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The Legal Philosophy of John Marshall

Douglas A. Poe

The Legal Philosophy of John Marshall Harlan: Freedom of Expression, Due Process, and Judicial Self-Restraint

*Douglas A. Poe**

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.[1]

> One of the current notions that holds subtle capacity for serious mischief is a view of the judicial function that seems increasingly coming into vogue. This is that all deficiencies in our society which have failed of correction by other means should find a cure in the courts. . . . [S]ome well-meaning people believe that the judicial rather than the political process is more likely to breed better solutions of pressing or thorny problems. This is a compliment to the judiciary but untrue to democratic principle.[2]

One of the greatest and most significant constitutional enigmas with which the Supreme Court has grappled during the past two decades has concerned the proper delineation of the first amendment's prohibition against the abridgment of "the freedom of speech." The range of problems confronted has extended from congressional investigations[3] to state obscenity laws,[4] from sit-in demonstrations[5] to the provision of legal counsel by labor unions for their members.[6] An all-encompassing and consistent theory of the first and fourteenth amendments has yet to be articulated by the Court, a situation which is hardly unexpected in view of the disparate claims asserted under the

* Member, Illinois Bar, B.A., DePauw University, 1964; LL.B., Duke University School of Law, 1967; LL.M., Yale University School of Law, 1968.

1. Bishop Hoadly's Sermon preached before King George I, March 31, 1717.

2. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 943-44 (1963).

3. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957).

4. *See, e.g.*, Mishkin v. New York, 303 U.S. 502 (1966); A book named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Jacobellis v. Ohio, 378 U.S. 184 (1964); Alberts v. California, 354 U.S. 476 (1957).

5. *See, e.g.*, Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Edwards v. South Carolina, 372 U.S. 229 (1963); Garner v. Louisiana, 368 U.S. 157 (1961).

6. *See, e.g.*, United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1 (1964).

constitutional guarantee of freedom of speech and the closely related freedoms of expression, association, and assembly.[7]

The attempt here will not be to chart the course which the Court has pursued through the muddied waters of the first amendment, but rather to detail the approach of one member of the present Court, John Marshall Harlan, to certain basic first and fourteenth amendment problems. The justifications for concentration upon Harlan's theories are several. In the first instance, Mr. Justice Harlan is currently an articulate spokesman for that prominent trend in American judicial philosophy which is popularly termed "judicial self-restraint."[8] Nevertheless, Harlan's views have not been subjected to systematic exposition and criticism as have those, for example, of Mr. Justice Black.[9] Secondly, Justice Harlan's theories are of interest not only because he has frequently spoken for the Court,[10] but, more significantly, because he has at times taken a position far more advanced than that which the majority was willing to adopt[11] and, upon other occasions, has criticized severely other members of the Court for unwarranted activism.[12] Finally, Justice Harlan's opinions are frequently rich in theoretical legal analysis, a fact which has provoked the

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7. The term "speech" will be used generically to designate the various interests which the Court has deemed to be protected by the emanations of the "freedom of speech" clause of the first amendment. These interests are frequently described by such rubrics as "freedom of association" and "freedom of expression." *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 185, 201-04 (1961) (Harlan, J., concurring in the result); NAACP v. Alabama, 357 U.S. 449, 460-63 (1958) (Harlan, J.).

8. *See generally*, L. HAND, THE BILL OF RIGHTS (1958); W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

9. *See generally*, Ash, *The Growth of Justice Black's Philosophy of Freedom of Speech: 1962-66*, 1967 WIS. L. REV. 840; C. L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights* in THE OCCASIONS OF JUSTICE 89 (1963); Black & Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967); Krislov, *Mr. Justice Black Reopens the Free Speech Debate*, 11 U.C.L.A. L. REV. 189 (1964).

10. *E.g.*, Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); NAACP v. Alabama, 357 U.S. 449 (1958).

11. *See* Garner v. Louisiana, 368 U.S. 157, 185 (1961) (Harlan, J., concurring in the result); Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

12. *See, e.g.*, Chapman v. California, 386 U.S. 18, 47 (1967) (Harlan, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting); Reynolds v. Sims, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting). Justice Harlan's varying positions in relation to other Justices points up the difficulty, if indeed not the futility, of assigning labels, such as "liberal" and "conservative," to members of the Court. *See also* Ash, *supra* note 9, at 850-51.

criticism that he presents a dizzying array of barely manageable doctrine.[13]

One caveat is in order before proceeding with the discussion: there does not appear in any Harlan opinion, series of opinions, or extrajudicial pronouncements, a consistent and concisely stated theory of the first amendment in relation to both the state and federal governments. Various elements must be drawn from a broad range of sources. Among the consequences produced by this circumstance are certain gaps, which must be filled by surmise and speculation.[14] Additionally, when dealing with materials drawn from disparate sources, one must resist the impression that Harlan would necessarily transport every specific element of a particular analysis into every other aspect of first amendment litigation.[15] In short, we must not be hasty in imposing an overall system upon Harlan's thought, if indeed inquiry should lead to the conclusion that no such system is intended.

I. General Philosophy

Before commencing a more particularistic elaboration of Justice Harlan's views concerning the scope of, and interrelation between, the first and fourteenth amendments, it may be useful to emphasize certain aspects of his overall conception of the function of the judicial process in the American governmental system. The reason for this preliminary excursus is that certain fundamental notions relating to federalism, separation of powers, and the primacy of the political (as opposed to the judicial) process permeate and underpin Justice Harlan's opinions in the first and fourteenth amendment areas.

Mr. Justice Harlan stands squarely in the tradition of those scholars and judges—pre-eminently James B. Thayer, Felix Frankfurter, and Learned Hand—who emphasized the deference which, as a matter of democratic principle, the judiciary should manifest toward judgments of the political branches, particularly the legislature.[16] Even in the case of a statute "manifestly unwise, harsh or out-of-date," Harlan has protested against the utilization of the power of judicial review as an instrument of legislative revision. Such a procedure, he has stated, would lead to:

> a substantial transfer of legislative power to the courts. A function more

13. *See* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 Sup. Ct. Rev. 267, 296-303; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 Sup. Ct. Rev. 1, 22-26.

14. *See generally* notes 73-91, 99-125, 169, 175-78, 183-84 *infra* and accompanying text.

15. *See generally, e.g.*, notes 73-91 *infra* and accompanying text.

16. *See generally* authorities cited note 8 *supra*.

> ill-suited to judges can hardly be imagined, situated as they are, and should be, aloof from the political arena and beholden to no one for their conscientious conduct. Such a course would also denigrate the legislative process, since it would tend to relieve legislators from having to account to the electorate. The outcome would inevitably be a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the blood stream of our system of government.[17]

Closely integrated with the notion of deference to the legislative judgment is the theory that the political processes, in the form of a bifurcated federal system, afford the best safeguard for the protection of individual liberty. Thus, in Harlan's view the framers of the Constitution relied:

> not primarily upon declarations of individual rights [specifically, the Bill of Rights] but upon the kind of goverment the Union was to have. And they determined that in a government of divided powers lay the best promise for realizing the free society it was their object to achieve.[18]

Another important ramification of the federal structure, in Harlan's view, is the progress anticipated from the broad freedom of experimentation retained by the states in the social and economic spheres.[19]

If the notion that Supreme Court Justices are to serve as Platonic Guardians[20] of liberty is firmly rejected, then the question arises as

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17. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963). *Compare* J. ROCHE, COURTS AND RIGHTS: THE AMERICAN JUDICIARY IN ACTION 121-23 (2d ed. 1966): ". . . [T]here is no sound justification for judicial policy-making. Essentially it is a Platonic graft on the democratic process —a group of wise men insulated from the people have the task of injecting truth serum into the body politic, of acting as an institutional chaperone to insure that the sovereign populace and its elected representative do not act unwisely.

"In other words, one is free to reject the democratic premise that the people, through their elected spokesman, are capable of self-government, but he should be aware of his élitism and its implications. . . .

"The judiciary rightfully has a strong and vital role to play in society: to insure that the 'principles of natural justice' are enforced in litigation, that citizens are not victimized by arbitrary and capricious government procedures, and, of course, that appropriate legal norms are applied in litigation between private parties. But it is not the function of judges to determine social and economic policy: their task is to apply those policies decided upon by the responsible organs of government to cases at bar."

18. Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A.J. 918, 920 (1964).

19. *See* Harlan, *supra* note 17, at 944. *Compare* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting): "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

20. The phrase is Learned Hand's. L. HAND, *supra* note 8, at 73. We may note in passing that even Justice Black has been known in recent years to quote Judge

to the proper role of the judiciary in regard to the preservation of individual rights. Preliminarily, Justice Harlan would emphasize the necessity for the application of neutral principles of constitutional law[21] which would fully preserve and promote the vitality of the federal system.[22] It is to be expected, therefore, that constitutional limitations upon the state and national governments will not be delineated in the same manner.[23] Nor can the limits of governmental power be defined without reference to the interest or power of the particular governmental unit, whether state or federal, in the regulation of the specific activity under consideration.[24] Furthermore, while the federal government is limited by the specific dictates of the Bill of Rights, Justice Harlan considers the due process clause of the fourteenth amendment to be doctrinally independent of the first eight amendments, requiring, in the procedural phase, "fundamental fairness"[25] and, substantively, "a freedom from *all substantial arbitrary impositions and purposeless restraints.*"[26]

Finally, it is pertinent to inquire whether Justice Harlan would recognize any interests or "preferred freedoms" which the judiciary should be particularly energetic to protect.[27] Mr. Justice Harlan has

Hand's admonitions concerning judicial self-restraint. *E.g.*, Powell v. Texas, 392 U.S. 514, 537 (1968) (Black, J., concurring).

21. "Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on *ad hoc* notions of what is right or wrong in a particular case." Harlan, *supra* note 17, at 944; *see* Harlan, *supra* note 18, at 920. *See also* A. BICKEL, THE LEAST DANGEROUS BRANCH 49-65 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

2. "These doctrines [federalism and separation of powers] lie at the root of our constitutional system. It is manifest that no view of the Bill of Rights or interpretation of any of its provisions which fails to take due account of them can be considered constitutionally sound." Harlan, *supra* note 18, at 920.

23. "[O]ur federalism not only tolerates, but encourages, differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness." *Id.*

24. "Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved." Roth v. United States, 354 U.S. 476, 504 (1957) (Harlan, J., dissenting).

25. *E.g.*, Griffin v. California, 380 U.S. 609, 616 (1965) (Harlan, J., concurring); Malloy v. Hogan, 378 U.S. 1, 20-22 (1964) (Harlan, J., dissenting).

26. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (emphasis added). Justice Harlan has also indicated that procedural issues should be more closely scrutinized by the courts on the theory that "these are questions which the Constitution has entrusted at least in part to courts, and upon which courts have been understood to possess particular competence." *In re* Gault, 387 U.S. 1, 70 (1967) (separate opinion of Harlan, J.). It is somewhat paradoxical, however, that some of Justice Harlan's broadest opinions have concerned substantive rights, while he has almost consistently dissented to the application of new procedural limitations upon the states. *Compare* cases cited note 11 *supra with* cases cited note 12 *supra*.

