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JUSTICE HARLAN AND THE FIRST AMENDMENT*

*Daniel A. Farber** and John E. Nowak****

During the Warren Court era a debate raged between “balancers” and “absolutists.” In this debate, balancing referred to a case-by-case weighing of an individual’s interest in free speech against the government’s interest in regulation, with the government’s interest often prevailing. Balancers were viewed as apologists for suppression; those advocating absolute protection for speech were seen as the champions of liberal thought and libertarian freedom. Along with Felix Frankfurter, Justice John Harlan was (and is) regarded as a leading proponent of ad hoc balancing.

The reader may understandably wonder why more ink is being spilled on analysis of John Harlan’s balancing approach to first amendment problems. Our answer is simple: we believe that Harlan’s voting record disproves the accepted wisdom that he favored a case-by-case balancing approach to the resolution of first amendment issues. He should be remembered as a champion of first amendment freedoms rather than a judicial roadblock to the quest for civil liberties by absolutist Justices. Properly understood, Harlan’s approach is a potentially valuable model for modern first amendment analysis.

By the close of his tenure on the Court, Justice Harlan had fashioned a three-part approach to the resolution of first amendment issues. His method varied depending on whether the case involved only a time, place, or manner regulation, an attempt to proscribe a message or association, or the regulation of speech because of a particular governmental interest connected with the context or social impact of the communication or association.

Harlan apparently agreed with the generally accepted view that ad hoc balancing is appropriate for judicial review of time, place, or manner regulations, which are based on the physical effects of a communication method (such as noise).¹ But when the

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1. Classic time, place, and manner cases rarely reached the Court during Harlan’s

government tried to proscribe messages as dangerous, Harlan used "balancing" only to establish categories of unprotected speech such as obscenity. Today, this would be considered definitional balancing or a categorization approach to content proscription problems, in which balancing is used only to define a category of speech that can be punished consistently with first amendment values. After a category such as obscenity or defamation was defined, Harlan directed lower courts to follow the Supreme Court's categorical definition of unprotected speech rather than engage in a case-by-case analysis of the worth of the speech versus the government's interest in suppression of that speech.

As is becoming clear to many scholars today, there is a third category of cases involving regulation of protected conduct on the basis of its special impact on its social or physical environment. This category of first amendment problems involves situational regulation rather than proscription of a message. A situational restraint regulates speech in part because of its content, and, hence, is more than a content neutral regulation of the time, place, or manner of speech. In these intermediate cases involving regulation rather than proscription, Harlan was willing to allow reasonable, narrowly focused regulations.² While this approach involved some weighing of governmental interests against first amendment values, it was far more structured than mere ad hoc "balancing."³ Justice Harlan realized, as the Court is perhaps coming to realize today, that context regulation cases cannot be resolved in terms of time, place, or manner analysis or the content neutral categorical approach to governmental proscription of speech.

John Harlan was never hostile to first amendment values, but the strength of his defense of those values evolved throughout his tenure on the Court. By the close of his career, his commitment to

tenure. There are, however, several indications of his adherence to the traditional approach. For example, in *Talley v. California*, 362 U.S. 60, 66 (1960), he said that in evaluating the validity of municipal ordinances affecting speech, "I do not believe that we can escape . . . 'the delicate and difficult task' of weighing 'the circumstances' and appraising 'the substantiality of the reasons advanced in support of the regulation of the free enjoyment of' speech." In *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961), he cited several time, place, and manner cases in support of his use of a balancing test. Harlan's votes in several cases in which he did not write also were consistent with this test. See *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana (I)*, 379 U.S. 536 (1965).

2. See Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 740-41 (1980). See *infra* note 147 and accompanying text for Harlan's most explicit statement of this approach.

3. In a recent article, we have advocated an approach similar to Harlan's as a means of restructuring first amendment analysis. See Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

free expression and his three-part approach to protecting it should have been clear to all, and should permanently separate him from the true ad hoc balancers such as Frankfurter. Indeed, in his later opinions Harlan's defense of free speech seems as strong as, if not stronger than, that offered by Justices who are commonly considered defenders of content neutrality. In *Street v. New York*,⁴ for example, Harlan wrote for the Court reversing the conviction of a defendant who burned a United States flag, over strong dissents by Warren, Black, Fortas, and White. Harlan stated in that case that "the public expression of ideas may not be prohibited merely because the ideas themselves are offensive." Rather, in Harlan's view, the "right to differ as to things that touch the heart of the existing order" included expression of contempt for the flag of the United States.⁵ Later, in *Cohen v. California*,⁶ Harlan wrote for a majority in reversing a criminal conviction of a young man who walked into a courthouse with a jacket bearing the slogan "Fuck the Draft." In *Cohen*, Justice Black, commonly regarded as a champion of first amendment freedoms, joined a dissenting opinion that would have held the young man punishable because his activity was "mainly conduct and little speech."⁷

While Justice Harlan's opinions in *Street* and *Cohen* give careful attention to the societal interests and first amendment values involved in each case, neither involves a form of analysis even remotely similar to ad hoc balancing. In *Cohen*, he noted that the young man's activity and his message did not come under any of the categories of speech, such as obscenity or "fighting words," where the Court had defined a test for speech that could be punished consistently with first amendment values. Harlan was against proscription of speech or ideas that did not fall within a limited category of punishable activity as defined by previous Court decisions. He expressed this commitment best in *Cohen*:

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public

4. 394 U.S. 576 (1969).

5. 394 U.S. at 592-93. For a perceptive comment on Harlan's opinions in *Street* and *Cohen*, see Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1006-11 (1972).

6. 403 U.S. 15 (1971).

7. 403 U.S. at 27 (Blackmun, J., dissenting).

discussion, putting the decision as to what view shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect policy and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.⁸

This passage is hardly consistent with the view of Harlan as one who engaged in ad hoc balancing. Nor was the *Cohen* opinion an aberration, for Harlan joined some of the Warren Court's most important first amendment decisions such as *New York Times Co. v. Sullivan*⁹ and *Brandenburg v. Ohio*.¹⁰

Misconceptions about Harlan's first amendment jurisprudence may be traced to two sources. In the first place, commentators have tended to overlook the evolution of his views. This evolution can be divided into three stages. In Harlan's early years on the Court, from 1955 to 1961, he experimented with a variety of first amendment analyses, including the ad hoc balancing approach advocated by Justice Frankfurter. From 1961 to 1967, the types of first amendment problems confronting the Court began to change, and Harlan's opinions evidence a search for standards prohibiting censorship of unpopular views while allowing the government latitude to achieve important societal goals. During this transitional period Harlan began to refine the concept of balancing and define a stronger role for judicial protection of first amendment values. Finally, in his last years on the Court, Harlan became an even more powerful defender of first amendment freedoms and a bulwark against governmental punishment of unpopular views. Those who want a simple dichotomy between balancing and content neutrality will find it best to focus on Harlan's early opinions so as to create this clear bifurcation; they can then treat his later opinions as aberrations rather than the result of a sophisticated first amendment theory.

The second source of confusion concerning Harlan's position on first amendment issues stems from the manner in which some commentators have examined first amendment problems. If one seeks a single test for all first amendment cases one is likely to think of Harlan as a balancer. Justice Harlan did favor a kind of balancing in some areas of first amendment law, such as time, place, or manner regulations and the disclosure of speech and associational activities by those seeking governmental licenses or employment. But by the close of the Warren Court era, it was becoming clear that the balancing versus absolutism debate had mistakenly as-

8. 403 U.S. at 24.

9. 376 U.S. 254 (1964) (limiting libel recoveries against public officials).

10. 395 U.S. 444 (1969) (per curiam) (limiting prosecutions for illegal advocacy).

sumed that a single test would fit all first amendment cases. Commentators and Justices today appear more willing to recognize that there are distinct types of first amendment problems, which have not been, and perhaps should not be, solvable in terms of a single test or approach. Justice Harlan, like most scholars and judges today, called for use of a definitional balancing or content neutral approach when the government sought to proscribe speech or association because of the message advocated, and use of a balancing test for content neutral regulations. The Court now is struggling with a third category of cases in which the government has attempted to regulate speech or speakers based upon the impact of speech in certain physical or social contexts. Today these cases are often analyzed in terms of a distinction between "public" and "non-public" forums. Harlan pioneered an alternative view of context-based regulation of speech as he analyzed the role of judges in examining regulations that did not involve content proscription. These cases show Harlan engaged in a form of balancing that, unlike the ad hoc analysis advocated by Frankfurter, did not lead to leniency toward the attempts to proscribe speech.

Time, space, and our editor forbid us to fully document our view of Harlan's place in the development of first amendment doctrine. For those who wish to investigate further we have included an appendix listing all cases in which Justice Harlan took part and in which we have identified a first amendment holding.¹¹ In this article we will use a few of those cases to trace the evolution of Harlan's first amendment philosophy and, finally, to examine his approach to three recurring first amendment issues.

I

A

Harlan's reputation as an ad hoc balancer derives mainly from his early years on the Court. He appears to have been strongly influenced during this period by Frankfurter,¹² whose intellect and

11. That list was compiled by the use of the LEXIS and WESTLAW computer research systems. We will use the cases selectively in the comment but believe that the total listing supports our view of the evolution of the Justice's first amendment philosophy.

12. See Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 76 HARV. L. REV. 1 (1962); Lewin, *Justice Harlan: "The Full Measure of the Man,"* 58 A.B.A. J. 579 (1972); Wilkinson, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1186 (1971). There is some evidence that Frankfurter privately held little respect for Harlan's view of first amendment principles and actively sought to convert Harlan to his own philosophy. See H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 181-82, 188-89, 193-94 (1981). However, Hirsch's interpretation of Frankfurter's papers and career has been criticized. See Isenbergh, *Felix Frankfurter: The Enigma of H. N. Hirsch*, 91 YALE L. J. 1018 (1982).

charm may have given him a great deal of influence over newly appointed Justices.¹³ In Harlan's case, Frankfurter had some additional advantages. He and Harlan shared a strong concern for federalism, which made him a natural guide for Harlan. Moreover, Frankfurter had been a close, lifelong friend of Emory Buckner, who was Harlan's mentor in private practice.¹⁴ Whatever the reason, Justice Harlan frequently voted with Frankfurter and shared his label as a balancer.¹⁵

Harlan's opinions in this period often contain balancing language. In *Barenblatt v. United States*,¹⁶ for instance, he found "the record . . . barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state." Hence, he said, "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter"¹⁷ Harlan's reputation as a balancer was cemented when Justice Black used *Barenblatt* and other Harlan opinions as occasions for blistering attacks on balancing.¹⁸

Although balancing played an important role in Harlan's opinions, he also made some substantial contributions to first amendment freedoms in this period.¹⁹ On June 17, 1957, the Court decided three cases that exemplify Harlan's commitment to the first amendment. In *Yates v. United States*,²⁰ Harlan wrote for the Court, finding that federal statutes could not prohibit general advocacy of the overthrow of the government as an abstract principle. In *Sweezy v. New Hampshire*,²¹ he joined an opinion by Justice Frankfurter that sought to protect the academic freedom of teach-

13. See J. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 200-09 (1980).

14. See M. MAYER, *EMORY BUCKNER*, 2-5, 290 (1968). Justice Harlan formed a committee to make arrangements for the publication of a biography of Buckner. *Id.* at 2.

15. See *Lathrop v. Donohue*, 367 U.S. 820, 851-64 (1961) (Harlan, J., concurring); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 797 (1961) (Frankfurter, J., dissenting); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Frankfurter and Harlan concurring without opinion); *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (separate opinion of Frankfurter, J., joined by Harlan, J.); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J., concurring in the judgment); *Konigsberg v. State Bar (I)*, 353 U.S. 252, 274 (Frankfurter, J., dissenting); *id.* at 276 (Harlan, J., dissenting); *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring in the judgment).

16. 360 U.S. 109 (1959).

17. *Id.* at 134.

18. *Barenblatt v. United States*, 360 U.S. 109, 140-45 (1959) (Black, J., dissenting); *Konigsberg v. State Bar (II)*, 366 U.S. 36, 61-71 (1961) (Black, J., dissenting).

