Clifford Geertz, Introduction to C. Geertz, Local Knowledge (New York: Basic Books, 1983), p. 10.

10. Clifford Geertz, "Found in Translation: On the Social History of the Moral Imagination", in Geertz, Local Knowledge, pp. 48-49.

the meaning of things--a culture or a way of thinking or a language or a nomos--by the application of another way without destroying the integrity of either our native way or the foreign way we are studying. Undertaking this task involves recognizing that the way of thinking we bring to the task is one way among many and that this way necessarily influences or guides our assessment both of other ways and also of our own way. Of course, the difficulty of comparing cultures or ways of thinking or nomian worlds does not imply that such comparison is impossible, but acknowledging this difficulty does induce a certain circumspection or caution, a heightened consciousness of the limits of our own way of thinking.

Because the effort to comprehend the kind of meaning which interests Geertz and Cover (and myself as well) necessarily draws the attention of the scholar to his or her own way of thinking, the meaning of the translation or interpretation the scholar produces will, I think, reside not only in what it tells us about the culture or discourse or text it studies but also in the way the scholar's work reflects upon and guides the scholar's own thinking. For this reason it is particularly appropriate to attend to matters of form, to the way of reasoning employed, when reading texts which aim at or depend upon or describe the translation or comprehension of the kind of meaning which constitutes ways of life. These considerations provide some ground for my belief, which I asserted earlier, that Cover's way of formulating the problems of toleration and the solutions to them he proposes follow from a particular view of reason.

My exposition of Cover's view of reason and comprehensive way of thinking in the next section will include a detailed examination of Cover's treatment of the idea of ideology. Geertz has some insightful

things to say about this idea, and it will prove helpful to consider briefly his comments. Not only will Geertz's reflections provide an illuminating contrast Cover's, but also we will have an opportunity to consider further his approach to the problems of translation and interpretation and, more particularly, his view of a matter raised several times in this thesis, the treatment of metaphor.

B.

Metaphor and Ideology

In his essay "Ideology as a Cultural System," Geertz analyzes the way most contemporary social scientists discuss the meaning of the political discourse they study. He argues that because those scientists misunderstand the nature of metaphor, they understand political discourse wrongly. Geertz stresses the capacity of figurative language to constitute and define conceptual road maps, to render the novel or unfamiliar situation comprehensible by identifying it with a context where understanding is unproblematic. According to Geertz,[11]

> The power of a metaphor derives precisely from the interplay between the discordant meanings it symbolically coerces into a unitary conceptual framework and from the degree to which that coercion is successful in overcoming the psychic resistance such semantic tension inevitably generates in anyone in a position to perceive it.

In this way, by creating a perspective or viewpoint within which discrete perceptions enter into significant relation to one another, figurative language permits the construction of cultural symbol-systems; it provides the vehicles of conceptualization which define a

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11. Geertz, "Ideology as a Cultural System", p. 59.

particular way of life and make truth accessible to and expressible for those who inhabit that way of life.

Yet, Geertz observes, modern social scientists tend to operate with a "flattened view of other people's mentalities," a view which refuses to recognize any vehicles of conceptualization other than the scientist's own and which insists that figurative language only "deceives the uninformed ... or excites ... the unreflective."[12] This misunderstanding of metaphor and other literary forms leaves social scientists incapable of rendering accurately the discourse they study.

More particularly, Geertz suggests, social scientists have been led by their inability to deal adequately with figurative language to overlook or misconstrue the significance of ideological assertions. The failure of these scientists to appreciate the kind of meaning which metaphor conveys (and conveys better than literal or technical language) leads them to dismiss ideological discourse as unworthy of respectful interpretation.[13] Geertz teaches that ideologies are in fact a sort of cultural symbol-system, not mere cries of pain but rather resources for comprehending the significance of political experience. The figurative nature of the ideological symbol-systems is not evidence of a departure from truth but is rather an essential

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12. Ibid., p. 58; Geertz's essay is now over twenty years old, but his criticism of social scientists is, I think, still valid and significant today.

13. Ibid., p. 57.

component of their attempt to give significance to unfamiliar political terrain:[14]

> As metaphor extends language by broadening its semantic range, enabling it to express meanings it cannot or at least cannot yet express literally, so the head-on clash of literal meanings in ideology--the irony, the hyperbole, the over-drawn antithesis--provides novel symbolic frames against which to match the myriad "unfamiliar somethings" that, like a journey in a strange country, are produced by a transformation in political life.

Geertz recommends that ideology be treated not as a poor cousin to science but, borrowing a term from the literary critic Kenneth Burke as an equally respectable "stylistic strategy," a way of encompassing truth sensitive to purposes and needs different from those science is capable of serving. The difference between science and ideology is not that one is more true or more comprehensive than the other. Rather, it is that they play distinct (and sometimes conflicting) but equally crucial parts in political discourse.[15]

> Where science is the diagnostic, the critical, dimension of culture, ideology is the justificatory, the apologetic one--it refers "to that part of culture which is actively concerned with the establishment and defense of patterns of belief and value."

This characterization of the place of science and ideology in the polity hints at the need for something more, a comprehensive stylistic strategy capable of regarding ideology and science as themselves part of a larger whole. Diagnosis and apology must come together somehow; we need a conceptual map which enables us to see the significance of the clash between critique and justification. There is of course a comprehensive strategy or map of this kind at work in Geertz's own

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14. Ibid., pp. 63, 64.

15. Ibid., pp. 71-72.

writing, a strategy or map which enables hims to discuss science and ideology by reference to the larger idea of a stylistic strategy. In the next section, I undertake a search for the comprehensive stylistic strategy or (to shift from Geertz's terminology to my own) way of thinking which Cover employs to describe the place of science and ideology in the American regime.

XIII.

"Nomos and Narrative:"
Commitment, Reason, and the Judicial Predicament

A.

Science and Religion in "Nomos and Narrative"

My aim in this Section will be to display the logic of the comprehensive way of thinking by which Cover renders the interaction of different nomic communities within the United States meaningful, and to indicate how that way of thinking informs Cover's understanding of the sort of tolerance proper to the American regime. Yet to say that such a comprehensive way of thinking is at work in Cover's thought about the Constitution is not to say that he identifies it with a Constitutionally-imposed or Constitutionally-inscribed American way of thinking. Indeed, I shall argue that Cover in fact rejects the idea that an American way of thinking of this kind exists.