27. It may be noted in passing that even Judge Learned Hand, hardly an advocate of far-reaching judicial review, conceded that issues involving the freedom of speech

noted that "certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment"[28] and that when dealing with "what must be considered 'a basic liberty' "[29] the ordinary presumption of the constitutionality of a legislative enactment is inapplicable.[30] However, since the due process concept of the fourteenth amendment "stands . . . on its own bottom,"[31] separate and apart from the Bill of Rights, there is no mechanical litmus test to designate "those rights 'which are . . . fundamental; which belong . . . to the citizens of all free governments.' "[32]

As to basic first amendment theory, one would not ordinarily characterize Harlan's views as positing a preferred position for speech in all contexts.[33] Certainly it is commonly believed that Justice Harlan would not extend protection to speech in the penumbral areas of the first amendment to the same extent as Justice Black.[34] Rather, in

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might require greater vigilence by the courts. He reasoned that "the most important issues here arise when a majority of the voters are hostile, often bitterly hostile, to the dissidents against whom the statute is directed; and legislatures are more likely than courts to repress what ought to be free. It is true that the periods of passion or panic are ordinarily not very long, and that they are usually succeeded by a serener and more tolerant temper; but, as I have just said, serious damage may have been done that cannot be undone, and no restriction is ordinarily possible for the individuals who have suffered. This is a substantial and important advantage of wide judicial review." L. HAND, *supra* note 8, at 69.

28. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

29. *Id.* at 545.

30. *See, id. See also* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . [Citations omitted.]"

31. Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

32. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

33. *But see* NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (Harlan, J.); notes 93-125 and accompanying text, *infra*.

34. *Compare*, for example, the majority opinions by Justice Harlan in Barenblatt v. United States, 360 U.S. 109 (1959) and Konigsberg v. State Bar of California, 366 U.S. 36 (1961), *with* the dissents of Justice Black in both of these cases. This is not to say that in all cases Justice Black would extend greater protection to "speech" than would Justice Harlan. A major difficulty, of course, is the definition of the scope of the term "speech." Justice Black adheres to sharp speech/conduct and direct-effect-upon-speech/indirect-effect-upon-speech dichotomies. *See* Barenblatt v. United States, *supra*, at 143-44 (Black, J., dissenting); Freund, *supra* note 9, at 471. *See generally* Ash, *supra* note 9. Justice Harlan, on the other hand, has declined to impose such rigid distinctions. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 452-55 (1963) (Harlan, J., dissenting). Thus, in Garner v. Louisiana, 368 U.S. 157 (1961), Harlan was the only Justice who specifically bottomed his opinion on the theory that a sit-in demonstration constituted constitutionally protected "speech." *See generally* notes 126-134 *infra* and accompanying

Harlan's view, it is frequently necessary to characterize the content and status of the speech, the circumstances of its delivery, the government which seeks to regulate the activity and its interest in the regulation, and the degree to which the regulation actually impinges upon or restricts the otherwise protected activity.[35] Thus, only after a multifaceted inquiry can the degree of protection for the activity be more precisely defined. It is to the categorization of speech and the relative protection afforded to each category that we will subsequently turn in Parts II and III.

II. The Standard of Protection: The Problem of Federalism—"Incorporation" and Substantive Due Process

Before proceeding to Justice Harlan's view of the scope of protection in the speech area provided by the first and fourteenth amendments, we must examine Harlan's notion of the interrelation between these provisions. Initially, of course, Justice Harlan rejects as historically unsound the "incorporation" theory, which is so strenuously advocated by Mr. Justice Black[36] and which holds that section 1 of the fourteenth amendment is precisely co-extensive with the first eight amendments.[37] In addition, Justice Harlan is the only member of the present Court who explicitly rejects the notion of "selective incorporation," the process by which the Court has gradually, over a period of time, extended various limitations of the Bill of Rights to

text. Mr. Justice Douglas also reached the constitutional issues in *Garner*, but his opinion was bottomed on the notion that "a State may not constitutionally enforce a policy of segregation in restaurant facilities." Of course, this comparison between the views of Justices Harlan and Black must be qualified by the fact that in recent years the Justices have frequently reached the same result, whether in dissent as in Brown v. Louisiana, 383 U.S. 131 (1966), or as members of the majority. *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966). In this series of cases both Justice Harlan and Justice Black opposed a latitudinarian interpretation of the first and fourteenth amendment freedoms of speech, expression, and assembly.

35. *See generally* notes 73-178 and accompanying text, *infra*.

36. Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

37. No small amount of judicial sleight of hand is necessary to make sense of the "incorporation" notion. The doctrine has its genesis in Gitlow v. New York, 268 U.S. 652 (1925), in which the Supreme Court for the first time "assumed" that the first amendment's guarantee of freedom of speech was also a limitation upon the states by virtue of § 1 of the fourteenth amendment. The *Gitlow* Court, however, infatuated as it was by the judicially-created dogma of "substantive due process," utilized the due process clause of the fourteenth amendment for this first act of "incorporation," and it is the due process clause which has been rather consistently employed throughout the subsequent evolution of "selective incorporation." *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (searches and seizures); Shelton v. Tucker, 364 U.S. 479 (1960) (association); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); Schneider v. New Jersey, 308 U.S. 147 ((1939) (speech, press). *See also* Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation and

the states through the fourteenth amendment.[38] Aside from the historical evidence (itself persuasive if indeed not conclusively opposed to both "incorporation" notions[39]), in the Harlan view the mere mechanical application of the first eight amendments to the states, together with the total body of federal law surrounding them,[40] fails utterly to take into account the fact that the powers and responsibilities of the state and federal governments are not identical.[41]

cross-examination of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Robinson v. California, 370 U.S. 660 (1962) (cruel and unusual punishment); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment of religion). The latter cases refer only to § 1 of the fourteenth amendment generally; however, there is little indication that reliance is intended to be placed upon any other provision than the due process clause.

38. It will be noted that "selective incorporation" describes a process of judicial interpretation rather than a fullblown theory of constitutional doctrine. "Selective incorporation" is sometimes associated with Mr. Justice Brennan and apparently is adhered to, or acquiesced in, by most of the members of the present Court. At this juncture, the only significant provisions of the first eight amendments which have not been applied to the states are the grand jury indictment and double jeopardy sections of the fifth amendment and the requirement of a jury trial in civil cases involving more than $20 imposed by the seventh amendment.

39. The use of the due process clause for "total incorporation" purposes is historical nonsense. To the extent that the fourteenth amendment was intended to impose the limitations of the Bill of Rights upon the states, it seems clear that the privileges and immunities clause was the intended medium. *See, e.g.*, Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 *passim* (1949); Comment, 42 N.C. L. REV. 925, 934-35 (1964). This distinction is not merely a case of excessive concern for historical niceties and legalistic fine-points; in at least one respect the reach of the due process clause is obviously greater than that of the privileges and immunities clause: the former extends protection to "any person," while the latter is limited to "citizens of the United States." Of course, aside from debating *which* clause of the fourteenth amendment was intended to incorporate the Bill of Rights, many authorities deny that any incorporation was sought to be achieved in the first place by the framers of the fourteenth amendment. *See* Fairman, *supra*; HARRIS, THE QUEST FOR EQUALITY 39-40 (1960); TEN BROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951); Graham *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938); Comment, 42 N.C.L. REV. 925 (1964). *But see* 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1083, 1119 (1953); FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908). Whatever the conclusion as to the historical validity of the "total incorporation" doctrine, it has been suggested that the notion of "selective incorporation" is wholly lacking in a sound historical foundation. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 934 (1965); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 77-78 (1963).

Justices Black and Harlan renewed the battle over the historical legitimacy of the "incorporation" doctrine in their concurring and dissenting opinions respectively in Duncan v. Louisiana, 392 U.S. 947 (1968).

40. Malloy v. Hogan, 378 U.S. 1, 27 (1964).

41. "The powers and responsibilities of the state and federal governments are not congruent; under our Constitution, they are not intended to be. Why should it be thought, as an *a priori* matter, that limitations on the investigative power of the States are in all respects identical with limitations on the investigative power of the Federal Government?" (Harlan, J., dissenting); *Compare* Friendly, *supra* note 38, at 935-38, 953-56; Duncan v. Louisiana, 392 U.S. 947 (1968) (Fortas, J., concurring).

Hence, the "creeping paralysis"[42] of the "incorporation" doctrine is condemned as placing the states in a constitutional strait jacket.[43] Thus, while Justice Harlan has in recent years occasionally joined the majority in reversing a conviction because particular procedural safeguards were deemed lacking,[44] he has invariably and scrupulously disassociated himself from a mechanical application of the first eight amendments to the states.[45]

If the Bill of Rights does not apply to the states through the medium of the fourteenth amendment, then the reach of the due process clause of that amendment remains to be determined. The most extensive elaboration by Mr. Justice Harlan of his concept of due process in the procedural sphere is probably contained in his dissenting opinion in *Malloy v. Hogan*.[46] There Harlan emphasized that due process is a manifestation of "the community's sense of justice,"[47] the development of which may gradually produce an "expansion of the protection which due process affords."[48] Thus, it is important to note that the Justice conceives of due process as an evolutionary rather than a static concept. Furthermore, he considers the due process provision of the fourteenth amendment to be conceptually independent of the Bill of Rights and argued in *Malloy* that "while inclusion of a particular provision in the Bill of Rights might provide *historical evidence* that the right involved was traditionally regarded as fundamental,"[49] nevertheless the "Court's usual approach has been to ground the prohibitions against state action squarely on due process, without intermediate reliance on any of the first eight Amendments."[50] Therefore, Justice Harlan protested that the Court in *Malloy* had failed to restrict its review of the challenged state action to its proper scope, namely, "inquiring whether the proceedings below met the demands of *fundamental fairness* which due process embodies."[51]

It will of course be noted that once the concept of due process is

42. Griffin v. California, 380 U.S. 609, 616 (1965) (Harlan, J., concurring).

43. Ker v. California, 374 U.S. 23, 45 (1963) (Harlan, J., concurring); *see* Washington v. State of Texas, 388 U.S. 14, 24 (1967) (Harlan, J., concurring); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (Harlan, J., concurring); Chapman v. California, 386 U.S. 18, 46-51 (1967) (Harlan, J., dissenting); Griffin v. California, 380 U.S. 609, 616-17 (1965) (Harlan, J., concurring); Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring).

44. *E.g.*, Washington v. Texas, 388 U.S. 14 (1967); Griffin v. California, 380 U.S. 609 (1965); Gideon v. Wainwright, 372 U.S. 335 (1963).

45. *See* cases cited notes 43-44 *supra*.

46. 378 U.S. 1, 14 (1964).

47. *Id.* at 15.

48. *Id.*

49. *Id.* at 22 (emphasis added).

50. *Id.* at 24.