19. Even before going on the bench, Harlan had demonstrated an interest in free speech in his unsuccessful attempt to overturn a lower court opinion prohibiting Bertrand Russell from teaching at City College. See Lewin, *supra* note 12, at 581.

20. 354 U.S. 298 (1957).

21. 354 U.S. 234 (1957).

ers and free speech in a college setting with a strong definition of this freedom and of first amendment principles. As the Justices stated: "For a citizen to be made to forego even a part of so basic a liberty as his political autonomy the subordinating interest must be compelling."²² In the third case, *Watkins v. United States*,²³ Harlan joined the majority opinion reversing the conviction of an individual for his failure to answer questions from the House Un-American Activities Committee.

In 1958, in *NAACP v. Alabama*,²⁴ Harlan wrote the earliest Supreme Court opinion explicitly recognizing the freedom of association as an independent first amendment right. His opinion gave a clearer statement of the need for freedom of political association than any prior decision, and allowed the NAACP to assert the rights of its members so as to protect free speech and associational rights. The opinion endorsed the principle that judges must give the "closest scrutiny" to state actions curtailing the right of association because "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly."²⁵ For the government to punish association because of the ideas or messages advocated by the association the governmental "subordinating interest . . . must be compelling."²⁶

At the close of this era Harlan's concern for the protection of unpopular ideas was demonstrated by his concurrence in the decision in *Talley v. California*²⁷ striking down an ordinance forbidding the distribution of anonymous handbills. Frankfurter, with his balancing approach, would have upheld that type of law.

In the Court's first modern obscenity case, *Roth v. United States*,²⁸ Harlan showed a stronger concern for first amendment freedoms than Justice Brennan, who wrote the majority opinion. Unlike Brennan, he demanded an examination of the materials in

22. *Id.* at 265 (Frankfurter, J., concurring in the judgment). See also *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (per Harlan, J.) ("this Court will always be on the alert" against intrusions into academic freedom); *Talley v. California*, 362 U.S. 60, 66 (1960) (Harlan, J., concurring) (ban on anonymous pamphletting invalid where not supported by compelling interest). The *Sweezy* plurality held, in a rather opaque opinion, that an investigation violated the first amendment because the scope of the delegation to the investigating officer was insufficiently clear. 354 U.S. at 254-55 (opinion of Warren, C.J.).

23. 354 U.S. 178 (1957).

24. 357 U.S. 449 (1958).

25. *Id.* at 460-61.

26. *Id.* at 463 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).

27. 362 U.S. 60, 66 (1960).

28. 354 U.S. 476 (1957).

each obscenity case to determine if they were properly banned. Harlan was willing to allow the states broad leeway in regulation of obscenity. In his view, however, the legitimate sphere of federal regulation was narrowly circumscribed. The federal government had little legitimate interest in regulating public morals, and federal censorship posed a much greater danger than state regulation of suppressing the communication of ideas. While balancing entered into his analysis, he seemed to be striving to define categories of unprotected speech, rather than balancing on a case-by-case basis.²⁹

By the end of this period, Harlan was beginning to articulate a clear distinction between government proscription of speech and governmental regulations merely burdening speech. In *Konigsberg v. State Bar (II)*,³⁰ he made his most complete attempt to explain his approach. For Harlan, "constitutionally protected freedom of speech is narrower than an unlimited license to talk" in two quite different ways.³¹ First, "certain forms of speech, or speech in certain contexts, have been considered outside the scope of constitutional protection."³² These exclusions are required to reconcile the first amendment with "valid but conflicting governmental interests."³³ Harlan's language seems to suggest, though not very clearly, that these conflicting interests are used to define categories of excluded speech rather than as a basis for ad hoc balancing.³⁴ Second, content neutral regulations of activity accompanying expression were permissible in a variety of contexts.

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the

29. *Id.* at 496-508. The relationship between Harlan's position on obscenity and his general views about federalism is discussed in Wilkinson, *supra* note 12, at 1216-17. For further discussion, see Part IIB of this article.

30. 366 U.S. 36 (1961).

31. *Id.* at 50.

32. *Id.*

33. *Id.* at 50 n.11.

34. The phrase "certain forms" suggests that a determinate category is involved, whereas the phrase "various forms" would have suggested a more open-ended, ad hoc selection. Two sentences earlier, Harlan had said that freedom of speech was an absolute "in the undoubted sense that where the constitutional protection exists it must prevail . . ." *Id.* at 49. Some commentators took this to be a move away from balancing. See Poe, *The Legal Philosophy of John Marshall Harlan: Freedom of Expression, Due Process, and Judicial Self-Restraint*, 21 VAND. L. REV. 659, 678-79 (1968). It probably meant only that balancing took place in determining whether first amendment protection applied, rather than after such a determination.

respective interests involved.³⁵

Judicial balancing was to be done on a case-by-case basis only when the government was not engaged in content proscription or punishment of an association. In the remainder of his career, Harlan would clarify and elaborate this approach.

B

During the next period of Harlan's tenure on the Court, first amendment issues seem to have received less of his attention, perhaps because his energies were devoted to dissenting from some of the Warren Court's innovations in other areas.³⁶ Some of his opinions in this era superficially support to the view that he was an ad hoc balancer. In several dissents, for instance, he attempted to explain the reasonableness of various state regulations.³⁷ Those cases involved regulation in the name of interests unrelated to speech, rather than proscription of disfavored messages. For example, Harlan was willing to uphold regulations protecting the fiduciary relationship between lawyer and client, even when those regulations impinged on the activities of the NAACP. But he reacted to a state effort to ban the NAACP with the harshest language to be found in any of his opinions.³⁸ When suppression of speech was at issue, Harlan's rejection of ad hoc balancing was shown by his support for the Supreme Court's sweeping rewriting of state libel laws in *New York Times Co. v. Sullivan*.³⁹ It was also shown by his use of the clear-and-present-danger test in *Wood v. Georgia*,⁴⁰ in which a sheriff had used press releases to try to influence a grand jury investigation.

Most of the cases in this period fall into two classes, neither of which the Warren Court was able to resolve very successfully. In one set of cases, the Court attempted to define the boundaries of permissible public demonstrations. It struggled to explain why demonstrations were permissible in some locations but not others,

35. *Konigsberg II*, 366 U.S. at 50-51.

36. For a discussion of Harlan's role as a dissenter from major Warren Court decisions in this period, see G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 358-67 (1976).

37. See *Gibson v. Florida Legis. Comm.*, 372 U.S. 539, 576 (1963) (Harlan, J., dissenting); *DeGregory v. Attorney Gen.*, 383 U.S. 825, 830 (1966) (Harlan, J., dissenting).

38. Compare *NAACP v. Alabama*, 377 U.S. 288 (1964) (reversing injunction barring NAACP from doing business in Alabama), with *NAACP v. Button*, 371 U.S. 415, 448 (1963) (Harlan, J., dissenting) (restrictions on control of litigation by third parties should be held valid as applied to NAACP).

39. 376 U.S. 254 (1964). See *Time, Inc. v. Hill*, 385 U.S. 374, 402 (1967) (Harlan, J., concurring in part and dissenting in part); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (Harlan, J.) (plurality opinion).

40. 370 U.S. 375, 395 (1962) (Harlan, J., dissenting).

and why various forms of conduct were permissible while others were not. Along with Justice Black, Harlan normally voted to uphold reasonable restrictions on demonstrators.⁴¹ Second, in a string obscenity cases, the Court was unable to muster a majority for any one approach to the definition of this category of unprotected expression. Harlan continued to believe that his *Roth* approach protected the free exchange of ideas while leaving scope for states to protect public morals. Some elements of his *Roth* approach became part of a plurality test, which controlled the outcome of most of the cases.⁴² In several obscenity cases, Harlan was strikingly more protective of civil liberties than Chief Justice Warren. Indeed, Harlan attacked Warren's approach as too ad hoc, too keyed to the circumstances of each individual case, to give fair notice. Harlan preferred to define categories of unprotected speech rather than engaging in an ad hoc analysis like Warren's.⁴³

Studying the opinions of this period, one can discern two important developments in Harlan's first amendment methodology. First, he built on his *Konigsberg II* foundation.⁴⁴ He seemed more and more inclined toward using a categorical approach in suppression cases, using balancing only to define the categories of speech subject to prohibition.⁴⁵ Second, he showed increasing concern with legislative clarity. In one obscenity case, for example, he chided the Court for having in effect rewritten the federal obscenity law, "but without the sharply focused definitions and standards necessary in such a sensitive area."⁴⁶ Both developments were to prove important in laying the foundation for his mature view of the first amendment.

41. Harlan and Black voted together in *Adderley v. Florida*, 385 U.S. 39 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Bell v. Maryland*, 378 U.S. 226, 318 (1964). In *Cox v. Louisiana (II)*, 379 U.S. 559, 591 (1965), Harlan agreed with Part III of Black's separate opinion.

42. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 1014-16 (2d ed. 1983).

43. See *infra* notes 133-40 and accompanying text.

44. See *supra* notes 30-35 and accompanying text.

45. See *Rosenblatt v. Baer*, 383 U.S. 75, 96-100 (Harlan, J., concurring in part and dissenting in part) (endorsing *New York Times* approach to libel law); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 310 (1965) (Brennan, J., concurring, joined by Harlan, J.) (compelling interest required for even incidental burden on speech); *NLRB v. Fruit Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964) (allowing regulation where the means of communication is likely to have effects caused by something apart from the message conveyed); *NAACP v. Button*, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting) (absent "the gravest danger to the community," speech and advocacy "must remain free from frontal attack or suppression," but "speech plus" can be regulated, subject to a balancing test).

46. *Ginzburg v. United States*, 383 U.S. 463, 494 (1966) (Harlan, J., dissenting).

C

During his final years on the bench, Harlan joined some of the Court's most liberal opinions. On occasion, he authored opinions considered too libertarian by several more "liberal" Justices.⁴⁷

By this point in his career, Harlan had clearly disavowed ad hoc balancing in governmental proscription cases. In *Coates v. City of Cincinnati*,⁴⁸ for example, he joined in reversing convictions under a statute making "annoying" conduct illegal where the record simply described the defendants as either demonstrators or labor picketers.⁴⁹ Justice Black and three other members of the Court wanted to remand for factual findings,⁵⁰ but Harlan, supposedly the ad hoc balancer, preferred to strike down the statute on its face.⁵¹ In *Rosenbloom v. Metromedia*⁵² Harlan criticized Justice Brennan's plurality opinion for taking too much of an ad hoc approach in a libel case:

Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed. This seems to be what is done in the plurality opinion. But we did not embrace this technique in *New York Times*. Instead, as my Brother MARSHALL observes, we there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts. . . . At least where we can discern generally applicable rules that should balance with fair precision the competing interests at stake, such rules should be preferred to the plurality's approach both in order to preserve a measure of order and predictability in the law that must govern the daily conduct of affairs and to avoid subjecting the press to judicial second-guessing⁵³

47. See *Cohen v. California*, 403 U.S. 15 (1971); *Street v. New York*, 394 U.S. 576 (1969).

48. 402 U.S. 611 (1971).

49. *Id.* at 612.

50. See *id.* at 616 (opinion of Black, J.); *id.* at 620-21 (White, J., dissenting, joined by Justice Blackmun and Chief Justice Burger).

51. The ordinance in question made it illegal for "three or more persons to assemble" on a sidewalk and "conduct themselves in a manner annoying to persons passing by" *Id.* at 611. The majority opinion, which Harlan joined, held the ordinance invalid on its face because

[i]t makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

Id. at 616.

52. 403 U.S. 29 (1971).

53. *Id.* at 63.