What, then, is the perspective at work in Cover's own narrative; what sort of comprehensive way of thinking or stylistic strategy does he invoke? Both Geertz's reflections on the task of social science and my own earlier reflections on the significance of attitudes suggest that we can begin to answer this question by attending to the details of Cover's figurative language.[1] The figures Cover employs are drawn in large part from four domains of experience. One of these is modern science. We find, for example, references to "narratives that are the trajectories plotted upon material reality," to law which is a force "like gravity," to an instant of unified meaning which is a sort of

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1. For my reflections on the matter of attitudes, see pages 86-91 above.

"legal DNA," to acts which embody a process of "juridical mitosis," and to legal and social worlds and universes.[2] Religion provides a second crucial source of Cover's imagery. Cover speaks of "redemptive narratives," of "constellations of creed and ritual--Torah and Temple worship ...," and of a community's "sacred stories."[3] A third group of metaphors and figures draw upon the vocabulary of literature and the arts. Not only Cover's reliance upon the idea of "narrative," but also his mention of "script," "genre," "myth," "hermeneutics," and "fantasy" evoke literary images.[4] The language of war and revolution, of morally-charged mortal conflict, is a fourth source of Cover's metaphors. He refers, for example, to "wielders of state power;" to "attack," "oppression," "persecution," and "suffering;" to "cosmic freedom and bondage," to judges who are at once "people of violence" and "people of peace" and who arbitrate among "warring sects."[5] These various types of images overlap; the images of violent conflict, for example, are reinforced by physical images referring to unbounded spaces and colliding worlds, and are set in sharp relief by passages speaking of the growth and creation of meaning and life. These passages on growth and creation shade into the language of Genesis, and so merge with Cover's religious imagery. While I have listed only a few examples, the four groups of figures I have identified are

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2. Cover, "Nomos and Narrative", 5, 10, 15, 31.

3. Ibid., 15, 33, 34.

4. Ibid., 10, 11, 36, 40.

5. Ibid., 28, 30-32, 35, 53.

prominent and pervasive in every section of "Nomos and Narrative;" Moreover, Cover alerts us to the significance he places upon metaphor by pausing on occasion to explain his choice of images.[6]

The most striking aspect of Cover's prose is the way it fuses together these images from science, religion, literature, and mortal combat and forges out of them an account of a topic, American Constitutional politics, where any of the four images alone--much less together--might seem out of place. Cover's writing is violent, world-changing, not only in the way it asks us to destroy and remake our understanding of legal behavior but also in the way it deals with words. When he writes, for example,[7]

> And to their common understanding of creed and ritual is added a common understanding of their relation to the primordial, imaginary, true unity that occurred in a vanished instant of long ago,

and implies that what he says in such a passage is deeply significant to understanding what law is, Cover joins history and fantasy, fact and fiction, lore and practice in ways that defy prevailing conventions of thought and reading. At work in Cover's language is an overwhelming faith in the power of the reader to sustain the tension in meanings his way of writing creates and to build new meaning, rather than to despair at unintelligible chaos, from the passages that result. If a nomos is, as Cover writes, "neither utopia nor pure vision" but rather "a present world constituted by a system of tension between reality and vision,"[8]

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6. Ibid.; See for example Cover's comments on "Babel," "imperial," and "redemptive" at 17 (note 45), 13 (note 35) and 34 respectively.

7. Ibid., 15.

8. Ibid., 9.

then the figurative language Cover invokes performs the idea of a nomos: it binds together science and belief, history and imagination to constitute new meaning. What controls or tames the powerful tension and enormous energy generated by this clash of differently charged elements is the force of the human will, the commitment of the reader. Cover's article is a testimony to faith in the power of men and women to create meaning from the physical and ideational resources they find in the world; it is a bold declaration of human procreative potency, of the human power to create, literally, life in its fullest sense within a universe filled with physical and spiritual dangers.

It is this human power, this moral will, which is, I think, the focal point of the comprehensive way of thinking Cover exemplifies. We can gain further insight into its nature by examining more carefully the materials this will or power works with. The scientific tradition alluded to by Cover's metaphors is modern natural science, a science that is technical and unphilosophical. He evokes images of this science by borrowing terms from its technical vocabulary: "energy," "mass," "DNA," "mitosis."[9] The science that has given these words their contemporary significance is a science that inquires into causes and processes without inquiring into ends; it is as a consequence necessarily instrumental and amoral.

The religious images with which Cover mixes these scientific images have an aspect of the mystical, the primitive, and the fanatical. We find, in mention of "creed and ritual," "divine

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9. Ibid.; the terms from physics appear on page 5, those from biology on page 15.

destiny," "mythologies and rites," "exile and martyrdom"[10] and in examples drawn from the experience of small, tightly bound religious communities (the Amish, the Mennonites), elements of extreme and enthusiastic belief, of other-worldly inspiration, of the occult. Religion so described is not only unscientific or nonscientific but antiscientific. Religious belief depends, in this picture, fundamentally on revelation, on inherited belief, or on sheer arbitrary commitment which reasoned investigation can perhaps supplement but never displace or account for. Cover's metaphorical references to primitive warrior cultures reinforce this image of religion as something founded upon a sort of commitment antithetical to science.[11]

This picture of religion works in Cover's narrative not to deprecate the worth of religion but to signify the inadequacy of science and ultimately of reason, for mystical and ancient religion is made the model for the sort of visions that Cover holds to be an essential constituent of every nomos. The development of this model occurs not only through Cover's examples of actual nomic communities (the Biblical Israelites, the Amish, the Mennonites; even the Garrisonians were characterized by a belief that was fervent and eccentric even if not religious or mystical) but also through his use of terms with religious overtones (e.g., redemption, ritual) when describing the activity of nomic communities more generally. The reason that inquires into what is the case in the world is, apparently, ultimately incapable of determining what the good is. What unites

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10. Ibid., 15, 22-24, 49, 50-51.

11. See for example the opening paragraphs of Section IIIB, ibid., 53.

reality and vision, science and religion, is law--"a force, like gravity, through which our worlds exercise an influence on one another"[12]--and narrative: quite literally, the force of human will and the fecundity of human imagination.

B.

Reason and Ideology in Constitutional Politics

Cover's remarks about the place of ideology in the American regime clarify and reinforce the account of Cover's comprehensive way of thinking which I have tried to draw out of the elements of his style. The opening paragraph of Cover's "The Left, the Right, and the First Amendment: 1918-1928" begins this way:[13]

> The Supreme Court of the United States has long been more than a forum of last resort, an ultimate tribunal for resolving disputes. At least since its decision in Marbury v. Madison in 1803 it also has been the political philosopher or, if one prefers a more perjorative connotation, the ideologue of the American democracy. Constitutional law in the United States has been and continues to be the line at which the plane of political ideas meets that of political action.