51. *Id.* at 28 (emphasis added).

severed from the specific requirements of the Bill of Rights, there is no inherent reason why the due process guarantee might not be extended beyond the protection which the first eight amendments afford.[52] However, Justice Harlan has not demonstrated this theoretical possibility in the criminal procedure area, largely because a majority of the present Court has manifested virtually unrestrained enthusiasm to impose strict procedural guarantees upon the states.[53] Justice Harlan has generally protested against this trend, occasionally acquiescing or expressing his concurrence on independent due process grounds.[54] On the other hand, in areas other than criminal procedures, Mr. Justice Harlan has established that his concept of substantive due process provides a vehicle for the protection of individual rights in instances not specifically covered by the Bill of Rights. The major battleground in the substantive due process area has been in the field of enforcement by the states of laws prohibiting the use of contraceptive devices, and the dissemination of medical advice on contraceptives. When the pertinent Connecticut statutes were challenged in *Poe v. Ullman*[55] in 1961, the majority employed one of the "passive virtues"[56] and dismissed the case on ripeness grounds. Justice Harlan wrote a vigorous dissent in which he rejected both the "incorporation" doctrine[57] and the argument that the due process guarantee was limited to procedural fairness.[58]

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52. In Adamson v. California, 332 U.S. 46 (1947), in which Justice Black articulated his "incorporation" notion, Justices Murphy and Rutledge urged that the fourteenth amendment not be limited to the Bill of Rights: "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. *Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.*" 332 U.S. at 124 (Murphy, J., dissenting) (emphasis added). Thus, Justices Murphy and Rntledge essentially would have combined the Black and Harlan notions of due process into a single theory of the fourteenth amendment.

53. *See, e.g.*, cases cited notes 43-44 *supra*. *See generally* Friendly, *supra* note 38.

54. *See, e.g.*, cases cited notes 43-44 *supra*.

55. 367 U.S. 497 (1961).

56. *See generally* A. BICKEL, *supra* note 21, at 143-56.

57. In addition to historical grounds concerning the intention of the fourteenth amendment framers, Justice Harlan relied on the fact that both the fifth and the fourteenth amendments contain identical due process clauses. This factor "suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [of the first eight amendments]." 367 U.S. at 542.

58. *Id.* at 540. Justice Harlan's argument for a substantive aspect to due process is that without such a limitation governmental action could destroy liberty and property entirely, assuming only that procedural fairness was employed. Presumably, the argument is that possible deprivation through procedural fairness necessarily presupposes and requires the existence of life, liberty, and property, with respect to which

In the *Poe* case, Justice Harlan conceded (or asserted) that due process cannot be reduced to a single formula; rather, "it has represented the balance which our Nation, built upon postulates of respect to the liberty of the individual, has struck between that liberty and the demands of organized society."[59] In a formulation which is clearly susceptible of a broad interpretation, Harlan noted that "the full scope of the liberty guaranteed by the Due Process Clause . . . includes a freedom from *all substantial arbitrary imposition and purposeless restraints.*"[60] Embracing the right of privacy notion expounded in Mr. Justice Brandeis' eloquent dissent in *Olmstead v. United States*,[61] Justice Harlan asserted that the Connecticut statutes demanded "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy,"[62] which "by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense."[63] Consequently, the Justice would have reversed the convictions, holding the anti-contraceptive statutes unconstitutional as applied to married couples.

The same Connecticut statutes came under renewed attack in *Griswold v. Connecticut*,[64] although this time the opponents of the state legislation mustered a decisive majority of the Court to their side.[65] The thrust of Justice Harlan's concurring opinion attacked the po-

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the procedures may be employed. "Thus the guaranties of due proeess, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks against arbitrary legislation.'" *Id.* at 541, *quoting* Hurtado v. California, 110 U.S. 516, 532 (1884).

59. *Id.* at 542.

60. *Id.* at 543 (emphasis added). The formulation is repeated in Washington v. State of Texas, 388 U.S. 14, 24 (1967) (Harlan, J., concurring), but it has not otherwise surfaced or been extensively developed in other contexts.

61. 277 U.S. 438, 478 (1928), *overruled by*, Katz v. United States, 389 U.S. 347 (1967).

62. 367 U.S. at 553.

63. *Id.* at 548. The notion of marital privacy is no doubt felt by many to constitute "a most fundamental aspect of 'liberty.'" However, such a proposition is not readily susceptible of extensive documentation. Thus, Justice Harlan's argument contains little more than bare assertion. Mr. Justice Goldberg, who took a similar tack in *Grisworld v. Connecticut*, was likewise plagued by a paucity of evidence to sustain the position that there is a fundamental right of marital privacy recognized by the English-speaking world.

64. 381 U.S. 479 (1965).

65. *Griswold* produced a grand total of six opinions. Mr. Justice Douglas wrote the opinion for the Court. Mr. Justice Goldberg wrote an opinion for himself, the Chief Justice, and Mr. Jnstice Brennan in which he concurred in the opinion and judgment of the Court. Justices White and Harlan each separately concurred in the judgment of the Court. Justices Black and Stewart each wrote dissenting opinions, in which the other joined.

sition, implicit in the majority view and explicit in the dissents,[66] that the "incorporation" doctrine could properly be used to *restrict* the reach of the fourteenth amendment.[67] Thus, just as it was deemed historically unsound to *impose* the full panoply of federal law surrounding the first eight amendments upon the states, so also did Justice Harlan consider it improper to *limit* the contours of the fourteenth amendment's due process clause to the confines of the first eight amendments.

In his dissent in *Poe v. Ullman,* Justice Harlan had anticipated the charge that his approach to interpretation of the due process clause would allow judges "to roam where unguided speculation might take them."[68] On the contrary, he insisted, judges are bound by the historical traditions of the American governmental experience. Thus, a decision of the Supreme Court "which radically departs from . . . [this tradition] could not long survive, while a decision which builds on what has survived is likely to be sound."[69] In *Griswold,* Justice Harlan attacked the implication of the dissents[70] that "judicial self-restraint" required that the due process clause be deemed co-extensive with the "specific" provisions of the first eight amendments. He noted that the "specific" provisions were no more effective than the due process clause in restraining some members of the Court from rendering "personal" interpretations to keep the Constitution in "tune with the times."[71] The Justice concluded that judicial self-restraint can be achieved:

66. *See* 381 U.S. at 481-84, 510-21 (Black, J., dissenting), 530-31 (Stewart, J., dissenting).

67. *Id.* at 500-01. Justice Goldberg agreed with Justice Harlan that § 1 of the fourteenth amendment is not properly restricted to the contours of the Bill of Rights: "Although I have not accepted the view that 'due process' as used in the Fourteenth Amendment incorporates all of the first eight Amendments . . . , I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Right." *Id.* at 486.

68. 367 U.S. at 542.

69. *Id. Compare* Rochin v. California, 342 U.S. 165, 170-71 (1952) (Frankfurter, J.): "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession."

70. 381 U.S. at 511-13, 519-27 (Black, J., dissenting), 530-31 (Stewart, J., dissenting).

71. *Id.* at 501. It could hardly be asserted persuasively that the approach of Justices Douglas or Goldberg would add significantly more certainty than the substantive due process conceptions of Justice Harlan. Mr. Justice Douglas in his penumbral approach managed to combine haphazardly the first, third, fourth, fifth, and ninth amendments, while Justice Goldberg blended the penumbral theory of the majority and the substantive due process notion of Justice Harlan with a revivified ninth amendment of uncertain scope. *See* 381 U.S. at 488-97. And one can hardly resist

> only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have playcd in establishing and preserving American freedoms.[72]

As we have seen, Justice Harlan would apply a less strict standard to the states in the area of criminal procedure under the rubric of "fundamental fairness," and in some circumstances, he would employ a concept of substantive due process which would impose limitations more extensive than those required by the Bill of Rights (strictly construed without extensive penumbras). It is now necessary to focus more closely upon the narrower question of the relation between fourteenth amendment due process and the first amendment's guarantee of the freedom of speech. The question may be posed in the following form: Would Justice Harlan impose the first and fourteenth amendments' limitations in the free speech area upon the federal government and the states in precisely the same manner? Or, alternatively stated, would the Justice accept the notion that at least the first amendment is "incorporated" in the fourteenth? The short answer to both queries is "no" with qualifications, but the ramifications of the Harlan doctrine are not simple to chart.

Initially, it should be noted that Justice Harlan has quoted with approval the dictum of Mr. Justice Holmes, dissenting in *Gitlow v. New York*,[73] in which Justice Holmes intimated that divergent standards may be appropriate under the first and fourteenth amendments:

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the observation that Justices Black and Stewart, in search of certainty in an uncertain world, are pursuing an illusion to the extent that their view finds specificity in the first eight amendments.

In addition, there are distinct overtones in Justice Stewart's dissent (*see id.* at 528), echoed by the majority (*see id.* at 481-82), that the Harlan approach represented a return to the bad old days when the Supreme Court invoked substantive due process "to substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws" (*id.* at 528, quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). One possible retort is that Justices Black and Stewart both hold a concept of substantive due process, which is given content through the "incorporation" theory. Apart from the shaky historical rationale, there appears to be no reason why the scope of a doetrine of substantive due process, if one insists upon having such a doctrine, should be delineated by the Bill of Rights. Additionally, to the argument that a substantive due process dogma *could* be applied again in the strictly social and economic areas to supervise state and federal legislation, the short answer is that no member of the present Court has suggested such a course. If the question is why in Harlan's view "fundamental individual liberties" are selected for special protection, then this is a question which all of the Justices, hardly excluding Justice Black, must confront. The answer is, I suppose, that respect for individual liberties is deeply rooted in our "concept of ordered liberty" (Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)), part of "what history teaches are the traditions" of the American political experience. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

72. 381 U.S. at 501.

73. 268 U.S. 652 (1925).

> The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a *somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.*[74]

Since Justice Harlan quoted this passage in the course of a discussion which attempted to demonstrate that the Supreme Court had traditionally distinguished sharply between the application of the Bill of Rights and the fourteenth amendment,[75] it is at least plausible that the Justice, as a matter of general theory, would define differently the standards imposed by the first and fourteenth amendments in the speech area.

However, it is only in the series of obscenity cases, commencing with *Roth v. United States* and *Alberts v. California*,[76] that Justice Harlan has explored in any detail the theory that the fourteenth amendment affords lesser protection to speech than does the first amendment. It will be recalled that in *Roth-Alberts* the majority, through Mr. Justice Brennan, developed a two-level theory, according to which certain specified categories of speech are deemed to be totally without the constitutional protection of the first amendment.[77] Justice Harlan, in his separate opinion, did not specifically address himself to the majority's theory, but rather analyzed the cases in terms of the differing ambits of the first and fourteenth amendments and the divergent interests of the state and national governments in the regulation of obscene materials. Thus, Justice Harlan denied that the:

> state and federal powers in this area are the same, and that just because

74. *Id.* at 672 (emphasis added). *See also* United States v. Dennis, 183 F.2d 201, 208 (2d Cir. 1950) (L. Hand, J.).

75. Malloy v. Hogan, 378 U.S. 1, 25 (1964) (Harlan, J., dissenting).

76. 354 U.S. 476 (1957). See also Ginsberg v. New York, 390 U.S. 629, 704 (1968) (Harlan, J., concurring); Mishkin v. New York, 383 U.S. 502, 515 (1966) (Harlan, J., concurring); A book named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 455 (1966) (Harlan, J., dissenting); Jacobellis v. Ohio, 378 U.S. 184, 203 (1964) (Harlan, J., dissenting).

77. "The dispositive question is whether obscenity is utterance within the area of protected speech and press." 354 U.S. at 481. "'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .*'" [quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (Murphy, J.) (emphasis added)]. *Id.* at 485. "We hold that obscenity is not with the area of constitutionally protected speech or press." *Id.* (Brennan, J.).