Thus, by the end of his career, Harlan had clearly chosen definitional balancing in governmental proscription cases.⁵⁴

In approaching governmental burdens on speech falling short of proscription, Harlan's main concern was to distinguish legitimate regulations from censorship. In an obscenity case, for example, he spoke of "the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objections."⁵⁵ This concern was also reflected in his handling of public demonstration cases and in loyalty cases.⁵⁶

The last decision Justices Black and Harlan participated in was the *Pentagon Papers Case*.⁵⁷ This decision helped to refurbish Black's reputation with civil libertarians. Harlan's willingness to continue a temporary injunction against publication of the *Pentagon Papers* confirmed his low reputation as a defender of free speech. But to put Harlan's vote in perspective, one should recall that his views were tentative and announced in the context of what he called the Court's "almost irresponsibly feverish" handling of the cases.⁵⁸ Second, even counsel for the newspapers agreed that an injunction could properly issue if publication would cause a severe enough injury.⁵⁹ Third, Harlan did not dispute the majority's statement that the government had a "heavy burden of showing justification for the imposition of such a restraint."⁶⁰ He did think that in one of the cases the government had not been afforded an adequate opportunity to present such proof, and that in any event the "scope of the judicial function in passing upon the activities of the Executive Branch . . . in the field of foreign affairs is very narrowly restricted" by the "concept of separation of powers" under the Constitution.⁶¹ For Douglas and Black, this was an easy case, which should have been decided without oral argument: no matter how many lives might be lost as a result of this publication, an injunction would never be proper.⁶² One of the costs of a more

54. See also *Cohen v. California*, 403 U.S. 15, 24 (1971); *Time, Inc. v. Pape*, 401 U.S. 279, 293 (1971) (Harlan, J., dissenting) (in libel cases, Court should establish legal standard rather than reviewing cases on their facts).

55. *United States v. Reidel*, 402 U.S. 351, 359 (1971) (Harlan, J., concurring).

56. See *infra* notes 163-87 and accompanying text.

57. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

58. *Id.* at 753 (Harlan, J., dissenting).

59. Oral argument in *New York Times Co. v. United States*, 403 U.S. 713 (1971), in 71 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 239-40 (P. Kurland & G. Casper ed. 1975).

60. 403 U.S. at 714 (per curiam).

61. *Id.* at 755-56 (Harlan, J., dissenting).

62. See *id.* at 714-15 (Black, J., concurring); *id.* at 720 (Douglas, J., concurring).

thoughtful approach to the first amendment is that it requires time to think, time not allowed to Harlan in this case.

The *Pentagon Papers Case* was atypical of Harlan's final years, in that it showed him taking a less libertarian position than Justice Black. Throughout his career, Black espoused an "absolutist" position, which in practice meant absolute protection for a relatively narrow class of activity.⁶³ Harlan provided less complete protection to a much broader class of conduct. By the end of their careers, it was often Harlan whose approach was the more protective of speech. His approach proved especially well suited to dealing with novel forms of dissent, when Black's broke down completely.⁶⁴ As the *Pentagon Papers Case* showed, Black's method retained an advantage where reflexive responses to traditional censorship were in order.⁶⁵ But since 1960, at least, such cases have been rare, and Harlan's more flexible approach has often proved superior.⁶⁶

II

Having given a general overview of Harlan's development as a defender of first amendment freedoms, we will now turn to a more detailed examination of some of his opinions. We have selected for examination three areas that occupied much of the Warren Court's time: "subversive" speech, obscenity, and public demonstrations.

A

The early years of the Warren Court overlapped with the era of McCarthyism. Much of the Court's attention was given to various anti-Communist measures. The cases can usefully be divided into two groups: (1) those involving criminal sanctions against Communists, and (2) those involving investigations into Communism, which were often connected with attempts to exclude Communists

63. See G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION, 390-95, 422-32 (1977); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 449-50 (1967).

64. See Gunther, *supra* note 5, at 1008-11; Kalven, *supra* note 63, at 448. For example, Harlan and Black joined the majority opinion in *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court upheld a conviction for draft card burning. Only Harlan added the proviso that expressive conduct might still be protected by the first amendment even where it met the majority's test for valid regulation, if banning a practice "has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise . . . communicate." *Id.* at 388-89 (Harlan, J., concurring). See also *infra* notes 163-87 and accompanying text.

65. We certainly do not denigrate the value of having guaranteed, readily available protection in key first amendment cases, such as that provided by Black's approach. It must be recognized, however, that the cost of such protection may be a failure to protect free speech adequately in harder cases.

66. See *supra* note 3.

from various occupations. Let us begin with the criminal prosecutions. Section 2 of the Smith Act made it a crime to “knowingly or willfully advocate . . . or teach the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence. . . .”⁶⁷ *Dennis v. United States*⁶⁸ upheld this provision against constitutional attack. Chief Justice Vinson’s plurality opinion, and the concurring opinions, left it quite unclear whether the clear-and-present-danger test retained any vitality, and if not, what protection remained for speech.⁶⁹ Some language in the opinions suggests that the harm of future revolution is so serious that any speech increasing its probability can be punished.⁷⁰ Other language suggests that the gap between speech and future harm is bridged by the existence of a present criminal conspiracy to overthrow the government in the future, and that the speech must be closely tied to the formation of the conspiracy.⁷¹

*Yates v. United States*⁷² was the Court’s first attempt to clarify *Dennis*. The government argued that any advocacy of forceful overthrow was illegal; the statute permitted only “mere discussion or exposition of violent overthrow as an abstract theory.”⁷³ The trial judge accepted this argument. He relied on language in *Dennis* saying that “advocacy of violent action to be taken at some future time

67. 18 U.S.C. § 2385 para. 1 (1982).

68. 341 U.S. 494 (1951).

69. See *id.* at 508-11 (opinion of Vinson, C.J.); *id.* at 524-28, 550-52 (opinion of Frankfurter, J.); *id.* at 568-70 (Jackson, J., concurring). Douglas’s dissent, *id.* at 581-91, is excellent.

70. See *id.* at 510 (test is gravity of the evil, discounted by its improbability). As Schmidt notes, this version of the clear and present danger test establishes a “notoriously amorphous standard” and has “symbolized a highly particularistic . . . approach to first amendment adjudication.” Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 460 (1977).

71. See 341 U.S. at 509, 511, 516-17. The best contemporary discussion of the opinions and their possible readings was Gorfinkel & Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 CALIF. L. REV. 475 (1951). They suggested the following approach, which comes close to that later adopted by Harlan:

A conspiracy to plan the overthrow of the government by force and violence should be a sufficient substantive evil to justify interference with speech that creates a clear and present danger of aiding or abetting that conspiracy. And even though the actual existence of the conspiracy not be established, if that speech creates a clear and present danger that such a conspiracy is being, or is about to be, organized, interference is warranted.

In either event, it would be the existence of a conspiracy, pending or impending, to plan overthrow which constitutes the evil and not the words spoken, the intent with which they were uttered, or the eventual result of such a conspiracy.

Id. at 498 (conceding, however, that the *Dennis* opinions themselves do not state such a rule). Harlan was to take an even stricter approach in *Yates* by requiring the actual existence of a conspiracy to engage in violent overthrow.

72. 354 U.S. 298 (1957).

73. *Id.* at 313.

was enough" to justify a conviction, if coupled with an intent to overthrow the government.⁷⁴ Apparently, in the trial judge's view, *Dennis* "obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action."⁷⁵

Writing for the Court, Justice Harlan rejected the government's position and narrowly defined the class of speech punishable under the Smith Act. The trial judge, he said, had misread *Dennis*:

The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow . . . is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*.⁷⁶

Hence, Justice Harlan concluded, for the statute to apply, "those to whom the advocacy is addressed must be urged to *do* something, rather than merely to *believe* in something."⁷⁷ He then proceeded to examine the record, finding too little evidence of a "call to forcible action at some future time," as opposed to advocacy of forcible overthrow as an abstract doctrine.⁷⁸ Retrials were ordered for defendants connected with Communist Party classes intended to foster such activities as sabotage and street fighting. Concerning the other defendants, there was not enough evidence even to justify a retrial.⁷⁹

In addition to banning advocacy, the Smith Act also made it a felony to be a knowing member of any group advocating forcible overthrow of the government.⁸⁰ In *Scales v. United States*,⁸¹ Justice Harlan gave the membership clause a narrow reading. He held that membership in the Communist Party could be punished only if the member was active in the Party, knew of the Party's illegal aims, and had a specific intent to further those aims.⁸² Because the Party was not named in the statute, the government had to prove in each

74. *Id.* at 317 n.21, 320.

75. *Id.* at 320.

76. *Id.* at 321-22.

77. *Id.* at 325.

78. *Id.* at 329.

79. *Id.* at 330-33.

80. 18 U.S.C. § 2385 para. 3 (1982).

81. 367 U.S. 203 (1961).

82. *Id.* at 221.

case that the Party was devoted to illegal advocacy.⁸³ In *Scales* such evidence was present,⁸⁴ but in *Noto*, a companion case, the conviction was reversed because there was no substantial evidence of present illegal advocacy by the Party.⁸⁵ As Harlan explained in *Noto*:

We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.⁸⁶

The “strict standards of proof”⁸⁷ established in *Scales* and *Noto* put an end to Smith Act prosecutions.⁸⁸ They also provided the foundation for the Court’s holding in *Brandenburg v. Ohio*.⁸⁹ In *Brandenburg*, an opinion joined by Harlan, the Court held that advocacy of illegal action is protected by the first amendment, unless the defendant incites imminent lawless conduct. *Noto* was cited as authority for this holding, thus vindicating Harlan’s commitment to a definitional balancing approach.

Although Harlan was willing to allow only a narrow class of “subversive” speech to be banned, he was more tolerant of governmental inquiries into such activities. Investigations, loyalty oaths, and related issues occupied much of the Court’s docket up to 1961, and continued to come up during Harlan’s remaining time on the bench.⁹⁰ In retrospect, three Harlan opinions stand out as especially important.

*Barenblatt v. United States*⁹¹ was his first major opinion in this

83. See *Noto v. United States*, 367 U.S. 290, 299 (1961).

84. *Scales*, 367 U.S. at 254-55.

85. *Noto*, 367 U.S. at 297-99.

86. *Id.* at 297-98.

87. *Scales*, 367 U.S. at 232.

88. Many pending cases against Communist leaders were dropped after *Yates*, including those of the remaining *Yates* defendants. See *Scales*, 367 U.S. at 274 n.8 (Douglas, J., dissenting).

89. 395 U.S. 444 (1969) (per curiam).

90. In addition to the cases discussed in the text, see *United States v. Robel*, 389 U.S. 258 (1967); *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Bond v. Floyd*, 385 U.S. 116 (1966); *DeGregory v. Attorney Gen.*, 383 U.S. 825 (1966); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965); *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539 (1963); *In re Anastaplo*, 366 U.S. 82 (1961); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Lerner v. Casey*, 357 U.S. 468 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958).

91. 360 U.S. 109 (1959).

area. In *Barenblatt*, a former teaching assistant refused to answer questions about his alleged Communist Party membership in hearings before a subcommittee of the House Committee on Un-American Activities. Justice Harlan concluded that investigating Communist Party infiltration into universities was permissible because of "the close nexus between the Communist Party and violent overthrow of the government."⁹² Given this permissible purpose, the investigation was properly conducted:

[T]he record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.⁹³

In later cases, the majority attempted, with only moderate success, to elaborate similar factors into a "bright-line" test for legislative investigations.⁹⁴ Harlan preferred a more general requirement that investigations be conducted reasonably and relate to a permissible purpose, but his dissents are lukewarm and seem to indicate a disinclination to pursue the issue.⁹⁵

In *Konigsberg v. State Bar (II)*,⁹⁶ Harlan considered the disclosure issue in the context of occupational qualification. Konigsberg had refused to answer questions about Communist Party membership in applying for the California bar. In the first round of appeals, the Court held in an opinion by Black that the record contained no basis for a finding that Konigsberg lacked good moral character.⁹⁷ On remand, he was denied admission on the theory that his refusal to answer was an obstruction of the investigation. On appeal, Harlan wrote the opinion for the Court, with Black in dissent.⁹⁸ Harlan explained that rules compelling disclosure of prior association fell into the class of governmental actions "not intended to control the content of speech but incidentally limiting its unfettered

92. *Id.* at 128.

93. *Id.* at 134.