This passage is interesting because of what it has to say about ideology and its place in constitutional politics. The second sentence establishes both a contrast between and an identity of philosophy and ideology: there is a difference between the two terms, but nonetheless the Court may justly be called either an ideologue or a philosopher according to preference. Cover elaborates his own preference for "ideology" in two footnotes. In footnote two of the article he remarks

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12. Ibid., 9-10; note also Cover's comment that the "normative universe is held together by interpretive commitments ...," ibid., 7.

13. Cover, "First Amendment", 349-50.

that by using "ideology" to describe the Court's work he intends to signify that the Court is engaged in "a comprehensive and justificatory or apologetic intellectual enterprise" and that the Court's thought is socially determined, but not that ideological systems of thought "are to be compared unfavorably to some 'truer' vision of the world."[14] In the next footnote he cites Geertz's essay "Ideology as a Cultural System" and endorses Geertz's suggestion that the function of ideology is "to make an autonomous politics possible by providing the authoritative concepts that render it meaningful."[15] The difference between calling the Court a philosopher and calling it an ideologue would seem to reside in the capacity of the term "philosopher" to leave open the possibility that the Court's accounts of the regime are simply (and not merely contingently or partially) true, that, to borrow again from Geertz's terminology, the Court's statements might be not only justificatory but also diagnostic. The identification of philosophy with ideology implies skepticism about the existence of this kind of truth. Ideology is acceptable as philosophy because there is nothing

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14. Ibid., 349-50 (note 2).

15. Ibid., 350 (note 3); for the original statement, see Geertz, "Ideology as a Cultural System", p. 63.

better than ideology.[16]

Later comments about the deficiencies of ideology reinforce this interpretation of Cover's distinction between philosophy and ideology. Cover writes for example that[17]

> The establishment of an ambivalent character for the Schenk test meant that will and judgment--precisely those elements subject to ideological predisposition--would control future applications. The dissent made an ideological critique of the Court's conclusions more plausible.

Cover in this passage departs from Geertz's analysis by making ideological thought the evidence of a predisposition. Implicit in Cover's account is a radically relativistic cartography: if ideology is a map which renders unfamiliar political terrain intelligible, it is a map which is sensitive not only to characteristics of the terrain but also to radical and unresolvable debates about what it is that constitutes the goodness of maps. Geertz does not appear to share Cover's skepticism about map-making: he remarks at one point, for

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16. Cover says explicitly that he uses the term "ideology" as part of a "liberal and relativistic 'sociology of knowledge,'" and cites as an example of such a sociology of knowledge the work of Robert Merton. Ibid., 350 (note 2). In the pages that follow I press rather hard Cover's treatment of the idea of ideology. I think, however, that the significance and weight I attach to his treatment of the idea are justifiable, for the idea is of central importance to his project in "First Amendment." Cover in that article provides an exegesis of what he describes as Louis Brandeis's "comprehensive ideological response" to questions placed on the Court's agenda by "the practical threats of domestic disorder and world-wide revolution and by the theoretical threats of a manipulated public-opinion and a contingent consciousness." Ibid., 371. The questions raised by these theoretical threats Cover elsewhere calls the "problem of ideology." Ibid., 367. The idea of ideology is thus in no sense peripheral to Cover's project; it is, on the contrary, at least arguably the most important idea in the article.

17. Cover, "First Amendment", 373.

example, that "Whether, in any particular case, the map is accurate ... is a separate question."[18]

Cover again departs from Geertz when he writes, in his concluding paragraph, that[19]

> Justices Brandeis and Holmes ... expressed a different faith and a commitment to have it both ways. For them, the possibility of restraining both private and public force demanded courage and a dedication to public politics, to active citizenship. Citizens, in their very decision to participate, express a faith in their capacity to speak to one another and to transcend ideology. This capacity is not an inherent feature of our politics, but an achievement created by a scrupulous "eschewing" of the arbitrary. Brandeis's answer to Walter Lippmann, finally, is that the commitment to deliberation is a matter of will. That commitment, if it is carried out, can generate intelligence and apply it. Ultimately, the sociology of knowledge tells us only where people start from, not whither--through deliberation--they can bring themselves to go.

Cover's disagreement with Geertz is evident in his suggestion that ideology is something citizens should, if possible, transcend and that the capacity to transcend ideology is related to a commitment to communicate. For Geertz, by contrast, ideology is a system of signs which makes discourse about politics possible. Cover's uneasiness about ideology stems from his conviction that ideological belief is fundamentally arbitrary--that reason is ultimately incapable of guiding our choice of maps. What is strking about his response to this uneasiness is that while it appears to stress the virtues of deliberation it does so by asserting the primacy not of reason but of will: "the commitment to deliberation is a matter of will." Moreover, this assertion is itself the product of the faith and commitment of

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18. Geertz, "Ideology as a Cultural System", pp. 64.

19. Cover, "First Amendment", 387-388.

Justices Holmes and Brandeis, a faith and commitment which Cover characterizes throughout the article as ideological. It would thus appear that the commitment to the belief that deliberation is a matter of will is on this account itself a matter of will. The significance of Cover's closing sentence would then seem to be that human thought is not socially determined because the human will is ungoverned by either social circumstance or reason.

The fate of reason in this way of thinking becomes more evident if we examine the passage in "Nomos and Narrative" where Cover distinguishes his position from Brandeis's. After observing that Brandeis's approach is unsuccessful because it presupposes a political life which "occurs within a public space dominated by common mythologies and rites and occupied by neighbors and kin," he writes that,[20]

> Brandeis's enduring legacy is his realization that it is particularly problematic to coerce silence, for such coercion destroys the element of reason that interpretation entails. Yet it is also problematic, even if less so, to coerce the abandonment of actions that arise from common life in a dedicated space within the normative world. The effect of this latter form of coercion is to destroy the experience and interpersonal faith that, as much as "reason," are constitutive of our understanding of normative worlds.

This paragraph asserts that interpretation depends in a crucial way upon reason. It also asserts, however, that interpretation is not simply reasoning; reason is "an element" of interpretation. Experience and faith enter into interpretation not only as part of what is being interpreted but also as part of the activity of interpreting.