> the State may suppress a particular utterance, it is automatically permissible for the Federal Government to do the same. I agree with Mr. Justice Jackson that the historical evidence does not bear out the claim that the Fourteenth Amendment "incorporates" the First in any literal sense.[78]

Noting that the federal government has "no substantive power over sexual morality,"[79] but only an incidental interest in obscene materials through the postal power, and that, on the other hand, the states bore "direct responsibility for the protection of the local moral fabric,"[80] Justice Harlan concurred in the affirmance of the state judgment of conviction in *Alberts* while dissenting to the federal conviction in *Roth.* Combining his analysis of the first and fourteenth amendments and his discussion of the respective governmental interests, Justice Harlan concluded that "both the letter and spirit of the First Amendment"[81] constitutionally limited the federal government to regulation of the narrow area of " 'hard-core' pornography,"[82] while state regulation would survive constitutional scrutiny unless it "so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power."[83]

If the theoretical framework were complete at this point, we would have a basis for analyzing the reach of governmental power under the first and fourteenth amendments, regardless of how difficult the application of the due process rationality criterion might be in a particular case.[84] However, in other instances of free speech adjudication, Justice Harlan has indicated that stricter limitations may be imposed upon

78. 354 U.S. at 503. Justice Harlan's citation is to Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting): "The assumption of other dissents [by Douglas, Black, and Reed, JJ.] is that the 'liberty' which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical 'freedom of speech or the press' which the First Amendment forhids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not 'incorporate' the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not." *Id.* at 288. Nevertheless, Mr. Justice Jackson found the Illinois group libel statute under attack to be constitutionally deficient because it failed to permit a jury determination of various critical issues. *Id.* at 299-305.

79. 354 U.S. at 504.

80. *Id.*

81. *Id.* at 506.

82. *Id.* at 507.

83. *Id.* at 501. "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." A book named "John Cleland's Memoirs of a Woman of Pleasure" v. Massaehusetts, 383 U.S. 413, 458 (1966) (Harlan, J., dissenting).

84. The test on the federal level is not entirely clear, however, even as to its proper formulation. *See* Kalven, *The Metaphysics of the Law of Obscenity,* 1960 SUP. CT. REV. 1, 24-25.

the states.[85] Furthermore, while not explicitly adopting the majority's two-level theory of speech in his *Roth-Alberts* opinion, Justice Harlan did state in his majority opinion in *Konigsberg v. State Bar of California* that "certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection."[86] Finally, Justice Harlan has cited first amendment authority in cases imposing limitations upon state action with the acknowledgment that "[p]rinciples of free speech are carried to the States . . . through the Fourteenth Amendment."[87]

In an attempt to rationalize these various disparate elements, we are left with the following solution: There are two broad classes of speech, one of which is entitled to full constitutional protection (however that may be defined)[88] against limitations imposed by either the

85. "The guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed.) Our touchstones are that acceptable limitations must not affect 'the impartial distribution of news' and ideas, Associated Press v. Labor Board . . . [301 U.S. 103, 133 (1937)], nor because of their history or impact constitute a special burden on the press, Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936), nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." Curtis Publishing Co. v. Butts, 388 U.S. 130, 150-51 (1967) (plurality opinion of Harlan, J.). *See also,* NAACP v. Alabama, 357 U.S. 449, 460-62 (1958).

86. 366 U.S. 36, 50 (1961). In support of the textual proposition, and as an indication of the classes of speech which Justice Harlan would presumably hold not entitled to constitutional protection, the following cases were cited: Schenck v. United States, 249 U.S. 47 (1919) (conspiracy to cause insubordination in the military; conspiracy to obstruct the recruiting and enlistment service of the United States); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words;" also, in dictum, obscenity, profanity, and libel); Dennis v. United States, 341 U.S. 494 (1951) (advocacy of the violent overthrow of the government); Beauharnais v. Illinois, 343 U.S. 250 (1952) (group libel); Yates v. United States, 354 U.S. 298 (1957) (incitement to the overthrow of the government by violence); Roth v. United States, 354 U.S. 476 (1957) (obscenity). Justice Harlan's recognition of the two-level theory of speech can also be gleaned from a comparison of his analysis of substantive due process in *Poe* and *Griswold* and his approach to obscenity in *Alberts v. California.* In each instance there was an admittedly legitimate state interest, broadly speaking, the preservation of the moral fabric of the community. In *Poe* and *Griswold* the means adopted to attain this end were held to collide with a fundamental right, broadly, a right to privacy in the marital relationship. On the other hand, pursuing this same state interest in *Alberts,* the state could completely suppress the composing and distributing of obscene materials. Obviously, therefore, the latter activities could not constitute a fundamental right. Any suggestion that Justice Harlan would exclude speech entirely from his fundamental rights category ignores the opinions that he has written or concurred in which accord broad protection to speech. *See, e.g.,* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (Brennan, J.); Garner v. Louisiana, 368 U.S. 157, 201-04 (1961) (Harlan, J., concurring); *supra* note 85. The only conclusion is that some forms of speech are entitled to greater protection than others.

87. McLaughlin v. Florida, 379 U.S. 184, 197 (1964) (Harlan, J., concurring).

88. *See generally* notes 95-125 *infra* and accompanying text.

state or the federal government, the other of which merits no special constitutional protection. That is to say, the latter category is assimilated to conduct and may be regulated by either the state or federal government in the same manner that any other conduct may be regulated, subject only to the general due process restriction against arbitrary and capricious governmental actions.[89] So much is more or less orthodox thought.

There is, however, a third, intermediate category of speech which is unique to Harlan's theories, in which divergent degrees of protection are afforded depending upon whether the regulation in question was promulgated by the state or the federal government. This form of speech may be said to be partially protected, at least to the extent that regulation by the *federal* government is sharply limited. The only example of a class of speech which has been placed explicitly in this third category is obscenity,[90] and it is in the delineation of this third class of speech that Justice Harlan has definitely parted company with his brethren on the present Court.[91]

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89. *See* note 83 *supra* and accompanying text. The general due process prohibition against arbitrary legislation is set out in such cases as Nebbia v. New York, 291 U.S. 502 (1934).

90. It is quite possible that if the occasion arose for extended analysis, Justice Harlan would assimilate some of the classes of speech in the unprotected category (*see* note 86 *supra*) into the third category which would allow greater regulation by the states than by the federal government. It will be recalled that Mr. Justice Jackson in his dissent in *Beauharnais* assumed that the federal government could not constitutionally enact a group libel statute (note 78 *supra*). In addition, it would appear that, since the states have the primary responsibility for maintaining order through local law enforcement agencies, the states aloue could punish such activity as the "fighting words" in *Chaplinsky*.

The only remaining class of speech in Justice Harlan's catalogue of unprotected activity (which, however, was not indicated to be exhaustive) is inciting advocacy of the overthrow of the government. By a curious twist, this advocacy if directed toward the federal government is punishable by the federal government alone, whereas if it is directed against the state government it is punishable by either the state or the federal government. *Compare* Pennsylvania v. Nelson, 350 U.S. 497 (1956), *with* Uphaus v. Wyman, 360 U.S. 72 (1959). This result was reached, however, by means of statutory construction of the Smith Act and not through the imposition of a constitutional command. Nevertheless, to the extent that surmise is possible, the only two classes of speech which may be suppressed, in Justice Harlan's view, by *either* the state or federal government are hard-core pornography and inciting advocacy of the overthrow of the *state* government.

91. "It is too late in the day to argue that the location of the line is different, and the task of ascertaining it easier, when a state rather than a federal obscenity law is involved. The view that the constitutional guarantees of free expression do not apply as fully to the States as they do to the Federal Government was rejected in Roth-Alberts . . . , where the Court's single opinion applied the same standards to both a state and a federal conviction." Jacobellis v. Ohio, 378 U.S. 184, 187 n.2 (1964) (opinion of Brennan, J., joined by Goldberg, J., announcing the judgment of the Court).

III. THE SCOPE OF PROTECTION: THE "BALANCING" PROBLEM AND A CENTRAL CORE OF ABSOLUTE PROTECTION

Thus far we have concentrated largely upon the standard of protection afforded to speech and related liberties and, more specifically, upon the question whether identical constitutional limitations are imposed upon the state and federal governments. Heretofore the analysis has been pursued by noting that implicit in Justice Harlan's thought is the classification of the various forms of speech according to their *content* as "protected," "unprotected," and "partially protected." The assumption has been that the governmental action in issue was designed to suppress completely a particular class of speech.

We shall now shift the focus slightly to isolate the "fully protected" category of speech and attempt to determine the scope of protection which Justice Harlan would afford to this particular class against varying degrees of governmental infringement, ranging from suppression on the one hand to a mere incidental effect upon the protected activity on the other. In short, we shall consider the breadth or reach of the constitutional immunities, particularly when countervailing governmental interests in certain forms of regulation are arguably present. At this point is raised the multitude of issues commonly associated with the controversy over whether governmental and private interests should be "weighed" or "balanced" to determine the scope of protection to be afforded by the first amendment. The controversy reached its zenith in *Konigsberg v. State Bar of California*[92] and *Barenblatt v. United States*,[93] both five-to-four decisions in which Justice Harlan wrote the majority opinions for the "balancers" and Justice Black spoke for the antibalancing "absolutists."[94]

Much has been written concerning the balancing controversy.[95] It

92. 366 U.S. 36 (1961). There are two cases, involving the same series of litigation, denominated Konigsberg v. State Bar of California, the first of which appears at 353 U.S. 252 (1957) (Black, J.). It is only the second decision, appearing at 366 U.S. 36 (1961) (hereinafter referred to as Konigsberg II) which is relevant to the present discussion.

93. 360 U.S. 109 (1959).

94. In the following discussion, our concern is primarily with Justice Harlan's theoretical framework, that is, with the questions as to when he would utilize the balancing device and whether one side of the scale should be more heavily weighted than the other. The emphasis will not be upon a critique of the definition of particular interests in specific cases. Nevertheless, it should be emphasized that even if there is agreement as to the theory to be employed there may be great differences concerning the proper definition of the interests involved. Thus, Mr. Justice Black in his *Barenblatt* dissent insisted at length that even if the majority had properly employed the balancing technique they had nevertheless failed properly to delineate the respective interests at stake. *Id.* at 144-53. *See also* Krislov, *Mr. Justice Black Reopens the Free Speech Debate*, 11 U.C.L.A. L. REV. 189, 208 (1964).

95. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 84-98 (1962); H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 120-21 (1965); P. KAUPER, CIVIL

has been stated that the dispute does not, in fact, concern broad philosophical differences relating to the proper interpretaton of the first amendment as much as the narrower issue of the judicial approach to be adopted with respect to certain types of regulatory actions taken by the government which do not directly control the content of speech, but nevertheless restrict in some measure its unfettered exercise.[96] Thus, it is clear that in some circumstances Mr. Justice Black will endorse the balancing approach.[97] On the other hand, it

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LIBERTIES AND THE CONSTITUTION 114-17 (1961); Black & Cahn, *Justice Black and the First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962); Brandwen, *The Battle of the First Amendment: A Study In Judicial Interpretation*, 40 N.C. L. REV. 273 (1962); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 907-18 (1963); Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424 (1962); Frantz, *Is the First Amendment Law?* 51 CALIF. L. REV. 729 (1963); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428 (1967); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1; Kalven, *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 U. CHI. L. REV. 315 (1960); Kalven & Steffen, *The Bar Admission Cases: An Unfinished Debate Between Justice Harlan and Justice Black*, 21 LAW IN TRANSITION 155 (1961); Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. REV. 1 (1965); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75; Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP CT. REV. 245; Meiklejohn, *The Barenblatt Opinion*, 27 U. CHI. L. REV. 329 (1960); Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Mendelson, *The First Amendment and the Judicial Process*, 17 VAND. L. REV. 479 (1964); Nutting, *Is the First Amendment Obsolete?*, 30 GEO. WASH. L. REV. 167 (1961).

96. Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1428-31 (1962); Frantz, *Is the First Amendment Law?*, 51 CALIF. L. REV. 729, 730-31 (1963); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 442-44 (1967); Kalven & Steffen, *supra* note 95, at 174-77; *see* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 216-17; Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. REV. 1, 22-24 (1965).

The textual formulation implies that there are two basic forms of regulation—one directed to the content of speech, the other aimed at conduct but which may incidentally or indirectly affect speech. If speech and conduct could be neatly compartmentalized into distinct categories of a mutually exclusive nature, then the theoretical framework would be relatively easy to dclineate. However, Justice Harlan has recognized that speech-conduct constitutes a continuum and that "as we move away from speech alone and into the sphere of conduct—even conduet associated with speech or resulting from it—the area of legitimate governmental interest expands." NAACP v. Buttou, 371 U.S. 415, 454 (1963) (Harlan, J., dissenting). Thus, a line drawn simply on a speech/conduct basis will be insufficient, and further distinctions will have to be attempted. *See* notes 34 *supra* and 126-178 *infra* and accompanying text.

97. "There are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. With these cases I

is somewhat less clear, but nevertheless highly probable, that Justice Harlan would reject the balancing technique in certain situations.[98]

In describing Justice Harlan's approach to the regulation of speech, it may be well to approach the matter systematically by inquiring initially whether the Justice would recognize a central core of speech content which is *absolutely immune* from governmental regulation, irrespective of alleged countervailing interests. Some commentators suggest an affirmative answer,[99] although it must be acknowledged that Justice Harlan has not addressed this point with unmistakable clarity.[100]

Nevertheless, there are indications that Justice Harlan would, in fact, recognize a central core of absolute protection for some forms of speech. Thus, in the course of the opinion in *Konigsberg II*, Harlan stated:

> At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," *not only in the undoubted sense that where the constitutional protection*

agree. Typical of them are Cantwell v. Connecticut, 310 U.S. 296, and Schneider v. Irvington, 308 U.S. 147. Both of these involved the right of a city to control its streets. . . ." Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting).

98. *See generally* notes 99-146 *infra* and accompanying text.

Mr. Justice Harlan's opinions do not pursue deference to the legislative judgment and balancing of interests with the vigor manifested by Mr. Justice Frankfurter in the following passages: "Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures, and *the balance they strike is a judgment not to be displaced by ours*, but to be respected unless outside the pale of fair judgment." Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring) (emphasis added); "To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighted the value to the public of the ends which the regulation may achieve." Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961). It has been suggested that Justice Frankfurter always found balancing appropriate in first amendment cases. *See* Krislov, *supra* note 94, at 198-99. *See also* Frantz, *The First Amendment in the Balance*, 71 YALE L. J. 1424, 1428-31 (1962).

99. *See, e.g.*, Frantz, *supra* note 98, at 1431 & n.43; Frantz, *Is the First Amendment Law?*, 51 CALIF. L. REV. 729, 731 (1963); Kalven, *Upon Rereading Mr. Justice Black on the First Amendment*, 14 U.C.L.A. L. REV. 428, 442 (1967); Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 216; Karst, *supra* note 96, at 22.

100. It must be noted, however, that most of the cases which are brought to the Supreme Court are the "difficult" ones where the line between constitutionality and unconstitutionality may be incapable of easy delineation. In many of such cases consideration of the countervailing governmental interest would be, in Justice Harlan's view, both appropriate and indispensable. The "easy" case, clearly manifesting activity within the central core of absolute protection (such as press criticism of the government carried on in the face of a statute forbidding that criticism), is rarely before the Court.

> *exists it must prevail,* but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.[101]

The thrust of the italicized section of this rather convoluted sentence appears to be that the content of speech which is determined to be within the scope of constitutional protection is absolutely free from abridgment, and the passage has been so interpreted.[102] Furthermore, in the immediately succeeding sentences of the *Konigsberg* opinion, Justice Harlan refers to "certain forms of speech, or speech in certain contexts"[103] which is without constitutional protection. This category of speech is juxtaposed with "general regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise. . . ."[104] Governmental regulation in these two areas may pass muster, but one may suppose that the negative implication of all of this is that a regulation *intended to control the content of speech which does not fall within a constitutionally unprotected* area would be held to be constitutionally infirm.

Justice Harlan reiterated his unprotected-speech/speech-incidentally-limited analysis in his dissenting opinion in *NAACP v. Button.*[105] After commencing with a relatively latitudinarian view of freedom of expression,[106] Harlan characterized the state statute under attack as one of a general regulatory nature, which at most would merely incidentally limit the unfettered exercise of speech/association. Therefore, the test was "to weigh the legitimate interest of the State against the effect of the regulation on individual rights."[107] What is interesting in the opinion is an extended discussion of the speech-

101. 366 U.S. at 49. (emphasis added).

102. The statement has been paraphrased in the following manner: "We reject the view that freedom of speech is an 'absolute' if the term 'absolute' comprehends 'not only' the uncontested proposition that when 'the constitutional protection exists it must prevail,' but also the additional propositiou, which we reject, 'that the scope of that protection must be gathered solely from a literal reading of the First Amendment.'" Frantz, *supra* note 98, at 1431 n.43. It may of course be argued that the phrase "where the constitutional protection exists it must prevail" is intended to suggest no more than that after the balancing process has been completed and it is determined that the individual interest outweighs the governmental interest, then the individual interest will prevail. This rendering, however, reduces the statement to an unuseful tautology: An interest which it has been previously determined shall prevail will prevail.

103. 366 U.S. at 50.

104. 366 U.S. at 50 (emphasis added).

105. 371 U.S. 415 (1963).

106. "Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and his right to join with his fellows in an effort to make that advocacy effective. . . . And just as it includes the right jointly to petition the legislature for redress of grievances, . . . so it must include the right to join together for purposes of obtaining judicial redress." *Id.* at 452-53.

107. *Id.* at 453.

conduct continuum, with the notation that progressively lesser protection is accorded as one moves from pure speech to pure conduct. However, the significance for our search for a central core of absolute protection is Harlan's catalogue of actions which the state may not undertake when regulating. Thus, the state "may not prohibit all informational picketing;"[108] "it may not prevent advocacy of union membership;"[109] it may not "wholly eliminate the right of collective action by workingmen;"[110] and it "surely may not broadly prohibit individuals with a common interest from joining together to petition a court for redress of their grievances."[111] These examples intimate the existence of a hard core of absolute constitutional protection which cannot be "balanced away."[112]

In a different area, that of libel actions instituted by public officials, Justice Harlan joined with the majority in *New York Times v. Sullivan*,[113] which defined a broad immunity for criticism of public officials, defeasible only upon a showing of actual malice or gross negligence.[114] Furthermore, there is much language in Harlan's

108. *Id.* at 454.
109. *Id.*
110. *Id.*
111. *Id.* at 455.
112. It must be noted that Justice Harlan imposes a clear and present danger test upon his analysis, albeit a strict one. Thus he states that "[a]bsent the gravest danger to the community, these rights [to associate, to discuss, and to advocate] must remain free from frontal attack or suppression . . . ." *Id.* The imposition of a clear and present danger test may be related to the notion of absolute protection for speech in at least two ways: (1) The speech which produces a clear and present danger may be assimilated to conduct (hence "verbal conduct") and as *conduct* may be regulated by the government. It may be noted in passing that this is the theory upon which Justice Black would allow punishment for shouting "fire" falsely in a crowded theatre. *See* Black & Cahn, *supra* note 95, at 558. It is also significant that when Justice Harlan in *Garner v. Louisiana* refers to a clear and present danger limitation upon speech he is evidently contemplating regulable conduct such as physical assault or rioting. *See* notes 130-134 *infra* and accompanying text. Also to be noted is Justice Harlan's concept of a speech-conduct continuum which allows greater governmental regulation of "conduct associated with speech or *resulting from it.*" *See* note 96 *supra* (emphasis added). (2) An alternative analysis would suggest that a clear and present danger test, particularly one which requires a minimal demonstration of actual, imminent danger to a state interest, effectively emasculates the notion of a central core of absolute protection for speech, or at least reduces that core of protection significantly. One would essentially be left with a balaneing notion which *may* give additional weight to the "preferred freedoms." The constitutional protection would, however, be defeasible upon a showing of a sufficient governmental interest.

Because of Justice Harlan's reference in *Button* to the "gravest dangers to the community" and his intimations in *Garner* and *Button* that it is illegal *conduct* toward which his clear and present danger test is directed, it would appear that the former analysis is the better view. Thus, a clear and present danger test *need not necessarily* be inconsistent with absolute protection for the *content* of speech.

113. 376 U.S. 254 (1964).
114. *Id.* at 279-80.

plurality opinion in *Curtis Publishing Co. v. Butts*[115] which manifests a latitudinarian view of the freedoms of speech and of the press. Thus the Justice stated that:

> [t]he dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "inalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us"[116] but that they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish his opinions."[117]

And again, "dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity . . . ."[118] After noting that the law of libel, because directed toward the content of speech, is difficult to harmonize with the constitutional guarantees of speech and press,[119] Justice Harlan resolved the dilemma by focusing upon the publisher's *conduct*.[120] By concentrating upon the reasonableness of the investigative techniques employed by the publisher,[121] Harlan seemingly obviated the alternative of permitting direct restraints upon the content of the press.[122]

There are further scattered indications that Justice Harlan would recognize a central core of absolute protection in the first amendment.

115. 388 U.S. 130 (1967) (Harlan, J., joined by Clark, Stewart, and Fortas, JJ.).

116. [Harlan's footnote renumbered] See Levy, Legacy of Suppression. The phrase is from the Court's opinion in Time, Inc. v. Hill [385 U.S. 374, 389 (1967)].

117. 388 U.S. at 149-50, *quoting* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (1788).

118. 388 U.S. at 150.

119. *Id.* at 151-54.

120. "It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. *Impositions based on misconduct can be neutral with respect to content of the speech involved,* free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Id.* at 153. (emphasis added).

121. "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of *highly unreasonable conduct* constituting an *extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*" *Id.* at 155. (emphasis added).

122. *See generally* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker,* 1967 SUP. CT. REV. 267.

On the theme of the free communication of ideas, Justice Harlan indicated in his concurring opinion in *Alberts v. California* that any substantial interference with this communicative process would constitute a violation of the due process clause. *See* 354 U.S. at 502-03. *See also* Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 702 (1959) (Harlan, J., concurring in the result).

Thus, in his dissenting opinion in *Poe v. Ullman*, he quoted with approval the statement that "[t]he fundamental theory of liberty upon which all governments in this Union repose *excludes any general power* of the State to standardize its children by forcing them to accept instruction from public teachers only."[123] Immediately thereafter, Justice Harlan added the following:

> I consider this so, even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief.[124]

This discussion has been pursued to demonstrate that Justice Harlan would provide absolute protection for the *content* of speech, except in the case of those narrowly defined categories which a consistent majority of the Court has traditionally held to be without constitutional protection.[125] Different results are reached, however, when we begin to move along the speech/conduct continuum. In this area, we move away from regulations effectually controlling the content of speech, and instead confront governmental action which ostensibly regulates conduct, but which may also produce consequences of greater or lesser severity for the free and unfettered exercise of speech.