94. See *DeGregory v. Attorney Gen.*, 383 U.S. 825 (1966) (insufficient foundation for investigation); *Gibson v. Florida Legis. Comm.*, 372 U.S. 539 (1963) (legislature failed to establish nexus between Communist activities and organizations whose membership information was sought).

95. See *DeGregory*, 383 U.S. at 830 (Harlan, J., dissenting); *Gibson*, 372 U.S. at 576 (Harlan, J., dissenting).

96. 366 U.S. 36 (1961).

97. *Konigsberg v. State Bar*, 353 U.S. 252 (1957).

98. Black used the case as the occasion for a major attack on balancing. See 366 U.S. at 61-71.

exercise”⁹⁹ He found it beyond question that a firm belief in overthrowing the government was relevant “in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country’s legal and political institutions.”¹⁰⁰ Nor was Communist Party membership unrelated to this inquiry. Hence, Harlan could see no basis for a constitutional claim.¹⁰¹

Harlan was to return to this question at the end of his career. In three 1971 cases, the Court was badly split in determining the precise questions which could be asked of bar applicants concerning organizational membership.¹⁰² Two cases involved questions about membership in organizations advocating violent overthrow; these were struck down,¹⁰³ but a question about knowing membership was allowed where immediately followed by a question about specific intent.¹⁰⁴ In Harlan’s view, the Court was “assuming general oversight of state investigatory procedures” by involving itself in the details of the phrasing of these question.¹⁰⁵ For him the crux of the case was simple:

I could hardly believe that anyone would dispute a State’s right to refuse admission to the Bar to an applicant who avowed or was shown to possess a dedication to overthrowing governmental authority by force or to supplanting the rule of law by incitement to individual or group violence as the best means of attaining desired goals.¹⁰⁶

The states could properly deny “admission to those who seek entry [to the bar] for the very purpose of doing away with the orderly processes of law”¹⁰⁷

As in *Konigsberg II*, Harlan was at great pains to distinguish legitimate investigation from prohibition of speech:

My Brother BLACK’s [opinions in these cases] could easily leave the impression that the three States involved are denying Bar admission to professionally qualified candidates solely by reason of their membership in so-called subversive organizations, irrespective of whether that membership is born of a purely philosophical cast of mind or of a specific purpose to engage in illegal action, or that

99. *Id.* at 50-51.

100. *Id.* at 52.

101. *Id.* at 53. For a critique of *Konigsberg II*, see Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 *LAW IN TRANSITION*, 155, 179-96 (1961).

102. *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971); *In re Stolar*, 401 U.S. 23 (1971); *Baird v. State Bar*, 401 U.S. 1 (1971).

103. *Stolar*, 401 U.S. at 27; *Baird*, 401 U.S. at 4-5.

104. *Law Students Civil Rights Research Council*, 401 U.S. at 164-65. Stewart was the swing vote in the three cases.

105. *In re Stolar*, 401 U.S. 23, 35 (1971) (Harlan, J., dissenting).

106. *Id.* at 35.

107. *Id.* at 36.

these States are at least trying to discourage prospective Bar candidates from joining such organizations. . . . If anything in these records could fairly be taken as pointing to either such conclusion, I would be found on the "reversing" side of these cases. The records, however, adumbrated by the representations of the responsible lawyers who appeared for the States, in my opinion belie any such inferences. They show no more than a refusal to certify candidates who deliberately, albeit in good faith, refuse to assist the Bar-admission authorities in their "fitness" investigations by declining fully to answer the questionnaires.¹⁰⁸

The questionnaires themselves were permissible, being merely "temperate inquiry into the character of [the applicants'] beliefs in this regard" ¹⁰⁹

One might well quarrel with the precise location of the line Harlan drew between reasonable regulations based on the nexus between speech and professional qualifications, on the one hand, and suppression of dissent, on the other.¹¹⁰ But the basic point seems sound. It is important to be vigilant in guarding against censorship, but it is also important not to confuse censorship with regulatory measures serving far different purposes.¹¹¹ It must be remembered that Harlan's diligence in stopping suppression of ideas was demonstrated that same year in his *Cohen* opinion.

B

Justice Harlan's first amendment craftsmanship is evident in the obscenity cases. The Supreme Court first encountered the problem of obscenity in *Roth v. United States*.¹¹² Writing for the majority, Justice Brennan defined obscenity as "material which deals with sex in a manner appealing to prurient interest."¹¹³ So defined, obscenity fell outside the scope of the first amendment because it was utterly without redeeming social value.¹¹⁴

Justice Harlan found the issues far more complex.¹¹⁵ Writing

108. *Id.* at 34-35. At the close of his dissent, Harlan added: "But if I am mistaken and it should develop that any of these candidates are excluded simply because of unorthodox or unpopular beliefs, it would then be time enough for this Court to intervene." *Id.* at 36.

109. *Id.*

110. In retrospect, we believe that Harlan placed excessive reliance on the good faith of state officials and correspondingly underestimated the chilling effect of state regulation.

111. For example, in *United States v. Robel*, 389 U.S. 258 (1967), the Court struck down a statute prohibiting the employment of Communists at defense plants designated as sensitive (about 1% of all defense plants). While perhaps such a rule is invalid, the majority was clearly wrong in viewing it as equivalent to measures outlawing the Party itself. *Id.* at 287 (White, J., dissenting). See Gunther, *Reflections on Robel: It's Not What the Court Did But the Way That It Did It*, 20 STAN. L. REV. 1140, 1146-1149 (1968). For a comprehensive discussion of the use of loyalty qualifications for government employment, see Israel, *Elfbrandt v. Russell: The Demise of the Oath?*, 1966 SUP. CT. REV. 193.

112. 354 U.S. 476 (1957).

113. *Id.* at 487.

114. *Id.* at 484.

115. *Id.* at 496 (Harlan, J., concurring in part and dissenting in part).

separately in *Roth*, he criticized the Court for assuming that obscenity is a clear, easily recognizable category of speech, which either falls inside or outside the first amendment. Instead, he argued, every book has its own individuality and value.¹¹⁶ Hence, appellate courts cannot leave the obscenity determination to the jury, as the majority seemed to contemplate. Instead, appellate courts must judge for themselves whether particular works can be suppressed.¹¹⁷ This part of Justice Harlan's analysis is now the law.¹¹⁸

The other part of his analysis was never accepted by any other Justice.¹¹⁹ He believed that states should have much broader power to control obscenity than the federal government.¹²⁰ In his view, states could properly decide, as guardians of public morals, that obscene works incite antisocial or immoral acts, or at least induce sexual conduct that a state may consider harmful to society's moral fabric.¹²¹ State suppression of the material involved in the case before him would not sufficiently interfere with the communication of ideas to violate the Constitution. On the other hand, Congress lacked any substantive power over sexual morality and had only an attenuated interest in regulation of pornography. Suppression of a book throughout the country could place an intolerable burden on free speech, and would also prevent experimentation by the states.¹²² Accordingly, Harlan would have allowed the federal government to ban only "hard-core pornography."¹²³

In later opinions, Harlan refined this analysis. In *Manual Enterprises v. Day*,¹²⁴ he attempted to define more clearly the class of materials the federal government could exclude from the mails. To fall into this class, a work must not only appeal to prurient interest, it must also be patently offensive, which is to say, violative of cur-

116. *Id.* at 497.

117. *Id.* at 498.

118. See *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974).

119. The Court currently applies the same standards to state and federal prosecutions, rejecting Harlan's argument for a dual standard. See *Hamling v. United States*, 418 U.S. 87, 104-07 (1974). The Court's use of local (as opposed to national) standards was, however, intended in part as a response to Harlan's concerns. See *Miller v. California*, 413 U.S. 15, 32 n.13 (1973).

120. Because Harlan never accepted the theory that the due process clause directly incorporated provisions of the Bill of Rights, he considered the first amendment to apply only to the federal government, while state regulation was limited by the somewhat more flexible requirements of the due process clause of the fourteenth amendment. See *Roth*, 354 U.S. at 503.

121. *Id.* at 501-02.

122. *Id.* at 504-05.

123. *Id.* at 507. For an excellent critique of the early obscenity cases, see Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

124. 370 U.S. 478 (1962).

rent community standards.¹²⁵ The "community" in question is the entire nation,¹²⁶ and mere nudity is not enough to render a work patently offensive under this test.¹²⁷ A few years later, in the *Memoirs* case, he reiterated his view that the federal government can only regulate hard-core pornography.¹²⁸

In *Memoirs*, Harlan also attempted to clarify his ideas about the boundaries of state power:

State obscenity laws present problems of quite a different order. The varying conditions across the country, the range of views on the need and reasons for curbing obscenity, and the traditions of local self-government in matters of public welfare all favor a far more flexible attitude in defining the bounds for the States. From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step with current American standards. As to criteria, it should be adequate if the court or jury considers such elements as offensiveness, prurency, social value, and the like. The latitude which I believe the States deserve cautions against any federally imposed formula listing the exclusive ingredients of obscenity and fixing their proportions.¹²⁹

Some charged that this test was unworkably vague. Harlan responded that as the case law developed, predictability would increase.¹³⁰ He also thought that the deterrent effect of vagueness on borderline materials could be reduced by the use of noncriminal procedures.¹³¹ Whatever vagueness remained was, he thought, no greater than under the majority's approach.¹³²

In *Ginzburg v. United States*,¹³³ a companion case to *Memoirs*, Justice Brennan wrote a majority opinion upholding conviction for mailing obscene material. Brennan assumed for the sake of argument that the materials themselves, considered in isolation, were not obscene.¹³⁴ But he went on to uphold the conviction anyway because the advertising for the materials was permeated by the "leer

125. *Id.* at 482, 486.

126. *Id.* at 487-88.

127. *Id.* at 490.

128. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen.*, 383 U.S. 413, 455 (1966) (Harlan, J., dissenting). Between *Roth* and *Memoirs*, Harlan wrote on some procedural aspects of obscenity regulation in dissenting opinions in *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 215-24 (1964), and *Bantam Books v. Sullivan*, 372 U.S. 58, 78-82 (1963). He also reiterated his *Roth* approach in *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964) (Harlan, J., dissenting), and *Smith v. California*, 361 U.S. 147, 169-71 (1959) (Harlan, J., concurring in part and dissenting in part).

129. *Memoirs*, 383 U.S. at 458 (Harlan, J., dissenting).

130. *Id.*

131. *Id.* at 458 n.3.

132. *Id.* at 459.

133. 383 U.S. 463 (1966). In a third case decided the same day, Harlan joined the majority to uphold the New York obscenity law. *Mishkin v. New York*, 383 U.S. 502 (1966).

134. *Ginzburg*, 383 U.S. at 465 n.4, 466.

of the sensualist.”¹³⁵ He seemed to find it especially offensive that the defendant sought mailing permits in Intercourse and Blue Ball, Pennsylvania, before ultimately obtaining one from Middlesex, New Jersey.¹³⁶ This evidence of “pandering” converted protected speech into unprotected obscenity, leaving Ginzburg to serve five years in prison for his offensive conduct.¹³⁷ In dissent, Justice Harlan wrote a blistering attack on ad hoc justice. The majority opinion was “an astonishing piece of judicial improvisation”¹³⁸ which cast “a dubious gloss over a straightforward 101-year-old statute.”¹³⁹ As he pointed out, the Court’s theory had nothing to do with the charge on which the defendant had been tried. Moreover, he observed, under the majority’s theory, works like *Lady Chatterly’s Lover* and *Ulysses*, which previously had been held nonobscene as a matter of law, might once again be banned if evidence of pandering could be produced.¹⁴⁰

Harlan’s last word on obscenity is found in *United States v. Reidel*.¹⁴¹ The issue in *Reidel* was the effect of *Stanley v. Georgia*,¹⁴² which had established a right to private possession of pornography, on the validity of the federal statute banning obscene materials from the mail. Although Justice Harlan had joined the *Stanley* opinion, he did not view *Stanley* as affecting the basic holding of *Roth* that obscenity is unprotected by the first amendment.¹⁴³ Rather, he read *Stanley* as holding that the government’s power to prohibit obscenity cannot be exercised through methods invading other individual rights. In *Stanley*, the relevant right was “the First Amendment right of the individual to be free from governmental programs of thought control, however such programs might be justified in terms of permissible state objectives.”¹⁴⁴ For Harlan,

Stanley rests on the proposition that freedom from governmental manipulation of the content of a man’s mind necessitates a ban on punishment for the mere posses-

135. *Id.* at 468. This “pandering” approach to obscenity originated with Chief Justice Warren. See G. WHITE, EARL WARREN: A PUBLIC LIFE 250-62 (1982).