The view of reason that I think emerges from these passages, when considered in the larger context of Cover's work, is best illustrated

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20. Cover, "Nomos and Narrative", 49.

metaphorically. The relationship between reason, nature, and will is something like the relationship between sperm, egg, and libido. Reason is essential to the creation of meaning, as sperm is essential to the creation of biological life, not merely instrumentally but, in an important sense, constitutively. Reason makes interpretation possible by constituting the structure of narrative. Yet just as it is not sperm but sexual will that governs when and what physical conception occurs, it is will and not reason that governs when and what ideational conception occurs: reason is constitutive of narrative, but it is will that puts reason to its purpose. To put the point another way, reason is deficient not because confined to one world or nomos (to, e.g., science rather than religion)--on the contrary, it is essential to and in an important sense constitutive of all such worlds--but because it is incapable of assessing the relative virtues of these worlds. All our particular worlds, and the universe that comprehends them, depend ultimately upon will.

I would like to make two observations aimed at clarifying the metaphor I have used to explain what I take to be Cover's view of reason. First, the instant and circumstances of biological conception will depend only partly upon sexual will or urges; various other biological and physical factors will govern the process of conception, determining which egg (if any) is fertilized. Likewise, will alone does not suffice to determine commitment; commitment requires an object (commitment is commitment to something) and, while will determines in a general way when and whether a commitment is made, the meaning and content of any particular commitment will also depend upon the ethical environment, the people and ideas and problems in the context of which the individual makes a commitment. Second, just as we cannot know what

kind of a human being procreative conception will produce before that human being is in fact conceived (and, in the case of some characteristics and traits, before that human being leaves the womb and develops further), we cannot comprehend completely the nature of the nomian worlds we conceive through our commitments without having first made those commitments. Two examples help to illustrate the point of this second observation. We can make commitments which create nomian worlds we do not at first comprehend by commiting ourselves to uphold or be faithful to words we do not fully understand. These words may be ones we have spoken or written ourselves or ones (including such texts as the Bible or the United States Constitution) spoken or written by others. As we live by these words, we interpret them and comprehend their meaning, a meaning we did not comprehend or appreciate fully at the time we declared our allegiance to or by those words. More fundamentally, we may make a commitment the significance of which we do not comprehend before the making of the commitment when we adopt a comprehensive way of thinking, since that way of thinking will provide the only precise account of itself. Of course, as we perform any particular way of thinking, our reasoning will tell us something (though not necessarily everything) about the commitments we might make, including commitments to comprehensive ways of thinking. That way of thinking we perform is, however, on Cover's view itself evidence of a commitment prior to the performance of that way of thinking.

I have used rather guarded language in presenting these examples; the need for such caution results from the difficulties inherent in making what I take to be wrong views comprehensible without distorting their wrongness. Cover's view of reason is not my own view. Nonetheless, it is possible, I think, not only to discern what Cover's

view is but to make sense of it, to show what it means to see the world the way Cover does and why that way of seeing things is plausible or appealing.

My reading of the significance of will and reason in Cover's teaching explains both his faith in and his skepticism about the powers of deliberation. The virtues of deliberation follow not from any capacity of deliberative reason to see political things truly but rather from the way deliberation combines reasoned interpretation with common (that is, shared) commitment. The public politics Brandeis envisioned could create a sphere of common experience and so give rise to common commitments. People would generate similar narratives and inhabit a single nomos. Ideolology would be transcended in the sense that because there existed a single, shared way of life there would be no conflicts of the fundamental sort resulting from clashes between different ways of life. The social fragmentation of the American regime forecloses the possibility of generating such a nomos, however, for that fragmentation ensures a diversity of commitments. Reason will continue to impregnate nature and so create new meaning, but the meanings so created will be fundamentally irreconcilable.

In summary, then, Cover's comprehensive way of thinking relies upon human will to integrate or tie together human experience. Reason is subordinated to will in the sense that the way of integration, and even the realms to be integrated, are decided ultimately by an assertion of will; reason is, however, crucial to this integration and to each of the realms (or ways of thinking) not merely instrumentally but constitutively. Reason is fundamentally hermeneutic; it interprets into being worlds conceived as a consequence of willful commitment. As a result of the subordination of reason to will, ideology necessarily

acquires an aspect of the arbitrary. Ideological politics, politics among people who inhabit different nomian worlds, is thus a clash of wills; deliberation is efficacious only where commitment is shared so that politics becomes a matter of working out a way of living rather than of mediating among different ways of living.

The attitude characteristic of Cover's way of thinking is that of the valiant warrior, the man of power and courage fighting for his commitments in a world made physically and spiritually dangerous by the impotence of reason. The attitude is, I think something like the attitude Cover attributes to Oliver Wendell Holmes, who, according to Cover, combined a "philosophical skepticism about 'truths' and [a] Spencerian fatalism about long-term social destiny." Cover writes that Holmes'[21]

> most attractive moments, however, are found in his existential poses as the fighter for values in spite of his perception of a cosmic void and the long-run earthly insignificance of individual action.

Cover's Court would share certain of these characteristics: a spirited commitment to particular values combined with a warrior's regard for the honor of others who display the courage and bravery to risk mortal (and even immortal) danger to defend their commitments. In the presence of a cosmic void (or, to speak less metaphorically, in the absence of any source of ultimate authority which might govern commitment), it is not any particular commitment but rather the mere fact of commitment that becomes the prime criterion for honor. Indeed, even this value, this belief in the value of having values or, in other words, the rejection of nihilistic despair, is itself a matter of sheer commitment, a commitment which Cover embraces and aims to uphold.

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21. Cover, "First Amendment", 383.

C.

Constitutional Implications: The Problem of Civic Education and the Form of Constitutional Discourse

Cover's comprehensive way of thinking has direct implications for concrete Constitutional issues. Its import is most evident in issues related to civic education: because Cover's way of thinking purports to describe how visions of the common good develop and what the significance of political disagreement within and between nomian worlds is, it determines what forms of argument, discussion, and influence are appropriate to American Constitutional politics. On Cover's view, the interpretive activity the Constitution licences depends on commitments and the development of narrative. The state, however, maintains a commitment to a subordinate or at most equal part in this interpretive activity, a part which leads it to disdain control over narratives. It must, however, nonetheless keep peace by regulating the acts of willful assertion which generate and accompany those narratives.[22]

> The conclusion emanating from this state of affairs is simple and very disturbing: there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. ... The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must "have meaning," but they necessarily borrow it from materials created by the social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.