A. *Regulation Pursuant to Valid Public Interest with Direct Effect upon Speech*

The first situation to be explored is that in which the government takes action pursuant to an admittedly valid public interest, but the effect of the regulation, nevertheless, is to curtail or restrict particular modes of promulgation of speech or forms of association otherwise constitutionally protected. Therefore, there is a direct clash of interests, with the "private" interest experiencing immediate and significant curtailment. Justice Harlan's approach in this area, as will become clearer in the subsequent discussion of particular cases,

123. 367 U.S. at 543-44, *quoting* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (emphasis added).

124. 367 U.S. at 544. It should be noted that Justice Harlan's substantive due process notion of protection for "fundamental rights," explored in *Poe v. Ullman* and *Griswold v. Connecticut*, involves no balancing process, as that phrase is commonly understood. The "fundamental right," once defined, prevails ipso facto over the restrictive state statute concededly enacted pursuant to a legitimate state interest.

125. The categorization of speech into protected and unprotected classes is itself, properly speaking, not produced by a balancing process but rather by an a priori definition of the constitutionally protected "freedom of speech."

does *not* involve ad hoc balancing of the respective interests, as that process has become known through his opinions in *Barenblatt* and *Konigsberg II*. Here it is clear that the interest relating to freedom of speech/association is given special emphasis (a preferred position, if you like), such that it will only be subordinated to the asserted public interest upon a demonstration of extraordinary circumstances by the government (for example, a clear and present danger of a *serious* evil).[126] Of course, since the area in question is concededly subject to governmental regulation to some degree, and since it is acknowledged that the public interest may prevail theoretically in special circumstances, it may be urged that Harlan is in fact employing a balancing technique. Such a description would not necessarily be inaccurate, assuming that it is recognized that the scales are heavily weighted in favor of the individual interest in speech.[127]

Among the Harlan opinions which illustrate the application of the foregoing "preferred interests" theory is his concurrence in *Garner v. Louisiana*.[128] In the *Garner* case, Harlan was the only Justice who was willing to assimilate a sit-in demonstration into the category of constitutionally protected " 'free trade in ideas,' " or "verbal expression, more commonly thought of as 'speech.' "[129] Justice Harlan then acknowledged that the state has a legitimate interest "in preserving

126. *See* Garner v. Louisiana, 368 U.S. 157, 202-03 (1961).

127. *Compare* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 94.

It has been suggested that an approach giving special emphasis to "preferred freedoms" is a "halfway house between the balancing of interests and the absolutist position." Krislov, *supra* note 94, at 206.

128. 368 U.S. 157, 185 (1961).

129. *Id.* at 201. It must be noted that the great potential of Justice Harlan's characterization of the demonstration as protected "speech" is significantly mitigated by his emphasis upon the notion that the defendants in *Garner* were sitting at the lunch counter "with the consent of the owner." *Id.* at 202. He does state that the demand of police officers that the individuals leave the premises would not vitiate the initial consent. If it were otherwise, "[s]imply by ordering a defendant to cease his 'protected' activity, the officer could turn a continuation of that activity into a breach of the peace." *Id.* at 204 n.11. Nevertheless, by defining the "protected aetivity" in terms of the consent of the owner, Harlan constricts rather narrowly the scope of his doctrine. *See* KALVEN, THE NEGRO AND THE FIRST AMENDMENT 130-33 (1965). Quite consistently, when later defendants demonstrated on private property without the owner's consent, Justice Harlan joined other Justices in the view that a trespass conviction was proper. *E.g.*, Bell v. Maryland, 378 U.S. 226, 318 (1964) (Black, J., dissenting). In partial defense of the Harlan restrictions, it can be said that a rule which would extend constitutional protection unconditionally to demonstrations would be totally unacceptable; for it would raise the specter of invasions of private property, including homes, for the purpose of thrusting "ideas" upon the owners/occupants. A limitation more suitable than the consent notion, however, might have accorded protection to demonstrations on private premises which were nevertheless open generally to the public.

peace and harmony within its borders."[130] Nevertheless, the state had sought to pursue this goal by subjecting to criminal sanctions, through "a general and all-inclusive breach of the peace prohibition,"[131] activity which "except for a *demonstrated paramount* state interest. . . ." would be constitutionally protected.[132] Since a state may not "suppress free communication of views . . . under the guise of conserving desirable conditions,"[133] it is required in the first instance to make a specific judgment that the otherwise protected activity constitutes a "clear and present danger to a *substantial* interest of the State."[134] Thus, the "necessity" test employed would require initially a specific judgment by the state that the governmental interest could be effectuated *only* by a curtailment of the otherwise protected activity. This formulation constitutes a significantly stricter standard than merely requiring the state to demonstrate a "rational relation" between the governmental interest and the means employed to implement that interest.[135]

Another example illustrative of the Harlan approach is found in the complex litigation produced by the ultimately futile attempt by Alabama to oust the NAACP from that state. The case, in one form or another, reached the Supreme Court a total of four times, resulting in two opinions by Justice Harlan.[136] The thrust of the latter opinions

130. 368 U.S. at 202.

131. *Id.*

132. 368 U.S. at 202 (emphasis added).

133. *Id.* at 203, *quoting* Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

134. 368 U.S. at 202-03, *quoting* Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). (emphasis added). Justice Harlan relied heavily in *Garner* upon the unanimous opinion, per Roberts, J., in Cantwell v. Connecticut, *supra.* The following passage from the latter opinion gives some insight as to what Justice Harlan might consider to be a "substantial interest" of the state: "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious. Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." 310 U.S. at 308.

135. *See* Krislov, *supra* note 94, at 198-99; notes 143-146, 175-178 *infra* and accompanying text.

136. Alabama initially attempted to apply to the NAACP its statute requiring the qualification of organizations transacting intrastate business. In the course of this procedure, a suit was brought in 1965 in an Alabama state court to enjoin the NAACP from conducting further intrastate activities. In this proceeding the NAACP was ordered to produce the names and addresses of all of its Alabama members and agents. The NAACP refused to comply fully with the court order and was adjudged in contempt. On appeal, the Supreme Court, per Harlan, J., held that the membership lists were immune from state scrutiny because of the "substantial restraint" which disclosure would have upon the associational rights of the NAACP members. NAACP v. Alabama, 357 U.S. 449 (1958). When the Alabama Supreme Court thereafter

is directed toward the nature of the protected associational rights of the NAACP members and is bottomed upon the following premises: (1) "Freedom to engage in association for the advancement of beliefs and ideas" is protected by the fourteenth amendment as an adjunct to, or extension of, the freedom of speech;[137] (2) governmental action "regarded as entailing the likelihood of a *substantial restraint*"[138] upon the otherwise protected activity can be sustained only by the demonstration of an overriding valid state interest which is "compelling."[139] The Court found that the state had failed to establish a paramount interest in the public disclosure of NAACP membership lists which was sufficient to justify the considerable deterrent effect, which such disclosure would entail, upon the otherwise protected activities of the association members. Justice Harlan concluded that the Alabama regulations had been unconstitutionally imposed upon the NAACP.

A similar approach, giving primacy to the interest in speech, was followed by Justice Harlan in his concurring opinion in *Talley v. California*,[140] in which the Court held unconstitutional a municipal ordinance prohibiting the dissemination of anonymous handbills. Here, Harlan's general formulation of the applicable constitutional principle was not radically different from that in *Garner* and *NAACP v. Alabama*: "state action *impinging* on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is *compelling*."[141] The ordinance was allegedly intended to aid in the detection of individuals attempting to perpetrate fraud, false advertising, libel, and the like. Noting that the ordinance was not limited to the suppression of these objectionable materials, Harlan concluded that the state had made an insufficient

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reaffirmed the judgment of contempt, the United States Supreme Court again reversed and remanded. 360 U.S. 240 (1959) (per curiam). A year later, since no hearings had been held in the state courts, the NAACP brought suit in the federal district court to obtain relief from the 1956 decree. The district court dismissed the suit, the court of appeals affirmed, and the Supreme Court reversed, holding that the district court should proceed unless Alabama "within a reasonable time, no later than January 2, 1962" should permit the NAACP to seek dissolution of the restraining order against its activities. 368 U.S. 16 (1961) (per curiam). The state court thereafter heard the case and permanently enjoined the NAACP from carrying on activities in Alabama. This final decree was reversed by the United States Supreme Court in NAACP v. Alabama, 377 U.S. 288 (1964) (Harlan, J.).

137. 357 U.S. at 460.

138. *Id.* at 462 (emphasis added).

139. 357 U.S. at 460, 462, 463 (emphasis added).

140. 362 U.S. 60, 66 (1960).

141. 362 U.S. at 66, *citing* NAACP v. Alabama, 357 U.S. 449, 463-64 (1958) (emphasis added).

showing to justify "the deterrent effect on free speech which this all-embracing ordinance is likely to have."[142]

A slightly different light is cast upon this particular class of cases by Harlan's analysis in his concurring opinion in *McLaughlin v. Florida*.[143] The Court in *McLaughlin* held that, assuming the existence of a valid state interest in the prohibition of sexual promiscuity, nevertheless, Florida could not single out promiscuous interracial couples for special statutory penalties.[144] The Court's theory was that state action which "trenches" upon the constitutionally protected freedom from racial discrimination would be upheld "only if . . . necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[145] The relevance of this test to the present discussion is that Justice Harlan, in his concurring opinion, specifically adopted this "necessity" test, which he determined to have been originally developed "to protect free speech against state infringement."[146] Thus we have an explicit repudiation by Justice Harlan of the notion that governmental action which was merely rationally related to the effectuation of a legitimate state interest could be sustained if the effect of that action was to restrict substantially ("trench upon" in the phraseology of the *McLaughlin* majority) the right of free speech. In brief summary, when state regulation is not designed to control directly the content of speech, but in its effect tends significantly to restrict, deter, or suppress otherwise protected modes of communication, then the state regulation will prevail only if it is responsive to a compelling or demonstrated paramount state interest and is necessary (indispensable) to the effectuation of that interest.

B. *Regulation of Conduct with Incidental Effect upon Speech*

The second category of regulation to be considered is that which is directed basically toward conduct or an object other than the content of speech, but which may have a *merely incidental* effect upon the unhindered exercise of speech.[147] It is here that the

142. 362 U.S. at 67.

143. 379 U.S. 184, 197 (1964).

144. *Id.* at 196. The decision in *McLaughlin* did not require the Court to declare unconstitutional Florida's miscegenation statute. This final step was taken by a unanimous Court on fourteenth amendment grounds in Loving v. Virginia, 388 U.S. 1 (1967).

145. 379 U.S. at 196.

146. *Id.* at 197, *citing*, among other cases, NAACP v. Alabama, 377 U.S. 288, 307-08 (1964).