136. *Ginzburg*, 383 U.S. at 467-68.

137. See *id.* at 497 (Stewart, J., dissenting).

138. 383 U.S. at 495 (Harlan, J., dissenting).

139. *Id.* at 494-95.

140. *Id.* at 496-97.

141. 402 U.S. 351 (1971). Between *Ginzburg* and *Reidel*, Harlan continued to criticize the prevailing approach. See *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704-11 (1968) (Harlan, J., dissenting); *Ginsberg v. New York*, 390 U.S. 629 (1968) (concurring opinion at 704); *Redrup v. New York*, 386 U.S. 767, 771 (1967) (Harlan, J., dissenting). He also joined Chief Justice Burger’s opinion in *Rowan v. United States Post Office Dep’t*, 397 U.S. 728 (1970), which upheld a federal statute giving individuals the right to have their names stricken from the mailing lists of publications they found offensive.

142. 394 U.S. 557 (1969).

143. *Reidel*, 402 U.S. at 358.

144. *Id.* at 359.

sion of the memorabilia of a man's thoughts and dreams In other words, the "right to receive" recognized in *Stanley* is not a right to the existence of modes of distribution of obscenity which the State could destroy without serious risk of infringing on the privacy of a man's thoughts; rather, it is a right to a protective zone ensuring the freedom of a man's inner life, be it rich or sordid.¹⁴⁵

In a companion case, Harlan reserved the question of whether the federal government could prohibit the noncommercial importation of pornography for private use.¹⁴⁶

It is not clear how history will judge Harlan's efforts in the pornography area. It was not until after his death that the Court was able to muster a majority for any one approach to the problem.¹⁴⁷ The current approach combines a modified version of the *Roth-Memoirs* test with the pandering concept rejected by Harlan.¹⁴⁸ Whatever its other imperfections, Harlan's approach to these cases did attempt to create an identifiable boundary around government's control of pornography, so as to protect freedom of thought.

C

Justice Harlan's most significant contributions to first amendment doctrine may have been in the field of public demonstrations. His writings on this problem display an innovative, sensitive approach to first amendment issues.

His approach was evident in his first opinion in the area, a concurrence in *Garner v. Louisiana*.¹⁴⁹ The defendants in *Garner* were convicted of "disturbing the peace" for a sit-in at a segregated lunch counter. They were quiet, orderly, and had never been asked to leave by the proprietors. Chief Justice Warren's majority opinion reversed the convictions on the theory that there was no evidence in the record to show that this sit-in in the deep South might provoke a disturbance.¹⁵⁰ Like Justice Douglas,¹⁵¹ Justice Harlan thought that this was an obvious fact of which the state courts could take judicial notice.¹⁵² Alone among the Justices, however, Harlan saw

145. *Id.* at 359-60. Although not an obscenity case, *Cohen v. California*, 403 U.S. 15 (1971), shows that Harlan was unwilling to extend the state's role as moral guardian in controlling offensive speech beyond the established category of obscene literature. For further discussion of *Cohen*, see *infra* notes 177-87 and accompanying text.

146. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 377 (1971) (Harlan, J., concurring).

147. See *Miller v. California*, 413 U.S. 15, 29 (1973).

148. See *Splawn v. California*, 431 U.S. 595 (1977). See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 42, at 1016-18.

149. 368 U.S. 157 (1961).

150. *Id.* at 170-74.

151. *Id.* at 177 (Douglas, J., concurring).

152. *Id.* at 193-96 (Harlan, J., concurring).

an important first amendment issue in the case.

At the outset of his first amendment analysis, he stressed that the management had acquiesced in the defendants' continued presence on the property.¹⁵³ Hence, he thought, the defendants had the same right to engage in first amendment conduct there as they would have had in the street, and "[w]e would surely have to be blind"¹⁵⁴ to ignore the speech aspect of their conduct. For Harlan, a demonstration was as much a part of the free trade in ideas as verbal expression.¹⁵⁵ He acknowledged, of course, the state's interest in preserving public order. He did not proceed, however, to balance this interest against the right of free speech. As he explained in a crucial passage, such balancing would be inappropriate in *Garner*:

But when a State seeks to subject [otherwise protected speech] to criminal sanctions . . . , it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." . . . And of course that interest must be a legitimate one. A State may not "suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

. . . [S]ound constitutional principles demand of the state legislature that it focus on the nature of the otherwise "protected" conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed.¹⁵⁶

The seven years following *Garner* brought a string of public demonstration cases before the Court. As commentators at the time observed, the Court seemed to have a great deal of trouble articulating a theory to cover these cases.¹⁵⁷ Yet there was a pattern in the holdings. Convictions under disturbing the peace statutes like that in *Garner* were generally reversed.¹⁵⁸ On the other hand, statutes focusing on narrower state interests (trespass, obstructing traffic, or courthouse picketing) were considered valid on their face by nearly every Justice.¹⁵⁹ The split between liberals and

153. *Id.* at 197-99.

154. *Id.* at 201.

155. *Id.* at 201-02.

156. *Id.* at 202-03.

157. See, e.g., Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

158. See *Brown v. Louisiana*, 383 U.S. 131 (1966) (breach of peace conviction for library sit-in reversed); *Cox v. Louisiana (I)*, 379 U.S. 536 (1965) (breach of the peace conviction for courthouse march reversed); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (breach of peace conviction for rally at state capitol reversed).

159. See *Cameron v. Johnson*, 390 U.S. 611 (1968) (prohibition on obstructing access to courthouses held facially valid); *Adderley v. Florida*, 385 U.S. 39 (1966) (state trespass law

conservatives usually involved the application of these statutes. In several cases, liberal majorities reversed convictions with arguments that appealed to the specific facts of the case, with little attempt to articulate a general principle. Sometimes the majority considered that the police had misled demonstrators or exercised undue discretion;¹⁶⁰ in one case, a conviction was reversed because the Justice whose vote determined the outcome saw signs of racial discrimination in the facts of the case.¹⁶¹ Justice Harlan resisted these ad hoc arguments and voted to uphold convictions whenever the demonstrators had violated narrowly drawn, regulatory statutes.¹⁶²

As *Street v. New York*¹⁶³ was to show, Harlan's approach could be a more reliable safeguard for first amendment values than the mere ad hoc approach of Warren and his followers. After hearing a radio report of the shooting of a civil rights leader, the defendant in *Street* had taken out an American flag, carried it to the nearest intersection, and burned it.¹⁶⁴ Harlan wrote the majority opinion reversing his conviction, with Warren, Black, Fortas, and White dissenting.¹⁶⁵

valid as applied to private property); *Cox v. Louisiana (I)*, 379 U.S. 536, 553-58 (1965) (suggesting that statute prohibiting obstruction of traffic would be facially valid); *Cox v. Louisiana (II)*, 379 U.S. 559, 564 (1965) (prohibition on picketing near courthouses held facially valid).

160. In *Cox I*, the Court found that the police had established a de facto discretionary licensing system for parades, and in *Cox II*, that they misled demonstrators into thinking that they had stayed a sufficient distance away from the courthouse to avoid violating a ban on picketing "near" courthouses.

161. See *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (White, J., concurring in the judgment).

162. Generally, Black and Harlan voted together in these cases. See *Adderley v. Florida*, 385 U.S. 39 (1966) (Harlan joins Black's majority opinion); *Brown v. Louisiana*, 383 U.S. 131, 151 (1966) (Black, J., dissenting); *Cox v. Louisiana (II)*, 379 U.S. 559, 591 (1965) (White and Harlan agree in part with Black's dissent); *Bell v. Maryland*, 378 U.S. 226, 344-46 (1964) (Harlan joins Black's dissent in favor of upholding state trespass law as applied to sit-in).

163. 394 U.S. 576 (1969). In 1969, Harlan wrote three other noteworthy first amendment opinions. In *Gregory v. City of Chicago*, 394 U.S. 111, 130 (1969) (Harlan, J., concurring), he agreed with Justice Black's concurring opinion that states could properly ban residential picketing, but that a disorderly conduct statute was too unfocused to serve this function. In *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 526 (1969) (Harlan, J., dissenting), he agreed with the majority that the first amendment applies to the public schools, but sought to retain broad authority for school officials to maintain discipline. Notably, he did not resort to ad hoc balancing but instead found it necessary to "translate that proposition into a workable constitutional rule." Under Harlan's approach, school children could establish a first amendment claim only if they could prove that officials were motivated by a desire to suppress a particular viewpoint. In the third case, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969) (Harlan, J., concurring), Harlan concurred in a holding that marchers need not comply with a state permit requirement when that requirement has been construed by state officials in a way that would render it unconstitutional, given the absence of any speedy method of getting judicial review of their decision.

164. *Street*, 394 U.S. at 578.

165. See *id.* at 594 (Warren, C.J., dissenting); *id.* at 609 (Black, J., dissenting); *id.* at 610 (White, J., dissenting); *id.* at 615 (Fortas, J., dissenting).

Although Harlan's opinions hints at the unconstitutionality of flag burning statutes,¹⁶⁶ he found it unnecessary to reach the issue, because the record showed that the defendant might have been convicted for what he said while burning the flag.¹⁶⁷ The dissenters protested that Harlan was distorting the record,¹⁶⁸ but his position was eminently reasonable. The defendant was convicted under a statute making it a crime to "publicly . . . cast contempt upon" the flag "either by words or act."¹⁶⁹ The charge filed against him was that he "did wilfully and unlawfully set fire to an American Flag and shout, 'If they did that to Meredith, we don't need an American Flag.'"¹⁷⁰ Neither the trial nor appellate courts identified these words as an independent basis for the defendant's conviction, but neither did they say anything to rebut the presumption that he was convicted for the conduct specified in the charge.¹⁷¹

Having established that the defendant could have been convicted for his words, Justice Harlan then turned to a careful examination of the state interests that might support such a conviction. The defendant's words did not constitute incitement or fighting words, nor was the statute limited to those areas of unprotected speech.¹⁷² Also, the conviction could not be upheld on the basis of the possible shock to bystanders, for any shock effect was due to the ideas he expressed,¹⁷³ an impermissible basis for regulation. Finally, the defendant could not be convicted for failing to show proper respect for the flag, for the government has no right to coerce such respect.¹⁷⁴ After this analysis, nothing was left to support the conviction. Indeed, since the same state interests are implicated by flag burning itself,¹⁷⁵ which Harlan would presumably have considered expressive conduct,¹⁷⁶ *Street* indicates rather strongly that

166. See *infra* notes 175, 176 and accompanying text.

167. *Street*, 394 U.S. at 588-90.

168. See *id.* at 595-600 (Warren, C.J., dissenting); *id.* at 610-12 (White, J., dissenting).

169. *Id.* at 578.

170. *Id.* at 579.

171. Since it was constitutional error to charge the use of the words as an offense, the conviction presumably could only stand if the error was shown to be harmless beyond a reasonable doubt. See *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

172. *Street*, 394 U.S. at 591-92. Note that Harlan used a categorization approach here, rather than balancing.

173. *Id.* at 592.

174. *Id.* at 593-94.

175. We assume that no one would seriously attempt to uphold a flag-burning statute as a means of preventing air pollution. Arguably, burning the flag might pass over into the realm of "fighting words," though *Cohen* suggests at least serious doubts on this score.

176. If sitting silently at a lunch counter is speech, as Harlan indicated in *Garner*, it is hard to see why flag burning would not qualify for first amendment coverage. In *Cowgill v. California*, 396 U.S. 371 (1970) (Harlan, J., concurring in dismissal), Justice Harlan argued

flag burning statutes are unconstitutional.