The question at stake in civic education cases is, on this view, how best the Court can foster the development of meaningful ways of life while regulating the social conflict that is inevitable in a regime marked by a diversity of commitments, narratives, and ways of

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22. Cover, "Nomos and Narrative", 18.

life, and so by ideological clashes. In "Nomos and Narrative" Cover develops the implications of this way of framing the Court's task for Constitutional questions related to public education. Public schooling has, on Cover's account, an anomolous place in the polity.[23]

> The weakness of the state's claim to authority for its formal umpiring between visions of the good is evidenced by the state's willingness to abdicate the project of elaborating meaning. The public curriculum is an embarrassment, for it stands the state at the heart of a paideic enterprise and creates a statist basis for the meaning as well as for the stipulations of law.

Cover argues that the Court has recognized and responded to the problematic character of public education in two ways. The first aspect of this response has imposed substantive limitations on the scope and content of curricular control; the Court has developed these limitations in a series of cases that includes West Virginia v. Barnette, Epperson v. Arkansas, School District v. Schempp, and Engel v. Vitale.[24] The second aspect of the response has supplemented these restrictions on public schooling by protecting the existence of private alternatives to the state curriculum. The Court has asserted Constitutional protection for private education in, among other cases, Pierce v. Society of Sisters and Wisconsin v. Yoder.[25]

Nonetheless, the Court has at times denied the autonomy of private education and legitimated state intervention. Cover argues that the understanding of politics he articulates governs and explains the form and circumstances of the Court's support for intervention. On

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23. Ibid., 61.

24. 319 U.S. 624 (1943); 393 U.S. 97 (1968); 374 U.S. 203 (1963); 370 U.S. 421 (1962).

25. 268 U.S. 510 (1925); 406 U.S. 205 (1972).

Cover's account, possibilities for legitimate intervention arise when the narrative of the educative community, which aims to teach its own particular vision, comes into conflict with a narrative offered or endorsed by state officials, a narrative which asserts a vision and a commitment incompatible with the vision and commitment of the private schools in question. The Court must respond by deciding between the conflicting commitments. Cover suggests by way of example that the distinction between NLRB v. Catholic Bishop[26] (where the Court overruled the National Labor Relations Board's finding that the Board could intervene in Chicago's parochial schools to establish bargaining procedures for lay teachers employed by the schools) and Bob Jones University v. United States[27] (where the Court upheld the Internal Revenue Service's ruling that schools discriminating on the basis of race were ineligible for tax exemptions) resides precisely in the existence of an appropriate narrative in the latter but not in the former case: on this reading, the Court's assertion of a compelling governmental interests in "eradicating racial discrimination in education" amounted to the endorsement of a narrative connected with the commitments central to the struggle for racial equality.[28]

The implications of Cover's comprehensive way of thinking extend beyond issues of public schooling to other facets of civic education. Cover's understanding of the significance of political disagreement allows him, for example, to offer a powerful interpretation of Justice

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26. 440 U.S. 490 (1979).

27. 103 S. Ct. 2017 (1983).

28. Cover, "Nomos and Narrative", 64-67.

Brandeis' doctrine of free expression, developed in Gilbert v. Minnesota and Whitney v. California.[29] On Cover's reading, Brandeis's opinions in these cases hinged upon an assessment of the significance of public debate. Brandeis founded his defense of free speech on a commitment to securing the place of reason and deliberation in public politics. This defense involved determining the relation between force and reason in order to discern whether it was possible "to stop the arbitrary, coercive, violent forms of street politics without resort to the arbitrary violence of the law."[30] Brandeis's understanding of the question at stake in Gilbert and Whitney and his answer to that question both reflect (on Cover's interpretation) the comprehensive way of thinking Cover describes and exemplifies in "Nomos and Narrative."

While this way of thinking is not in its broad outlines sufficient to determine the outcome of Constitutional questions less directly related to civic education and political meaning, it does govern the form of those issues. Thus Cover is, for example, able to explain the significance of the development of the Court's activism on behalf of minorities by portraying it as evidence of a deepening judicial commitment to racial equality. In a sense this point is obvious (intentionally doing something to promote the equality of minorities manifests a commitment to promote the equality of racial minorities), but I mean commitment here to be understood in the context of Cover's own narrative: it describes an assertion of will and

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29. 254 U.S. 325, 334 (1920) (dissenting opinion); 274 U.S. 357, 372 (1927) (concurring opinion).

30. Cover, "First Amendment", 379, 383-387; the quoted passage is from 387.

involves the development of a nomic world. Cover presents the Carolene Products doctrine[31] as a response to a need to convert a successful dissenting strategy into a prevailing ideology, and, more particularly, into an ideology capable of meeting certain technical challenges to democracy.[32] The dissenting strategy had emphasized the virtues of the majoritarian law-making process; the ideology that grew out of this strategy involved a commitment to a two-tiered system of review that selected certain rights for special protection. The existence of a socially-entrenched system of discrimination and prejudice, a system which might well take advantage of rather than succumb to an open political process, forced judges to refine the commitment first articulated in footnote four:[33]

> Footnote four coined the phrase "discrete and insular minorities" and staked out a territory for vigorous judicial action. The forty years since 1938 have repeatedly tested the meaning of the phrase and the strength of the Court's commitment to act.

Cover's comprehensive strategy explains and determines the significance of this history of judicial activism: it says that the Court was expounding an ideology (and it says what an ideology is and what the place of ideology is in the American polity) and it says that the development of such an ideology depends fundamentally upon an act of will undeterminable by reason. The comprehensive way of thinking thus delineates the form and significance of the history of judicial activism, but it does not (at least in the generality with which I have

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31. 304 U.S. 144,152-153 (note 4) (1938).

32. Cover, "Judicial Activism", 1287-1289.

33. Ibid., 1307.

described it) determine the particular commitment (in this case, the commitment to protect Blacks) adopted by the Court.

D.

The Carolene Products Community

To say that Cover's attitude or the comprehensive way of thinking it characterizes has direct implications for concrete Constitutional issues is, of course, not to imply that this way of thinking is indicative of a Constitutional way of life or that it is the Constitutional way of thinking, a way uniquely appropriate to and derived from the character of the regime or embedded in the Constitution. Indeed, there are several fairly unambiguous indications that Cover would reject such a description. The passages comparing judicial interpretation to the interpretive activities of other nomic communities, communities which rely fundamentally on texts born outside the Constitutional tradition, suggest there is no single Constitutional way of thinking:[34]

> I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded the understanding of the Justices of the Supreme Court.

Indeed, Cover, in contrast to Harlan, denies that there is any single unified and identifiable "background of Constitutional purposes" capable of guiding Constitutional interpreters:[35]

> All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance. And even were we to share

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34. Cover, "Nomos and Narrative", 28.