147. The phrase "merely incidental effect upon speech" is indicative of a characterization which Justice Harlan would use in stating his conclusion concerning a particular regulation. Of course, if the issue in a particular case is *whether* the

balancing controversy emerges full-blown in *Barenblatt* and *Konigsberg II*. One formulation of Justice Harlan's balancing approach is contained in *Konigsberg II*:

> . . . general 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. . . . It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. . . . 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 respective interests involved.[148]

The key phrase in the foregoing passage is "incidentally limiting . . . [the] unfettered exercise [of speech]." Such a characterization of the effect of the governmental action is a necessary prerequisite to the utilization of the balancing approach. Thus, in *Konigsberg II*, Justice Harlan, speaking for the Court, determined that California's inquiry into past Communist Party membership of prospective bar members would have a "minimal effect" upon free association.[149] That being so, he weighed the state's interest "in having lawyers who are devoted to the law . . . , including its procedures for orderly change"[150] against the effect which disclosure of Communist affiliation was likely to have upon rights of association, and concluded that the former interest was "clearly sufficient to outweigh" the latter.[151] Finally, the Court employed the "substantial relation" test to evaluate the specific state procedure, namely, compulsory disclosure of Communist Party

deterrent effect on speech is "merely incidental" or "more than incidental," then to phrase the issue in the form "the effect is merely incidental, therefore the regulation is valid" is to assume the couclusion. On one level, it is true, the dispute between Justice Harlan and Black in *Barenblatt* and *Konigsberg II* may be viewed as a disagreement over the extent to which speech will be deterred as a result of the particular governmental action. There is also a doctrinal dispute, however, which may be more significant. Justice Black would presumably authorize a balancing test only when the governmental action constituted a nondiscriminatory regulation of such matters as the time and place of speech (although Black uses a direct/indirect-effect-upon-speech dichotomy for his analysis in Barenblatt). However, regulation which deters or interferes with speech generally, even incidentally or inadvertently, is void. *See* Kalven, *Upon Rereading Mr. Justice Black on the First Amendment,* 14 U.C.L.A. L. REV. 428, 443-44 (1967). With this latter notion, Justice Harlan would disagree; that is, he would balance the asserted governmental interest against its incidental deterrent effect in order to determine the regulation's validity.

148. 366 U.S. at 50-51 (emphasis added).
149. *Id.* at 52.
150. *Id.*
151. *Id.*

membership. The Court held that the "state's interest in ascertaining the fitness of the employee for the post he holds" is not "insubstantially related" to inquiry about Communist Party membership.[152] The Court premised its conclusion on the notion derived from *Barenblatt* and earlier cases, which validated "the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for . . . illegal ends of powers given for limited purposes."[153]

A further example of Justice Harlan's approach to these general balancing problems is his dissent in *NAACP v. Button*,[154] which involved Virginia's attempt to place the activities of the NAACP within a statutory ban upon "the improper solicitation of any legal or professional business."[155] The majority concluded that the NAACP had acted within the protection of the first amendment and that the state had failed to demonstrate "any substantial regulatory interest" to justify the broad prohibitory action which it had undertaken.[156] In his dissent, Justice Harlan acknowledged that freedom of expression encompasses one's right "to advocate and his right to join with his fellows in an effort to make that advocacy effective."[157] Harlan noted, however, that there was a speech-conduct continuum and that the further the regulatory effect of the state's action became removed from speech in its pristine form, the greater the latitude of the state becomes in regulating the activity. Thus he stated that:

> . . . as we move away from speech alone and into the sphere of conduct—even conduct associated with speech or resulting from it—the area of legitimate governmental interest expands. *A regulation not directly suppressing speech or peaceable assembly, but having some impact on the form or manner of their exercise will be sustained if the regulation has a reasonable relationship to a proper governmental objective and does not unduly interfere with such individual rights.*[158]

Applying this test, and citing the "incidental effect upon speech" criterion from *Konigsberg II*, Harlan concluded that the state's interest "in maintaining high professional standards among those who

152. *Id.*
153. *Id.* at 52.
154. 371 U.S. 415, 448 (1963).
155. *Id.* at 419.
156. *Id.* at 444.
157. *Id.* at 452.
158. *Id.* at 454. (emphasis added). Later in the opinion the test employed by Justice Harlan was formulated in the following manner: ". . . [T]he question is whether the particular *regulation of conduct* concerning litigation has a *reasonable relation* to the furtherance of a proper state interest, and whether that interest *outweighs* any foreseeable harm to the furtherance of protected freedoms." *Id.* at 455 (emphasis added).

practice law within its borders"[159] outweighed any incidental deterrent effect upon freedom of expression and association.[160]

Consideration must also be given to the legislative investigation cases, the most notable of which for our purposes is Justice Harlan's opinion for the Court in *Barenblatt v. United States*.[161] In assessing the validity of the investigative techniques employed by a subcommittee of the House Committee on Un-American Activities against the alleged deterrent effect upon first amendment associational rights resulting from compelled disclosure, Justice Harlan was quite clear that a balancing approach for this type of case is always appropriate.[162] After noting briefly that the proper constitutional principle required " 'the subordinating interest of the State must be compelling' in order to overcome the individual rights at stake,"[163] Justice Harlan explored at length the question whether "this investigation was related to a valid legislative purpose . . . ."[164] The investigative objective was inquiry into the activities of the Communist Party, which the Court had previously viewed as, at least, a quasi-subversive organization.[165] Justice Harlan combined this factor with his previous conclusion that the particular questions asked of the defendant-witness were pertinent to the inquiry,[166] and concluded that the investigation was valid. Discussion of the individual interests at

159. *Id.* at 455.

160. *Id.* at 455. When it is necessary for the Justices to delineate and balance the respective interests in a particular case, it is virtually inevitable that they will reach different conclusions. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Barenblatt v. United States, 360 U.S. 109 (1959). Furthermore, as Justice Harlan noted in his dissent in Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 227 & n.3 (1967), the precedential value of many of the balaneing decisions is impaired to the extent that later cases present a relatively divergent amalgam of interests. In the latter event, the balance of interests must be struck anew. It will be noted that many of the recent cases which have prominently employed the balancing technique (in one or more of the opinions) have dealt with a single issue—namely, the deterrent effect which compelled disclosure of associational memberships is likely to have upon the exercise of first amendment rights. In these cases, the result achieved by the majority has followed a rather consistent pattern: where the issue of racial equality was involved, the Court has sustained the private interest. However, when Communist Party membership was the issue, the balance has usually been struck in favor of the governmental interest. The cases are collected in Franz, *Is the First Amendment Law?*, 51 CALIF. L. REV. 729, 731 & n.10 (1963). *But see* United States v. Robel, 389 U.S. 258 (1967); *cf.* Aptheker v. Rusk, 378 U.S. 500 (1964).

161. 360 U.S. 109 (1959).

162. "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue *always* involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Id.* at 126. (emphasis added).

163. *Id.* at 127, *citing* NAACP v. Alabama, 357 U.S. 449, 463-66 (1958).

164. 360 U.S. at 127, 127-33.

165. *Id.* at 128-29.

166. *Id.* at 123-24.

stake was extremely summary and consisted largely of the suggestion (probably to be revived by future litigants[167]) that the subcommittee had not attempted, as far as the record indicated, to "pillory witnesses" or to employ "indiscriminate dragnet procedures" to obtain appearances before the subcommittee.[168]

It may be noted in passing that in his *Barenblatt* opinion Justice Harlan appears almost to have inverted the test which he purports to apply. Initially, he states that the governmental interest must be "compelling" in order to overcome the individual interests at stake. This formulation implies that particular deference is to be given to the individual interests.[169] Yet the emphasis upon such interests is so niggardly that, by the conclusion of the opinion, one is left with the impression that, to the contrary, it is the individual interest in speech/expression which must be shown to be "compelling" by a demonstration of peculiar circumstances in order to prevail.

Furthermore, viewed as a balancing case, *Barenblatt* may cause some concern by the insistence therein that balancing is *always* appropriate in governmental interrogation cases. If we are correct in the premise that a prerequisite to utilization of the balancing technique is the determination that the effect of the governmental action upon individual interests is merely "incidental,"[170] then the conclusion would seem to follow that a priori governmental interrogation, via legislative committees or otherwise, could never have more than an "incidental" effect upon individual freedoms. This latter is a proposition which gives one pause and could be reluctantly endorsed only with the greatest caution and circumspection.

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167. *See* Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966); *See generally* Note, *HUAC and the "Chilling Effect": The Dombrowski Rationale Applied*, 21 RUTGERS L. REV. 679 (1967).

168. 360 U.S. at 134. Justice Harlan employed a similar approach in his dissenting opinion in Shelton v. Tucker, 364 U.S. 479, 496 (1960), in which the state of Arkansas had attempted to compel the disclosure of all the associational ties of teachers in the public school system. Harlan stated that when the governmental action in question "pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether judged in the light of that purpose, the questioned action has substantial relevance thereto." *Id.* at 497-98. It will be noted that this formulation omits entirely a reference to countervailing private interests and has been severely criticized for its apparent breadth. *See* Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. REV. 1, 23-24 (1965). There is, however, a loophole for the protection of individual interests—the strict requirement of "pertinency" applied in investigation cases. *Id.* It will be recalled that Justice Harlan has joined the majority in reversing convictions when the pertinency of questions was not clear or had not been made known to the defendant/witness with sufficient clarity. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

169. *See* notes 126-146 *supra* and accompanying text.

170. *See* notes 148-152, 158-160 *supra* and accompanying text.

The balancing approach is sometimes criticized by Justice Black, among others, on the theory that it tends to produce results which unduly subordinate individual to governmental interests.[171] In this connection, Justice Harlan's concurrence in *United States v. O'Brien*[172] is of interest. The majority opinion by Chief Justice Warren held that draft card burning did not constitute constitutionally protected "speech." In the course of his opinion, the Chief Justice noted that the draft card regulations "further[ed] an important or substantial government interest" and that the "incidental restriction on alleged First Amendment freedom" was no greater than is "essential to the furtherance of that interest."[173] While generally concurring in this formulation, Justice Harlan nevertheless felt that it was not sufficiently qualified. Therefore, he wanted:

> to make explicit [his] understanding that this passage [did] not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest . . . , in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate.[174]

Thus, Justice Harlan has explicitly recognized a circumstance in which the balancing approach, where there is only an "incidental" effect upon first amendment rights, may nevertheless produce subordination of the governmental regulation to the individual interests.

It may be suggested that Justice Harlan is in fact merely applying a single balancing test in all of these cases, with no special preference given in any event to the assertion of first amendment rights. The fact that extended discussion in some opinions concerns the private interest and in others emphasizes the governmental interest[175] may be explained on the basis that the one interest or the other has been determined, in the balance, to outweigh the alleged competing interest. Support for this conclusion can be found in the fact that in his theoretical discussion, for example in *Konigsberg II*, Harlan does not appear to distinguish between governmental regulations which "incidentally affect" and those which "substantially restrain" the

171. As suggested previously, however, the Supreme Court as a whole has preferred the individual interests in civil rights cases and has emphasized the governmental interest in internal security cases. Note 160 *supra.*

172. 391 U.S. 367 (1968).

173. *Id.* at 377.

174. *Id.* at 388.