Like *Street*, Harlan's last major first amendment opinion was a defense of expression that he must have found highly offensive. The defendant in *Cohen v. California*¹⁷⁷ was convicted for wearing a jacket with the inscription "Fuck the Draft." Again, Harlan wrote for a five-man majority in reversing the conviction for disturbing the peace. He began by canvassing "various matters which this record does *not* present."¹⁷⁸ It did not involve a statute establishing special standards of decorum in a courthouse, where the arrest took place. It did not involve any recognized category of unprotected speech. Nor did it involve a captive-audience claim. Such a claim would require "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," for "[a]ny broader view would effectively empower a majority to silence dissidents simply as a matter of personal predilections."¹⁷⁹ In any event, no such claim could be made in *Cohen*, because no one unable to avoid the slogan had actually objected and the statute itself did not focus on protection of captive audiences.¹⁸⁰

Having eliminated these issues from the case, Harlan turned to the core issue: whether California could properly remove the offending word from the public vocabulary.¹⁸¹ The insubstantial likelihood of a violent response from the audience could not justify a ban, for the states may not engage in censorship just to avoid "physical censorship" by the "lawless and violent."¹⁸² Nor could the states, acting as guardians of public morality, eliminate this expletive to maintain "a suitable level of discourse within the body politic."¹⁸³ Matters of taste form no basis for state regulation of speech, for "one man's vulgarity is another's lyric,"¹⁸⁴ and offensive language is an important means of communicating otherwise inexpressible emotions.¹⁸⁵ More fundamentally, Harlan explained, any attempt to render public discourse inoffensive would be incompatible with a free society:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however,

that there was at least a not insubstantial question whether wearing a vest made of an American flag was protected conduct.

177. 403 U.S. 15 (1971).

178. *Id.* at 18 (emphasis in original).

179. *Id.* at 21.

180. *Id.* at 22.

181. *Id.* at 22-23.

182. *Id.* at 23.

183. *Id.*

184. *Id.* at 25.

185. *Id.* at 26.

within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.¹⁸⁶

Guiding the entire *Cohen* analysis was a clearly expressed reluctance to expand the established exceptions to "the usual rule that governmental bodies may not prescribe the form or content of individual expression."¹⁸⁷

III

As *Cohen* shows, Harlan was far from being an ad hoc balancer. He was a defender of the freedom to express unpopular ideas and an opponent of censorship. In the area of subversive speech, for example, he led the way to defining a clear category of unprotected speech.¹⁸⁸ Instead of balancing, he used a much more structured form of first amendment analysis. In his view, the government's power to proscribe the form or content of speech was limited to a few clearly defined categories, such as obscenity, incitement to violence, and libel.¹⁸⁹ Harlan believed that Supreme Court Justices, in deciding whether to create a new category of punishable speech, must evaluate and balance the loss of first amendment values caused by suppression of a type of speech or association and the societal end achieved by such a proscription. As *Street* and *Cohen* should make clear, he did not take this responsibility lightly; he presumed that content proscription was impermissible except for a few, limited categories of cases. Once the Supreme Court defined a category of speech as punishable, he favored the use of a test that would provide as clear a distinction as possible between punishable and nonpunishable speech rather than an ad hoc balancing approach. His preference for clear tests in content proscription cases is exemplified by his opinions in the Smith Act cases¹⁹⁰ and his approach to defining punishable defamation.¹⁹¹

186. *Id.* at 24-25.

187. *Id.* at 24. For a more detailed discussion of *Cohen*, see Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of Cohen v. California*, 1980 DUKE L.J. 283, 286-95.

188. See *supra* notes 72-89 and accompanying text.

189. See *Cohen*, 403 U.S. at 24.

190. See *supra* notes 67-89 and accompanying text.

191. See *supra* note 39 and accompanying text. Harlan joined the decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). He also joined in decisions which strictly applied the *New York Times* rule to protest speech. See *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727 (1968);

In particular situations, where speech might well have an adverse impact on its environment, states were not powerless to regulate in order to reduce this adverse impact.¹⁹² But such regulatory statutes would be carefully scrutinized. To pass muster, they would have to focus narrowly on these non-speech related interests and exclude any possibility that their purpose was to censor ideas.¹⁹³ Harlan only engaged in true ad hoc balancing when reviewing content neutral time, place, or manner regulations.¹⁹⁴

For Harlan, the core value of the first amendment was freedom of thought. As his opinion in *Reidel* makes clear, the first amendment marks off a sphere of individual independence and freedom from mind control.¹⁹⁵ As his *Cohen* opinion indicates, this freedom extends to the interchange of communications that form the "national mind."¹⁹⁶ Freedom from thought control, then, is the ultimate aim of the first amendment. Harlan used balancing only to determine the boundary between this sphere of autonomy and the spheres of valid legislative authority. Once he had determined this boundary, he rarely balanced again on the basis of the facts of any individual case, though he did not foreclose such balancing entirely.¹⁹⁷

In the years since Harlan left the bench, the Court has experimented with various methods of first amendment analysis. Whether Harlan's approach offers today's Supreme Court an ideal methodology for resolving new first amendment issues may be less than certain.¹⁹⁸ What should be clear is his commitment to the protection of first amendment values and his rejection, at least by

Garrison v. Louisiana, 379 U.S. 64 (1964). Harlan did struggle with the standard of proof that should be applied in such cases, particularly if the case involved defamation of a person not truly a public official. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 62 (1971) (Harlan, J., dissenting); *Time, Inc. v. Pape*, 401 U.S. 279, 293 (1971) (Harlan, J., dissenting); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (plurality opinion by Harlan); *Time, Inc. v. Hill*, 385 U.S. 374, 402 (1967) (Harlan, J., concurring in part and dissenting in part); *Rosenblatt v. Baer*, 383 U.S. 75, 96 (1966) (Harlan, J., concurring in part and dissenting in part); *Ashton v. Kentucky*, 384 U.S. 195, 201 (1966) (Harlan, J., concurring in result without opinion). However, Harlan did not favor an ad hoc balancing approach in such cases. See *supra* note 34.

192. See *supra* notes 102-11 and 157-62 and accompanying text.

193. See *supra* notes 156, 162 and accompanying text.

194. See *supra* notes 149-62 and accompanying text.

195. See *Reidel*, 402 U.S. at 359-60.

196. See *Cohen*, 403 U.S. at 24-25.

197. See *United States v. O'Brien*, 391 U.S. 367, 388-89 (1968) (Harlan, J., concurring) (even statute serving substantial state interest unrelated to the suppression of ideas may be invalid when it forecloses a speaker from reaching a specific audience).

198. We have argued elsewhere that these other approaches are inadequate and should be replaced by something similar to Harlan's approach. See Farber & Nowak, *supra* note 3; see also Farber, *supra* note 2.

the end of his tenure on the Court, of ad hoc balancing as a general approach to first amendment issues.

APPENDIX

FIRST AMENDMENT DECISIONS IN WHICH JUSTICE
HARLAN WAS A PARTICIPANT**1954-55 Term*

ACLU v. City of Chicago, 348 U.S. 979 (1955) (per curiam) (dissented)
 Quinn v. United States, 349 U.S. 155 (1955) (concurred in result)
 Emspak v. United States, 349 U.S. 190 (1955) (wrote dissent)
 Peters v. Hobby, 349 U.S. 331 (1955) (joined majority)
 Ellis v. Dixon, 349 U.S. 458 (1955) (statutory decision) (wrote majority)
 Davidson v. United States, 349 U.S. 918 (1955) (per curiam) (joined majority)

1955-56 Term

Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (statutory decision) (joined dissent)
 Ullmann v. United States, 350 U.S. 422 (1956) (joined majority)
 Slochower v. Board of Educ., 350 U.S. 551 (1956) (joined majority)
 Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) (joined majority)
 Black v. Cutter Labs., 351 U.S. 292 (1956) (statutory decision) (joined majority)

1956-57 Term

Butler v. Michigan, 352 U.S. 380 (1957) (joined majority)
 United States v. UAW, 352 U.S. 567 (1956) (statutory decision) (joined majority)
 Schwere v. Board of Bar Examiners, 353 U.S. 232 (1957) (joined concurrence)
 Konigsberg v. State Bar, 353 U.S. 252 (1957) (wrote dissent)
 Government & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364 (1957) (per curiam)
 (joined majority)
 California v. Taylor, 353 U.S. 553 (1957) (joined majority)
 Watkins v. United States, 354 U.S. 178 (1957) (joined majority)
 Sweezy v. New Hampshire, 354 U.S. 234 (1957) (joined concurrence)
 International Bhd. of Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (joined
 majority)
 Yates v. United States, 354 U.S. 298 (1957) (wrote majority)
 Service v. Dulles, 354 U.S. 363 (1957) (wrote majority)
 Kingsley Books v. Brown, 354 U.S. 436 (1957) (joined majority)
 Roth v. United States, 354 U.S. 476 (1957) (decided with *Alberts v. California*) (concurred in
Alberts, dissented in *Roth*)
 Adams Newark Theatre Co. v. City of Newark, 354 U.S. 931 (1957) (per curiam) (joined
 majority)

1957-58 Term

Rowoldt v. Perfetto, 355 U.S. 115 (1957) (wrote dissent)
 Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (joined majority)
 Staub v. City of Baxley, 355 U.S. 313 (1958) (joined majority)
 One, Inc. v. Olesen, 355 U.S. 371 (1958) (per curiam) (joined majority)
 Sunshine Book Co. v. Summerfield, 355 U.S. 372 (1958) (per curiam) (joined majority)
 NLRB v. District 50, UMW, 355 U.S. 453 (1958) (joined majority)
 Wilson v. Loew's, Inc., 355 U.S. 597 (1958) (per curiam) (joined majority)
 Brown v. United States, 356 U.S. 148 (1958) (joined majority)
 Sacher v. United States, 356 U.S. 576 (1958) (per curiam) (wrote concurrence)

* Justice Harlan's position in each case is noted in parentheses after each citation.

Nowak v. United States, 356 U.S. 660 (1958) (wrote majority)
 Maisenberg v. United States, 356 U.S. 670 (1958) (wrote majority)
 Bonetti v. Rogers, 356 U.S. 691 (1958) (joined dissent)
 Kent v. Dulles, 357 U.S. 116 (1958) (joined dissent)
 Dayton v. Dulles, 357 U.S. 144 (1958) (joined dissent)
 NLRB v. United Steelworkers of Am., 357 U.S. 357 (1958) (statutory decision) (joined majority)
 Beilan v. Board of Pub. Educ., 357 U.S. 399 (1958) (joined majority)
 NAACP v. Alabama, 357 U.S. 449 (1958) (wrote majority)
 Lerner v. Casey, 357 U.S. 468 (1958) (wrote majority)
 Speiser v. Randall, 357 U.S. 513 (1958) (joined majority)
 First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958) (joined majority)
 First Methodist Church of San Leandro v. Horstmann, 357 U.S. 568 (1958) (per curiam) (joined majority)

1958-59 Term

Flaxer v. United States, 358 U.S. 147 (1958) (statutory decision) (joined majority)
 Cammarano v. United States, 358 U.S. 498 (1959) (wrote majority)
 Scull v. Virginia, 359 U.S. 344 (1959) (joined majority)
 Vitarelli v. Seaton, 359 U.S. 535 (1959) (wrote majority)
 Uphaus v. Wyman, 360 U.S. 72 (1959) (joined majority)
 Barenblatt v. United States, 360 U.S. 109 (1959) (wrote majority)
 Harrison v. NAACP, 360 U.S. 167 (1959) (wrote majority)
 NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) (joined majority)
 Raley v. Ohio, 360 U.S. 423 (1959) (joined concurrence in part, dissent in part)
 Greene v. McElroy, 360 U.S. 474 (1959) (wrote concurrence)
 Farmers Educ. & Coop. Union of Am. v. WDAY, Inc., 360 U.S. 525 (1959) (statutory decision) (joined dissent)
 Barr v. Matteo, 360 U.S. 564 (1959) (wrote plurality)
 Howard v. Lyons, 360 U.S. 593 (1959) (wrote majority)
In re Sawyer, 360 U.S. 622 (1959) (statutory decision) (joined dissent)
 Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959) (wrote concurrence)