35. Ibid., 17-18.

> some single authoritative account of the framing of the text--even if we had a national history declared by law to be authoritative--we could not share the same account relating each of us as an individual to that history.

The consequence of this absence of a shared history is that there is what Cover calls a "pluralism of meaning," a "Babel" composed of "a multiplicity of coherent systems and a problem of intelligibility among communities" and presenting "the problem of interpenetrability or comprehensibility between interpretive efforts or traditions, each of which is independently defensible or even 'right'."[36]

Apparently, "judges are like the rest of us" not only in that "they interpret and they make law"[37] but also in that this activity of interpreting and making depends in a fundamental way on extra-Constitutional narratives and commitments. On Cover's account, the Constitution is at best an incomplete foundation for interpretation: "In our own normative world, there is no obvious central text, certainly none that exhaustively supplies both narrative and precept."[38]

Cover, then, offers a comprehensive way of thinking about the significance of American politics, but he does not offer it as the Constitutional way or claim, in offering it, to speak for the American community. Indeed, he appears to deny that such a community exists. Whom, then, does Cover speak for? To raise again a question I mentioned earlier, who is the "we" that speaks and is spoken to in "Nomos and Narrative?"

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36. Ibid., 13 (note 36), 17 (note 45), 42.

37. Ibid., 67.

38. Ibid., 25.

The answer to these questions becomes evident if we look at which texts Cover interprets to define and articulate his own commitment. The final paragraph of Cover's essay on judicial activism is particularly revealing:[39]

> Each constitutional generation organizes itself about paradigmatic events and texts. For my generation, it is clear that these events are Brown v. Board of Education and the civil rights movement and that the text is footnote four. For, whether or not the footnote is a wholly coherent theory, it captures the constitutional experience from 1954 to 1964. And that experience, more than the logic of any theory, is the validating force in law.

The community Cover speaks to is thus, apparently, his "constitutional generation," a community organized not about the Constitution itself (indeed, the Carolene Products jurisprudence, according to Cover, entails a commitment to "rewrite the Constitution")[40] but rather about a footnote to one Supreme Court opinion and the politics of the civil rights movement.

Footnote four is a rather peculiar text about which to constitute a community. It is a footnote that reads like a footnote; its prose is dry, technical, and uninspiring. The crucial ideas, moreover, are introduced as matters which need not be inquired into or considered in the instant case. The footnote shows no evidence of profundity or greatness of mind in the way that the Bible or the Constitution or even John Marshall's opinion in McCulloch v. Maryland do.[41] Cover's principal achievement in "Nomos and Narrative" is, I think, to show

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39. Cover, "Judicial Activism", 1316.

40. Ibid.

41. 17 U.S. (4 Wheat.) 316 (1819).

what it would mean to couple the compact statements of footnote four to recent Constitutional history in such a way as to constitute a full or comprehensive way of life. He accomplishes this generative act by fortifying the way of thinking that renders meaningful footnote four with ideas gleaned from a wide range of other texts. Cover cites roughly two hundred sources in "Nomos and Narrative," drawing upon scholarship not only in law and legal history but also in the social sciences (particularly sociology and psychology), theological criticism, moral philosophy, and literary criticism. These works of contemporary scholarship differ from footnote four in an important respect, for they are not footnotes but (in many cases) seminal works, works which display great breadth and intellectual virtuosity (if not in all cases greatness of mind). As such they provide a womb capable of nurturing to viability the embryonic politics of footnote four.

Cover's "Nomos and Narrative" thus exemplifies precisely the sort of jurisgenerative creation of meaning it describes and celebrates. It does not attempt to propound a Constitutional way of thinking authoritative for every citizen in the regime, but rather to bring to maturity a way of thinking and way of life implicit in the commitments of one community within the polity. Cover's teaching is significant for two reasons. It is significant because his way of thinking may be right (or at least not wrong), so that to ask for something more comprehensive, for a way of life which encompasses the entire regime, may be to envision an unattainable utopia or to overestimate or misunderstand the scope of reason. If Cover is not wrong, then his teaching, a teaching which nurtures a particular way of life to maturity, is, for those of us who share his commitment to the worth of meaningful ways of life, a teaching of the most valuable kind. Yet

Cover's teaching is valuable even if it is wrong, for his teaching exhibits in detail and in maturity an important way of thinking, and so enables us better to judge its merit and discern its character. The way of thinking he exhibits is important because there is indeed, I think, a "constitutional generation" which takes its bearings from Brown and from the Carolene Products footnote, and which ultimately relies on a comprehensive strategy similar to Cover's, though rarely of comparable richness or fertility. This generation includes lawyers, judges, and academics, and Cover's narrative makes the insights of these legal thinkers more accessible to us by helping us to set these insights within the larger frame of thought that determines their significance. Cover's ability to provide powerful interpretations of first amendment and equal protection doctrines suggests, moreover, that the way of thinking characterizes not only Cover's contemporaries but also their intellectual forerunners, Justices like Brandeis, Holmes, and Stone who might be regarded as the prophets or lawgivers of Cover's constitutional community.

Chapter Four

Conclusion

XIV.

Comprehensive Ways of Thinking and Constitutional Scholarship

As I indicated in my introduction, I aim in this thesis to inquire into what good American Constitutional scholarship is. In the first three chapters, I have pursued this aim by careful examination both of what I consider to be a particularly good example of Constitutional interpretation done well (Mr. Justice Harlan's opinion in Poe v. Ullman) and also of the work of two American legal scholars, Ronald Dworkin and Robert Cover, whose writings provide, in my opinion, examples of unusually good Constitutional scholarship. I would at this point like to state in a somewhat more general way the themes which animate and, I hope, emerge from the more specific and concrete reflections of the first three chapters.