175. *Compare, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958), *and* notes 126-144 *supra* and accompanying text *with* Barenblatt v. United States, 360 U.S. 109 (1960), *and* notes 147-167 *supra* and accompanying text.

exercise of first amendment rights. Additionally, some of the cases which have been placed in different categories herein are cited occasionally interchangeably by Justice Harlan.[176]

Nevertheless, it would appear that more incisive analysis indicates that the cases, viewed from the standpoint of the effect of the regulation upon the exercise of speech, can be categorized generally along lines similar to those suggested herein.[177] However, recognition by Justice Harlan of the continuum from speech to conduct raises a warning against categorical rigidity in analyzing his views. With that caveat in mind, there is certainly a doctrinal distinction to be drawn in measuring the effect of a regulation upon speech between the "substantial restraint" of *NAACP v. Alabama,* the "deterrent effect" of *Talley v. California,* and the suppression of speech in *Garner v. Louisiana,* on the one hand, and the "incidental effect" upon speech (in Harlan's view) in *Konigsberg II, Barenblatt,* and *Button* on the other. In the former class of regulations, we are told that the legitimate state interest must be "overriding" or "compelling" (*NAACP v. Alabama*; *Talley v. California*), "paramount" or "substantial" (*Garner v. Louisiana*), and the procedure to implement the interest must be "necessary," and not merely rationally related, to the furtherance of the state interest (*McLaughlin v. Florida*). However, where the effect upon speech is merely "incidental," we learn from *Konigsberg II, Barenblatt,* and *Button* that the regulation need bear only a "reasonable relation" to a legitimate governmental interest, which interest in turn outweighs any "foreseeable harm" to

176. Thus, for example, the principle of *NAACP v. Alabama* that the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake" is stated to be controlling in *Barenblatt. See* note 163 *supra* and accompanying text. *But see* text following note 165 *supra.* Or, again, a free speech case such as Schneider v. New Jersey, 308 U.S. 147 (1939), is cited in *Konigsberg II* as an example of a "general regulatory statute . . . incidentally limiting" the exercise of speech, while in *McLaughlin v. Florida* it is cited for the proposition that state infringements of free speech must be necessary, and not merely rationally related, to the effectuation of a legitimate state policy. Again, in *Konigsberg II,* both *Barenblatt* and *NAACP v. Alabama* are cited together as "balancing" cases.

177. Of course, to the extent that governmental interests are also necessarily taken into account, the presence or absence of such interests cannot be ignored. It may be noted that in Shelton v. Tucker, 364 U.S. 479, 496 (1960) (dissenting opinion), Justice Harlan analyzed *NAACP v. Alabama* in terms of a lack of legitimate state interest in the regulatory scheme there struck down. *Id.* at 498. If it is determined that the state has no legitimate interest in the enforcement of a particular regulation, then one may suppose that it could be struck down on Justice Harlan's general substantive due process notion of freedom from all substantial arbitrary impositions and purposeless restraints without even considering a specific countervailing private interest. The statements in *Shelton v. Tucker* to the contrary, however, the opinion as written in *NAACP v. Alabama* focuses upon the "substantial restraint" upon private interests rather than upon the lack of legitimate state interest in the regulation, although the latter factor is assuredly presented as a significant element.

protected first amendment freedoms. It may be, however, that, as suggested above, all of Justice Harlan's opinions should be viewed as requiring a form of balancing, with the stipulation that as the restraint upon speech becomes greater the more severe is the burden upon the government to sustain its regulation.[178]

CONCLUSION

There are a number of points that might be made in the course of a systematic critique of Justice Harlan's judicial philosophy in general and in his approach to free speech problems in particular. A few of these have been alluded to or discussed in previous sections of this article. Here we shall merely emphasize a few highlights by way of summary and conclusion.

Initially, it may be reiterated that Justice Harlan's position in regard to protection of individual liberties has varied greatly in relation to that adopted by other Justices. Occasionally, as in *Garner v. Louisiana* and *Poe v. Ullman*, he has been in the vanguard, arguing for the extension of protection when few other Justices would concur. More frequently, perhaps, he has been more reluctant than others to extend protection in the penumbral area of the first amendment; his dissent in *Button*, as well as his opinions for five-man majorities in *Barenblatt* and *Konigsberg II* are clear examples of this reluctance. The moral is, I suppose, that labels such as "conservative" and "liberal" when applied to eminent jurists are at least frequently misleading.[179]

Secondly, emphasis should be given to Justice Harlan's notion of substantive due process, developed in *Poe v. Ullman* and *Griswold v. Connecticut* as being unrelated to the Bill of Rights. If the notion that due process means freedom from "all substantial arbitrary impositions and purposeless restraints" were liberally construed and applied, then it would appear to have great potential as a broad charter of liberty for the individual. The fundamental objection to this approach is not that it uniquely leaves judges free to roam at large with insufficient guidelines; conscientious judges *could* be given the task

178. It will be noted that in his *Konigsbury II* opinion, Justice Harlan refers to the necessity for an "appropriate" weighing of individual and governmental interests. The term "appropriate" could be read to indicate that different balancing tests are required, depending upon such factors as the gravity of the state's interest and the degree of restraint upon individual rights. This interpretation would sanction, at least in some circumstances, a balancing approach heavily weighted in favor of the individual interest as an a priori matter before a detailed analysis of the respective interests involved was accomplished.

179. *But see generally* G. SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946-1963 (1965). On the alleged shift in Justice Black's philosophy in recent years, *see generally* Ash, *The Growth of Justice Black's Philosophy of Freedom of Speech 1962-1966*, 1967 WIS. L. REV. 840.

of interpreting the "traditions of the English-speaking peoples" under a rubric such as due process. After all, no one has really disputed that privacy in general or marital privacy in particular, is a fundamental value in our society;[180] the divergence of opinion arises when it is sought to elevate this interest into the realm of constitutional dogma. The real problem is whether judges are limited under our system to legislating interstitially, that is, to filling in the gaps created by specific statutory or constitutional provisions, or whether they have the broader power or duty to create fundamental changes in the law—to "keep the Constitution in tune with the times," as some would prefer to characterize the process.[181] On this latter issue, one must concede some doubts. Particularly, this is so if one's general philosophy emphasizes the primacy of the political processes and a concomitant restraint upon the judiciary. This is not to say that notions of judicially-created substantive due process and judicial self-restraint are *necessarily* contradictory or inconsistent. Nevertheless, while a philosophy containing both concepts may constitute a unity, there remains a significant possibility that a certain degree of tension will be found within the overall system. However, once a notion of substantive due process is generally acknowledged, through the adoption of the "total incorporation" doctrine, the "selection incorporation" notion, or otherwise, there seems to be scant imperative for limiting it to eighteenth century modes of thought expressed incompletely in the Bill of Rights, some of whose provisions are arguably quite obsolete.[182]

When we come to Justice Harlan's view of the limitations which the first and fourteenth amendments place upon the state and federal governments, a number of responses, favorable and unfavorable, are evoked. To begin with the unfavorable, it may be noted that we are met in the various Harlan opinions with a dizzying proliferation of doctrine; the barest surface of which has been scratched in the preced-

180. *See also* note 63 *supra.*

181. The latter theory has been criticized severely in recent years by Justice Black. *See, e.g.*, Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 518-23 (1965) (Black, J., dissenting).

182. I assume, for the sake of this discussion, what seems to be the better view of the "incorporation" and "selective incorporation" doctrines, namely, that they are premised upon infirm historical bases. Thus, incorporation of all of the provisions of the Bill of Rights, or of selected portions thereof, necessarily rests on a concept of substantive due process—but upon a concept limited to specific sections of the first eight amendments. Why the concept should be so limited is unclear. Of course, if one insists upon the view that the "incorporation" doctrine represents the better historical view, then it is at least consistent to argue that the Constitution is to be interpreted solely in accordance with the intentions of the framers of the Bill of Rights and the fourteenth amendment and read the intention of the framers as requiring "incorporation."

ing exposition.[183] Distinction is built upon distinction, theory upon theory. One wonders if the Constitution really commands all of the nuances and technicalities which Justice Harlan has read into the first and fourteenth amendments. Furthermore, it must be remembered that we do not have a single coherent exposition of first amendment theory presented by Harlan by which to analyze his various opinions and the results reached therein. This is perhaps a bit too much to expect in a case-by-case decisional process in which highly disparate factual circumstances are presented to the Court. Nevertheless, there are occasionally loose ends which are simply left hanging. For example, in the obscenity cases we are told that the first amendment applies a less strict standard to the states through the fourteenth than it does to the federal government. Not only are we left somewhat in the dark as to the reasons underlying each wing of this dual approach,[184] but this particular element mysteriously fails to reappear in any other area of first/fourteenth amendment analysis.

On the positive side, there is much to be said for Justice Harlan's balancing approach as a technique, quite apart from an evaluation of the results reached in particular cases. The merit of balancing is that it tends, theoretically at least, to bring into the open in a rational discourse the various competing interests which contend for acceptance by the Supreme Court.[185] The hope is, I suppose, that rigorous analysis will be substituted for decision by slogan.[186] Of course, it may occur in some instances that a constitutional provision will be sufficiently specific, or the interests involved will be sufficiently disparate in the proper weight to be attached thereto, that a decision will be relatively straightforward. However, this is frequently not the case with respect to the litigation which reaches the Supreme Court. The difficult issues are almost invariably resolved by a weighing or balancing process, whether or not the individual Justices so acknowledge, and not by such formulae as the oversimplified tautology that

183. *See generally* authorities cited note 95 *supra.*

184. Why, for example, may the federal government prohibit "hard-core pornography" but not other forms of obscenity? The reply that this result is more consistent with the letter and spirit of the first ammendment does not seem entirely satisfactory. *See* Kalven, *The Metaphysics of the Law of Obscenity,* 1960 SUP. CT. REV. 1, 22-25.

185. *See generally* Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUP. CT. REV. 75; Nutting, *Is the First Amendment Obsolete?,* 30 GEO. WASH. L. REV. 167 (1961).

186. The reference is to Reynolds v. Sims, 377 U.S. 533 (1964) and Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964) and their progeny, including Avery v. County of Midland, 390 U.S. 474 (1968). *See also* McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting): "A rule of law should not be drawn from a figure of speech" (referring to Jefferson's "wall of separation between church and state" metaphor).

"no law" in the first amendment means "no law."[187] The critical issue in first amendment adjudication is not the interpretation of "no law," but rather the scope to be assigned to the phrase "the freedom of speech." Exhaustive historical scholarship concludes that even the framers of the first amendment had no clear idea as to what was comprehended within "the freedom of speech."[188] It is difficult, therefore, to understand those who insist that the first amendment speaks with unmistakable clarity, even in its penumbral area.

Finally, several of Justice Harlan's opinions indicate quite clearly that, even within the context of a general balancing approach, a preferred status may be given to rights derived from the first amendment. Thus, he has recognized explicitly a speech-conduct continuum, with the area of legitimate governmental concern expanding in direct proportion as the effect of the regulation reaches the conduct phase and the effect upon speech becomes concomitantly more incidental. Such an approach may encourage the proliferation of doctrine and make hazy those bright lines of distinction which are attempted to be drawn. Nevertheless, such an approach may be required when it is necessary in the course of the case-by-case judicial process simultaneously to give effect to legitimate governmental interests, to accommodate the needs of the federal system, to respect the limits of judicial authority, and finally, to protect the constitutional immunities of individual citizens.

187. If one is to be entirely consistent in a "literal" approach to the first amendment, it would seem difficult to escape the conclusion that the amendment, in any event, protects only against *laws* passed by *Congress;* for, after all, the plain words are "Congress shall make no law . . . ."

188. *See generally* L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960).