1959-60 Term

United Steelworkers of Am. v. United States, 361 U.S. 39 (1959) (per curiam) (wrote concurrence)
 Smith v. California, 361 U.S. 147 (1959) (concurred in part, dissented in part)
 Bates v. City of Little Rock, 361 U.S. 516 (1960) (joined majority)
 Nelson v. County of Los Angeles, 362 U.S. 1 (1960) (joined majority)
 Talley v. California, 362 U.S. 60 (1960) (wrote concurrence)
 NLRB v. Drivers, Chauffeurs, Helpers, Local 639, 362 U.S. 274 (1960) (statutory decision) (joined majority)
 Order of R.R. Tel. v. Chicago & N.W. Ry. Co., 362 U.S. 330 (1960) (statutory decision) (joined majority)
 Marine Cooks & Stewards, AFL v. Panama Steamship Co., 362 U.S. 365 (1960) (statutory decision) (joined majority)
 Niukkanen v. McAlexander, 362 U.S. 390 (1960) (per curiam) (joined majority)
 Nostrand v. Little, 362 U.S. 474 (1960) (per curiam) (joined majority)
 Communication Workers of Am., v. NLRB, 362 U.S. 479 (1960) (per curiam) (joined majority)
 Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) (joined majority)
 Kimm v. Rosenberg, 363 U.S. 405 (1960) (per curiam) (joined majority)
 Hannah v. Larche, 363 U.S. 420 (1960) (wrote concurrence)
 Flemming v. Nestor, 363 U.S. 603 (1960) (wrote majority)

Gonzales v. United States, 364 U.S. 59 (1960) (joined majority)
 Elkins v. United States, 364 U.S. 206 (1960) (joined dissent)

1960-61 Term

Chaunt v. United States, 364 U.S. 350 (1960) (statutory decision) (joined majority)
 McPhaul v. United States, 364 U.S. 372 (1960) (joined majority)
 Uphaus v. Wyman, 364 U.S. 388 (1960) (per curiam) (joined majority)
 Shelton v. Tucker, 364 U.S. 479 (1960) (wrote dissent)
 Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961) (joined majority)
 Wilkinson v. United States, 365 U.S. 399 (1961) (joined majority)
 Braden v. United States, 365 U.S. 431 (1961) (joined majority)
 Konigsberg v. State Bar, 366 U.S. 36 (1961) (wrote majority)
In re Anastaplo, 366 U.S. 82 (1961) (wrote majority)
 Cohen v. Hurley, 366 U.S. 117 (1961) (wrote majority)
 Slagle v. Ohio, 366 U.S. 259 (1961) (joined majority)
 Louisiana v. NAACP, 366 U.S. 293 (1961) (concurred in result)
 McGowan v. Maryland, 366 U.S. 420 (1961) (joined concurrence)
 Two Guys v. McGinley, 366 U.S. 582 (1961) (joined concurrence)
 Braunfield v. Brown, 366 U.S. 599 (1961) (joined concurrence)
 Gallagher v. Crown Koshier Super Market, 366 U.S. 617 (1961) (joined concurrence)
 Local 761, Int'l Union of Elec., Radio & Machine Workers v. NLRB, 366 U.S. 667 (1961)
 (statutory decision) (joined majority)
 Irvin v. Dowd, 366 U.S. 717 (1961) (joined majority)
 Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961)
 (joined majority)
 Scales v. United States, 367 U.S. 203 (1961) (wrote majority)
 Noto v. United States, 367 U.S. 290 (1961) (wrote majority)
 Communist Party v. Catherwood, 367 U.S. 389 (1961) (wrote majority)
 Deutch v. United States, 367 U.S. 456 (1961) (wrote dissent)
 Torcaso v. Watkins, 367 U.S. 488 (1961) (concurred in result)
 Marcus v. Search Warrant, 367 U.S. 717 (1961) (joined majority)
 International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (joined dissent)
 Lathrop v. Donohue, 367 U.S. 820 (1961) (wrote concurrence)
 Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961) (joined
 majority)
 Bargaintown, USA v. Whitman, 367 U.S. 903 (1961) (per curiam) (joined majority)

1961-62 Term

Garner v. Louisiana, 368 U.S. 157 (1961) (wrote concurrence)
 Killian v. United States, 368 U.S. 231 (1961) (joined majority)
 Cramp v. Board of Pub. Instr., 368 U.S. 278 (1961) (joined majority)
 Nostrand v. Little, 368 U.S. 436 (1962) (per curiam) (joined majority)
 Association for Preservation of Freedom of Choice v. Power, 369 U.S. 816 (1962) (per
 curiam) (joined majority)
 Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) (statutory decision) (joined dissent)
 Wood v. Georgia, 370 U.S. 375 (1962) (wrote dissent)
 Engel v. Vitale, 370 U.S. 421 (1962) (joined majority)
 Manual Enterprises v. Day, 370 U.S. 478 (1962) (wrote plurality)

1962-63 Term

Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94 (1962) (joined
 majority)
 Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962) (per curiam) (joined majority)
 NAACP v. Button, 371 U.S. 415 (1963) (wrote dissent)
 Bantam Books v. Sullivan, 372 U.S. 58 (1963) (wrote dissent)

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (wrote dissent)
 Edwards v. South Carolina, 372 U.S. 229 (1963) (joined majority)
 Gideon v. Wainwright, 372 U.S. 335 (1963) (wrote concurrence)
 Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539 (1963) (wrote dissent)
 Brotherhood of Ry. & Steamship Clerks v. Allen, 373 U.S. 113 (1963) (statutory decision)
 (concurred in part, dissented in part)
 Peterson v. City of Greenville, 373 U.S. 244 (1963) (wrote concurrence)
 Shutlesworth v. City of Birmingham, 373 U.S. 262 (1963) (wrote dissent)
 Lombard v. Louisiana, 373 U.S. 267 (1963) (wrote dissent)
 Wright v. Georgia, 373 U.S. 284 (1963) (joined majority)
 Yellin v. United States, 374 U.S. 109 (1963) (statutory decision) (joined dissent)
 School Dist. v. Schempp, 374 U.S. 203 (1963) (joined concurrence)
 Sherbert v. Verner, 374 U.S. 398 (1963) (wrote dissent)
 Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963) (joined majority)
 Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963) (joined dissent)

1963-64 Term

Fields v. South Carolina, 375 U.S. 44 (1963) (per curiam) (joined majority)
 Fields v. City of Fairfield, 375 U.S. 248 (1963) (per curiam) (joined majority)
 Association for the Preservation of Freedom of Choice v. Nation Co., 375 U.S. 899 (1963)
 (per curiam) (joined majority)
 New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (joined majority)
 Henry v. City of Rock Hill, 376 U.S. 776 (1964) (per curiam) (joined majority)
 Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (joined dissent)
 NLRB v. Servette, Inc., 377 U.S. 46 (1964) (statutory decision) (joined majority)
 NAACP v. Alabama, 377 U.S. 288 (1964) (wrote majority)
 Baggett v. Bullitt, 377 U.S. 360 (1964) (joined dissent)
 Chamberlain v. Dade County Bd. of Pub. Instr., 377 U.S. 402 (1964) (per curiam) (joined
 majority)
 Malloy v. Hogan, 378 U.S. 1 (1964) (wrote dissent)
 Elfbrandt v. Russell, 378 U.S. 127 (1964) (per curiam) (joined majority)
 Barr v. City of Columbia, 378 U.S. 146 (1964) (joined dissent)
 Robinson v. Florida, 378 U.S. 153 (1964) (joined majority)
 Jacobellis v. Ohio, 378 U.S. 184 (1964) (wrote dissent)
 A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (wrote dissent)
 Bell v. Maryland, 378 U.S. 226 (1964) (joined dissent)
 Bouie v. City of Columbia, 378 U.S. 347 (1964) (joined dissent)
 Aptheker v. Secretary of State, 378 U.S. 500 (1964) (joined dissent)
 Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (joined majority)
 Drews v. Maryland, 378 U.S. 547 (1964) (per curiam) (joined dissent)
 Williams v. North Carolina, 378 U.S. 548 (1964) (per curiam) (joined dissent)
 Green v. Virginia, 378 U.S. 550 (1964) (per curiam) (joined majority)
 Mitchell v. City of Charleston, 378 U.S. 551 (1964) (per curiam) (joined dissent)
 Harris v. Virginia, 378 U.S. 552 (1964) (per curiam) (joined majority)
 Tralins v. Gerstein, 378 U.S. 576 (1964) (per curiam) (joined dissent)
 Grove Press v. Gerstein, 378 U.S. 577 (1964) (per curiam) (joined dissent)
 Mayer v. Rusk, 378 U.S. 579 (1964) (per curiam) (joined dissent)
 Fox v. North Carolina, 378 U.S. 587 (1964) (per curiam) (joined dissent)
 Copeland v. Secretary of State, 378 U.S. 588 (1964) (per curiam) (joined dissent)

1964-65 Term

Garrison v. Louisiana, 379 U.S. 64 (1964) (joined majority)
 Moity v. Louisiana, 379 U.S. 201 (1964) (per curiam) (joined majority)
 Hamm v. City of Rock Hill, 379 U.S. 306 (1964) (wrote dissent)
 Stanford v. Texas, 379 U.S. 476 (1965) (joined majority)
 Cox v. Louisiana, 379 U.S. 536 (1965) (joined majority)

Cox v. Louisiana, 379 U.S. 559 (1965) (joined concurrence in part, dissent in part)
 Blow v. North Carolina, 379 U.S. 684 (1965) (per curiam) (wrote dissent)
 Freedman v. Maryland, 380 U.S. 51 (1965) (joined majority)
 United States v. Seeger, 380 U.S. 163 (1965) (joined majority)
 Trans-Lux Distrib. Corp. v. Board of Regents, 380 U.S. 259 (1965) (per curiam) (joined majority)
 Henry v. Collins, 380 U.S. 356 (1965) (per curiam) (joined majority)
 McKinnie v. Tennessee, 380 U.S. 449 (1965) (per curiam) (joined dissent)
 Dombrowski v. Pfister, 380 U.S. 479 (1965) (wrote dissent)
 American Comm. for Protection of Foreign Born v. SACB, 380 U.S. 503 (1965) (per curiam) (joined dissent)
 Veterans of the Abraham Lincoln Brigade v. SACB, 380 U.S. 513 (1965) (per curiam) (joined dissent)
 Zemel v. Rusk, 381 U.S. 1 (1965) (joined majority)
 Parrot v. City of Tallahassee, 381 U.S. 129 (1965) (per curiam) (joined majority)
 Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (joined majority)
 Walker v. Georgia, 381 U.S. 355 (1965) (per curiam) (joined dissent)
 United States v. Brown, 381 U.S. 437 (1965) (joined dissent)
 Griswold v. Connecticut, 381 U.S. 479 (1965) (wrote concurrence)
 Estes v. Texas, 381 U.S. 532 (1965) (wrote concurrence)
 Cameron v. Johnson, 381 U.S. 741 (1965) (per curiam) (joined dissent)

1965-66 Term

Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965) (joined majority)
 Solomon v. South Carolina, 382 U.S. 204 (1965) (per curiam) (joined majority)
 Evans v. Newton, 382 U.S. 296 (1966) (wrote dissent)
 Linn v. United Plant Guard Workers of Am., 383 U.S. 53 (1966) (statutory decision) (joined majority)
 Rosenblatt v. Baer, 383 U.S. 75 (1966) (concurred in part, dissented in part)
 Brown v. Louisiana, 383 U.S. 131 (1966) (joined dissent)
 Hicks v. District of Columbia, 383 U.S. 252 (1966) (per curiam) (wrote concurrence)
 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966) (wrote dissent)
 Ginzburg v. United States, 383 U.S. 463 (1966) (wrote dissent)
 Mishkin v. New York, 383 U.S. 502 (1966) (wrote concurrence)
 DeGregory v. Attorney Gen., 383 U.S. 825 (1966) (wrote dissent)
 Elfbrandt v. Russell, 384 U.S. 11 (1966) (joined dissent)
 NAACP v. Overstreet, 384 U.S. 118 (1966) (per curiam) (joined majority)
 Ashton v. Kentucky, 384 U.S. 195 (1966) (concurred in result)
 Mills v. Alabama, 384 U.S. 214 (1966) (wrote dissent)
 Redmond v. United States, 384 U.S. 264 (1966) (per curiam) (joined majority)
 Sheppard v. Maxwell, 384 U.S. 333 (1966) (joined majority)
 Gojack v. United States, 384 U.S. 702 (1966) (joined majority)
 Georgia v. Rachel, 384 U.S. 780 (1966) (statutory decision) (joined majority)
 City of Greenwood v. Peacock, 384 U.S. 808 (1966) (joined majority)
 Dennis v. United States, 384 U.S. 855 (1966) (statutory decision) (joined majority)
 Baines v. City of Danville, 384 U.S. 890 (1966) (per curiam) (joined majority)
 Wallace v. Virginia, 384 U.S. 891 (1966) (per curiam) (joined majority)