Constitutional scholarship, as I have presented and practiced it in this thesis, is a matter of learning, studying, comparing, and developing comprehensive ways of thinking. Constitutional scholarship has this character in part because the meaning of the Constitution itself is inseparable from a particular way of thinking, a way which is the Constitutional way both in the sense that it is appropriate to the reading and interpretation of the Constitution and also in the sense that it is a form of reasoning which embodies and is founded upon the

Constitutional view of what reason is and what reason's place in the American polity is. I aimed, through my exegesis of Mr. Justice Harlan's opinion in Poe v. Ullman, to identify and elaborate the Constitutional way of thinking. I stressed that this way of thinking regards general ideas as comprehensible and determinate but not as susceptible to technically precise definition, that it relies upon words which could not easily be classified as strictly metaphorical or strictly literal, that it respects the integrity of textual language, and that it involves a form of reason which is neither mechanical nor a sort of unguided speculation but rather a kind of thinking which seeks guidance from "a background of Constitutional purposes." In the next two chapters, I attempted to portray two ways of thinking, those of Ronald Dworkin and Robert Cover, which I think differ from the Constitutional way. Yet while I believe that neither of these two ways of thinking is the Constitutional way, I nonetheless believe that Dworkin's and Cover's contributions to American Constitutional thought are for at least two reasons extremely valuable ones. First, Dworkin and Cover, by demonstrating alternatives to the Constitutional way of thinking help us to comprehend the significance of that way. To choose some particular comprehensive way of thinking is to reject other ways, and to fully understand a choice we must have at least some understanding of the important alternatives we discard in making that choice. Second, the particular ways of thinking Dworkin and Cover exemplify can plausibly claim to grow out of and capture the best of certain aspects of, most generally, what might be called American Constitutional experience, the history of political discussion of what the Constitution means, and, more specifically, the experience of the Warren Court. Dworkin's way of thinking takes its bearings largely, I

think, from the American tradition of Constitutional advocacy and Cover's founds itself upon the Court's attention to the claims of particular disadvantaged groups within the American nation. While I believe that the way of thinking exemplified by Harlan is the way of thinking appropriate to and envisioned by the Constitution, it is a separate and, I think, much more difficult matter to say whether that way of thinking is adequate to explain or make sense of what is best in recent American Constitutional history. This latter topic is an appropriate and important matter for American Constitutional scholars to consider. Though I have not investigated that question in this thesis, I hope that, by setting out three ways of thinking which might render comprehensible American Constitutional experience and providing a vocabulary within which these ways may be compared, I have at least provided a solid foundation upon which to build an answer to that question.

It is possible to look at the ideas expressed in the preceding paragraph from another perspective. The aim of Constitutional scholarship is (at least in part but perhaps even comprehensively) to teach or educate Constitutional statesmen (in light of the questions raised at the end of the last paragraph, the more general idea of a "Constitutional statesman" is more suitable than that of a "Constitutional interpreter") to be good Constitutional statesmen. The Constitutional scholar will be not only a teacher to but also a student of Constitutional statesmen, for by studying the best of these statesmen he can learn what it is that makes them good statesmen. The study of such statesmen poses two problems for the Constitutional scholar. First, the scholar must identify which Constitutional statesmen are good Constitutional statesmen: should the Constitutional

scholar spend his or her time attending to the works of John Marshall Harlan III, or to those of Earl Warren or Louis Brandeis or Alexander Hamilton or Martin Luther King Jr.? Second, the scholar must discern what it is that makes the statesmen he or she chooses to study good statesmen. We might, for example, decide to take (as, according to Norman Dorsen, many jurists, lawyers, and law students have done)[1] Harlan as our model, but we must then ask what it means to emulate Harlan. We cannot simply identify our behavior with Harlan's in every detail (even if we thought such a complete identification desirable) for he lived in different circumstances and confronted different problems than do we. I have in this thesis selected Harlan as an example of a good Constitutional interpreter (and, in my opinion, he is a good Constitutional statesman as well), and suggested that his value as a model resides in the comprehensive way of thinking he exemplifies. I have also aimed to sketch two other comprehensive ways of thinking which we might as Constitutional scholars choose to emulate and to teach to aspiring Constitutional statesmen.

Because good Constitutional statemen will themselves be teachers to other Constitutional statesmen by the example they set, it is, I think, evident that such a statesman may serve, in at least some respects, as a model to Constitutional scholars as well as to statesmen. This observation suggests a third way of expressing the ideas I have been trying to get across in the last two paragraphs and, in more concrete contexts, throughout this thesis. Both the Constitutional scholar and the Constitutional statesman are

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1. Norman Dorsen, "John Marshall Harlan", in The Justices of the United States Supreme Court, Vol. 5, ed. L. Friedman (New York: Chelsea House, 1978) p. 215. I quote the passage on page 7 above.

interpreters of Constitutional politics, but the scholar, in my view, poses questions and seeks answers of a more comprehensive character than those which are of interest to the statesman. Of course, the statesman may put into practice or perform the answers which the scholar seeks, but there is a difference between performing something and narrating or giving an account of one's own or somebody else's performance. This difference emerges in my own exegesis of Harlan's way of thinking, for although I think that my way of thinking is similar to Harlan's and though his performance and words guide my investigation of the nature of general ideas and the place of reason in American politics, Harlan's own reflections are aimed at answering more specific questions at issue in the case before him. The Constitutional scholar, in posing questions about Constitutional politics of greater comprehensiveness than those asked by the Constitutional statesman, discerns or arrives at a kind of teaching aimed not merely at resolving some particular political issue but at providing a guidance of a more comprehensive sort. The consitutional way of thinking and living which the scholar seeks to learn is in a sense the American way of thinking or living, but it is the ideal or foundational form rather than the typical or common form of this way. The Constitutional way is, in short, the way of thinking and living which Constitutional politics (formed out of and built upon the way of thinking and living common among or typical of Americans) may, at its best, educate Americans to adopt. The scholar who looks for a comprehensive sort of guidance from Constitutional politics again faces two questions: first, what aspects, if any, of Constitutional politics are capable of guiding our thinking in a comprehensive way, and, second, what is the guidance

these aspects provide. Good Constitutional scholarship rests upon good answers to these questions.

I have made extensive use of the idea of a comprehensive way of thinking throughout this thesis, both in the specific studies of the first three chapters and in this Conclusion's more general discussion of what good Constitutional scholarship is. Conventional Constitutional scholarship tends to speak through and about theories; some readers may as a consequence may be inclined to ask whether comprehensive ways of thinking or ways of life might be translated into or represented by or replaced by theories. This question is, I think, a rather difficult one to answer. Fortunately, we need not do so. While it may perhaps be possible to construct a theory which articulates in precise and detailed fashion the Constitutional way of thinking, we can at present say, as Harlan said of due process, that the meaning of the Constitution has not been reduced to any formula and cannot be determined by reference to any code. Moreover, it would seem that developing any adequate formula or code is, if perhaps not impossible, at least very difficult. In any case, however imprecise the idea of a comprehensive way of thinking and the accounts of particular ways I have set out may be, that idea and those accounts are, I believe, adequate to the discussion of American Constitutional politics. I have tried in this thesis to demonstrate that adequacy by using the idea of a comprehensive way of thinking to explain a particularly difficult Constitutional controversy (the case of Poe v. Ullman) and to provide sufficiently well-drawn accounts of three ways of thinking to allow some comparison of those ways. Additional refinements to the idea of a comprehensive way of thinking may be made in the light of particular Constitutional problems, but to attempt to

replace the idea with a theory (or to attempt to translate my reflections in this thesis into a theory) would, I think, be an immoderate and unnecessary exercise in unguided speculation.[2]

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2. Compare my comments in this paragraph to those of Thomas Kuhn in "Second Thoughts on Paradigms" in Kuhn, The Essential Tension: Selected Studies in Scientific Tradition and Change (Chicago: University of Chicago Press, 1977), pp. 308-319.

XV.

Three Conjectures

I would like to close with three conjectures. First, I think that the troubled state of American Constitutional scholarship arises in large part from the tendency of Constitutional thinkers to ignore the variety of forms that reasoning about Constitutional matters may take. As a consequence of this oversight, these thinkers tend to set themselves goals which are immoderate and unnecessarily difficult. The nature of these goals emerges, I think, from the following statement by Yale Law Professor Stephen Carter, a statement made in an article recommending a way of responding to the present unrest in American Constitutional scholarship:[1]

> The Constitution that we have is riddled with provisions best described as indeterminate. They are indeterminate in a particular sense: One who understands the language and laws of the nation can nevertheless find many different meanings in these clauses unless provided with a set of interpretive rules. Providing these rules--and thereby providing the substantive underpinnings for Constitutional adjudication--is probably the most vital task that constitutional theory must perform.

If Carter means, by saying that some Constitutional provisions are "indeterminate" and that interpreters can "find" several meanings in these provisions, to call our attention to the difficulty of defining these provisions in the abstract or to the need for interpreters to engage in an autonomous (not mechanical) exercise of reason, then I agree with his claims about these provisions. If, however, he means

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1. Stephen L. Carter, "Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle", Yale Law Journal 94 (1985), 821.

(as I think is more likely) that, until some rules external to the document itself and external to "an understanding of the language and laws" of the United States are supplied, these provisions have no single or determinate meaning, I think he is wrong. In neither of these two cases, moreover, does it follow from the difficulty of interpreting the Constitution that Constitutional theory must supply "interpretive rules" to guide or (worse yet) determine Constitutional decision-making. It follows only that Constitutional scholarship should look for a way to make the problems of Constitutional politics comprehensible and manageable. Because men and women need not always think in terms of rules and theories, this aim of comprehensibility and manageability does not necessarily require the development of rules for interpretation or of a specific and determinate theory of Constitutional meaning capable of substituting for the document itself. Nonetheless, Constitutional scholars seem to assume that comprehensibility and manageability are attainable only if it is possible to provide rules or a theory capable of determining Constitutional meaning. These scholars are then tempted to conclude from the absence of any satisfactory such rules or theories that some Constitutional provisions are indeterminate in the strong (and, in my view, incorrect) sense described above. The assumption upon which this temptation rests is a dubious one, and, in any case, the temptation itself should be resisted.

These points deserve further attention. Constitutional scholars today seem to me to be entranced by the dream of making Constitutional politics easy. Modern natural science inspires this dream in two ways. First, it inspires the dream by contributing to technical progress which has made what were once arduous and complex tasks easy or

effortless activities. Second, it inspires the dream by the character of scientific proofs and theories: though these theories require immense intellectual effort from those who discover them, they can, once discovered, often be taught even to intelligent schoolchildren. Constitutional theorists suppose that the wisdom essential to practicing Constitutional politics well has the character of a scientific theory, and suppose that this wisdom can be discovered and transmitted, thereby making Constitutional politics easy and effortless. In dreaming this dream, Constitutional scholars set for themselves a task which is impractical and immoderate if perhaps not impossible. Some of these dreamers are disillusioned by the difficulty of the task and react by denying that Constitutional politics is comprehensible and manageable. The consequence of this confusion is that the comprehensible and manageable task of making Constitutional politics comprehensible and manageable is overlooked by both the dreamers and the disillusioned.

My second conjecture is that the troubled state of American Constitutional scholarship results in large part from the difficulty of deciding what way of thinking best comprehends the achievements of the Warren Court. I have no doubt that the landmark decisions of the Warren Court stand ultimately for ideals inseparable from the constitutional way of thinking of today if there is any one such way. Whether or not the way of thinking embodied by the two-hundred year old Constitution is in fact the best way of comprehending the significance of the Warren Court's <u>corpus juris</u> strikes me as a question that is important, open, and worthy of a great deal of scholarly attention. Unfortunately, the confusion described by my first conjecture has, I think, distracted scholars from this important question and detracted

from their treatment of it. I hope that by setting out in this thesis three different ways of thinking which might account for or explain the significance and meaning of the Constitutional politics of the last thirty years I have made a helpful contribution to the discussion of the Warren Court's legacy.

My third conjecture is that the Constitutional way of thinking is, despite its age, still at the heart of modern Constitutional experience, including the experience of the Warren Court. My opinion may perhaps become more plausible if considered in light of some remarks made by Mr. Justice Harlan at Brandeis University in October 1955. Harlan noted that some observers of the excesses of American anti-communist activity feared that those excesses indicated a decay or weakening of the American character, and Harlan offered a reply to these pessimistic observers:[2]

> On reflection such pessimists will come to see, I think, that the excesses of the times do not represent a change in the true character of our people, but are rather the product of some traits in our national temperament. We have a passion for getting things done. We have a weakness for panaceas, and we are loath to let time take a hand in the solution of our problems. We are easy prey to overstatement. We like to see things in black or white. All this leads us as a society to move in extremes, and we are apt to meet particular situations in terms of absolutes rather than with the immediate sense of proportion some other free societies seem to have been able to achieve. Yet in a different way we too in the end emerge with things in a sensible balance.

Harlan's comments apply, I think, no less to the excesses of Constitutional jurisprudence than to the excesses of McCarthyism. Indeed, the great respect the legal community has for Harlan's own sensibly balanced opinions in spite of his status as a dissenter on the

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2. John Marshall Harlan, The Evolution of a Judicial Philosophy, ed. David Shapiro (Cambridge, Mass: Harvard, 1969), p. 286.

Warren Court suggests to me that the Constitutional way of thinking still flourishes in the United States. Though the great decisions of the Warren Court may have provoked some to criticize or to abandon the Constitutional way of thinking, my guess is that those decisions will eventually develop into the foundations of a sensibly balanced jurisprudence very much like Harlan's own, for I suspect that the way of thinking identified by the Framers two-hundred years ago as the American way and instilled by them into the Constitution remains, at bottom, the United States' constitutional way of thinking.

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