1966-67 Term

Adderley v. Florida, 385 U.S. 39 (1966) (joined majority)
 Bond v. Floyd, 385 U.S. 116 (1966) (joined majority)
 Osborn v. United States, 385 U.S. 323 (1966) (joined majority)
 Time, Inc. v. Hill, 385 U.S. 374 (1967) (concurred in part, dissented in part)
 United States v. Laub, 385 U.S. 475 (1967) (joined majority)
 Keyishian v. Board of Regents, 385 U.S. 589 (1967) (joined dissent)

Berenyi v. District Dir., INS, 385 U.S. 630 (1967) (joined majority)
 Redrup v. New York, 386 U.S. 767 (1967) (per curiam) (wrote dissent)
 Turner v. New York, 386 U.S. 773 (1967) (per curiam) (joined majority)
 Holding v. Blankenship, 387 U.S. 94 (1967) (per curiam) (concurred in part, dissented in part)
 Blankenship v. Holding, 387 U.S. 95 (1967) (per curiam) (joined majority)
 Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (wrote plurality)
 Walker v. City of Birmingham, 388 U.S. 307 (1967) (joined majority)
 Jacobs v. New York, 388 U.S. 431 (1967) (per curiam) (joined majority)
 Tannenbaum v. New York, 388 U.S. 439 (1967) (per curiam) (joined majority)
 Keney v. New York, 388 U.S. 440 (1967) (wrote dissent)
 Friedman v. New York, 388 U.S. 441 (1967) (wrote dissent)
 Ratner v. California, 388 U.S. 442 (1967) (wrote dissent)
 Cobert v. New York, 388 U.S. 443 (1967) (wrote dissent)
 Sheperd v. New York, 388 U.S. 444 (1967) (wrote dissent)
 Avansino v. New York, 388 U.S. 446 (1967) (wrote dissent)
 Aday v. United States, 388 U.S. 447 (1967) (wrote concurrence)
 Corinth Publications v. Wesberry, 388 U.S. 448 (1967) (per curiam) (wrote dissent)
 Books, Inc. v. United States, 388 U.S. 449 (1967) (wrote concurrence)
 Rosenbloom v. Virginia, 388 U.S. 450 (1967) (per curiam) (wrote concurrence)
 A Quantity of Copies of Books v. Kansas, 388 U.S. 452 (1967) (wrote dissent)
 Mazes v. Ohio, 388 U.S. 453 (1967) (joined dissent)
 Schackman v. California, 388 U.S. 454 (1967) (wrote dissent)

1967-68 Term

Associated Press v. Walker, 389 U.S. 28 (1967) (per curiam) (joined majority)
 Potomac News Co. v. United States, 389 U.S. 47 (1967) (wrote concurrence)
 Conner v. City of Hammond, 389 U.S. 48 (1967) (wrote dissent)
 Central Magazine Sales v. United States, 389 U.S. 50 (1967) (wrote concurrence)
 Whitehill v. Elkins, 389 U.S. 54 (1967) (wrote dissent)
 Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967) (per curiam) (joined majority)
 Chance v. California, 389 U.S. 89 (1967) (wrote dissent)
 Hackin v. Arizona, 389 U.S. 143 (1967) (per curiam) (joined majority)
 UMW of Am., Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (wrote dissent)
 Zwickler v. Koota, 389 U.S. 241 (1967) (wrote concurrence)
 United States v. Robel, 389 U.S. 258 (1967) (joined dissent)
 W.E.B. DuBois Clubs of Am. v. Clark, 389 U.S. 309 (1967) (per curiam) (joined majority)
 Katz v. United States, 389 U.S. 347 (1967) (wrote concurrence)
 I.M. Amusement Corp. v. Ohio, 389 U.S. 573 (1967) (wrote dissent)
 Robert-Arthur Mgmt. Corp. v. Tennessee, 389 U.S. 578 (1968) (wrote dissent)
 Schneider v. Smith, 390 U.S. 17 (1968) (joined concurrence)
 Epton v. New York, 390 U.S. 29 (1968) (per curiam) (joined majority)
 Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) (per curiam) (joined majority)
 Felton v. City of Pensacola, 390 U.S. 340 (1968) (per curiam) (wrote dissent)
 Cameron v. Johnson, 390 U.S. 611 (1968) (joined majority)
 Ginsberg v. New York, 390 U.S. 629 (1968) (wrote concurrence)
 Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968) (wrote dissent)
 St. Amant v. Thompson, 390 U.S. 727 (1968) (joined majority)
 Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968) (wrote dissent)
 Zwicker v. Boll, 391 U.S. 353 (1968) (per curiam) (joined majority)
 Brooks v. Briley, 391 U.S. 361 (1968) (per curiam) (joined majority)
 United States v. O'Brien, 391 U.S. 367 (1968) (wrote concurrence)
 Rabeck v. New York, 391 U.S. 462 (1968) (per curiam) (wrote dissent)
 Pickering v. Board of Educ., 391 U.S. 563 (1968) (joined majority)
 Flast v. Cohen, 392 U.S. 83 (1968) (wrote dissent)
 Board of Educ. v. Allen, 392 U.S. 236 (1968) (wrote concurrence)

Lee Art Theatre v. Virginia, 392 U.S. 636 (1968) (per curiam) (wrote dissent)
 Henry v. Louisiana, 392 U.S. 655 (1968) (wrote dissent)

1968-69 Term

Williams v. Rhodes, 393 U.S. 23 (1968) (wrote concurrence)
 Epperson v. Arkansas, 393 U.S. 97 (1968) (wrote concurrence)
 Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) (joined majority)
 Oestereich v. Selective Serv. Sys., 393 U.S. 233 (1968) (wrote concurrence)
 Thorpe v. Housing Auth., 393 U.S. 268 (1969) (joined majority)
 Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (wrote concurrence)
 Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (wrote dissent)
 Golden v. Zwickler, 394 U.S. 103 (1969) (joined majority)
 Gregory v. City of Chicago, 394 U.S. 111 (1969) (wrote concurrence)
 Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (wrote concurrence)
 Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (wrote concurrence)
 Street v. New York, 394 U.S. 576 (1969) (wrote majority)
 Shapiro v. Thompson, 394 U.S. 618 (1969) (wrote dissent)
 Watts v. United States, 394 U.S. 705 (1969) (per curiam) (joined dissent)
 Robinson v. Johnson, 394 U.S. 847 (1969) (per curiam) (wrote dissent)
 Montgomery v. Burns, 394 U.S. 848 (1969) (per curiam) (wrote dissent)
 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (joined majority)
 Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (joined majority)
 NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) (joined majority)

1969-70 Term

Bryson v. United States, 396 U.S. 64 (1969) (wrote majority)
 Carlos v. New York, 396 U.S. 119 (1969) (wrote dissent)
 Gutknecht v. United States, 396 U.S. 295 (1970) (wrote concurrence)
 Cowgill v. California, 396 U.S. 371 (1970) (per curiam) (wrote concurrence)
 Breen v. Selective Serv. Local Bd. No. 16, 396 U.S. 460 (1970) (wrote concurrence)
 Jones v. State Bd. of Educ., 397 U.S. 31 (1970) (per curiam) (joined majority)
 Taggart v. Weinacker's, Inc., 397 U.S. 223 (1970) (per curiam) (wrote dissent)
 Cain v. Kentucky, 397 U.S. 319 (1970) (per curiam) (wrote dissent)
 Bachellar v. Maryland, 397 U.S. 564 (1970) (joined majority)
 Walz v. Tax Comm'n, 397 U.S. 664 (1970) (wrote concurrence)
 Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (joined majority)
 Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6 (1970) (joined majority)
 Schacht v. United States, 398 U.S. 58 (1970) (wrote concurrence)
 Bloss v. Dykema, 398 U.S. 278 (1970) (per curiam) (wrote dissent)
 Welsh v. United States, 398 U.S. 333 (1970) (wrote concurrence)
 Mulloy v. United States, 398 U.S. 410 (1970) (joined majority)
 Mitchell v. Donovan, 398 U.S. 427 (1970) (per curiam) (joined majority)
 Walker v. Ohio, 398 U.S. 434 (1970) (per curiam) (wrote dissent)
 United States v. Sisson, 399 U.S. 267 (1970) (wrote majority)
 Gunn v. University Comm., 399 U.S. 383 (1970) (joined majority)
 Dial v. Fontaine, 399 U.S. 521 (1970) (per curiam) (joined majority)
 Hutcherson v. Lehtin, 399 U.S. 522 (1970) (per curiam) (joined majority)
 Hoyt v. Minnesota, 399 U.S. 524 (1970) (per curiam) (joined dissent)
 Russell v. Catherwood, 399 U.S. 936 (1970) (cert. denied) (joined majority)

1970-71 Term

McCann v. Babbitz, 400 U.S. 1 (1970) (per curiam) (joined majority)
 Wyman v. James, 400 U.S. 309 (1971) (joined majority)
 Blount v. Rizzi, 400 U.S. 410 (1971) (joined majority)

- Baird v. State Bar, 401 U.S. 1 (1971) (wrote dissent)
In re Stolar, 401 U.S. 23 (1971) (wrote dissent)
Younger v. Harris, 401 U.S. 37 (1971) (joined concurrence)
Samuels v. Mackell, 401 U.S. 66 (1971) (joined majority)
Boyle v. Landry, 401 U.S. 77 (1971) (joined majority)
Perez v. Ledesma, 401 U.S. 82 (1971) (joined majority)
Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971) (wrote concurrence)
Dyson v. Stein, 401 U.S. 200 (1971) (per curiam) (joined majority)
Byrne v. Karalexis, 401 U.S. 216 (1971) (per curiam) (joined majority)
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (joined majority)
Time, Inc. v. Pape, 401 U.S. 279 (1971) (wrote dissent)
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (joined majority)
Gillette v. United States, 401 U.S. 437 (1971) (joined majority)
Grove Press v. Maryland State Bd. of Censors, 401 U.S. 480 (1971) (per curiam) (joined majority)
United Transp. Union v. State Bar, 401 U.S. 576 (1971) (concurred in part, dissented in part)
United States v. Reidel, 402 U.S. 351 (1971) (wrote concurrence)
United States v. 37 Photographs, 402 U.S. 363 (1971) (wrote concurrence)
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (wrote dissent)
McGee v. United States, 402 U.S. 479 (1971) (joined majority)
Coates v. City of Cincinnati, 402 U.S. 611 (1971) (joined majority)
Cohen v. California, 403 U.S. 15 (1971) (wrote majority)
Rosenbloom v. Metromedia, 403 U.S. 29 (1971) (wrote dissent)
Griffin v. Breckenridge, 403 U.S. 88 (1971) (wrote concurrence)
Connell v. Higginbotham, 403 U.S. 207 (1971) (per curiam) (joined majority)
Jenness v. Fortson, 403 U.S. 431 (1971) (joined majority)
Lemon v. Kurtzman, 403 U.S. 602 (1971) (joined majority)
Tilton v. Richardson, 403 U.S. 672 (1971) (joined plurality)
Clay v. United States, 403 U.S. 698 (1971) (per curiam) (wrote concurrence)
New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (wrote dissent)