1991

Justice Harlan and the Bill of Rights: A Model for How a Classic Conservative Court Would Enforce the Bill of Rights

Nadine Strossen
New York Law School, nadine.strossen@nyls.edu

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_articles_chapters

Part of the Constitutional Law Commons, First Amendment Commons, Fourth Amendment Commons, and the Supreme Court of the United States Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.
JUSTICE HARLAN AND THE BILL OF RIGHTS:
A MODEL FOR HOW A CLASSIC CONSERVATIVE COURT
WOULD ENFORCE THE BILL OF RIGHTS*

NADINE STROSSEN**

I. INTRODUCTION

A study of Justice Harlan’s enforcement of the Bill of Rights is particularly timely at the present juncture in the Supreme Court’s history. We now have a Court that is regularly described as “conservative,” including in its attitude toward the Bill of Rights.¹ By analyzing the Bill of Rights jurisprudence of Justice Harlan, a highly respected judicial conservative,² and comparing it to the corresponding jurisprudence of the Rehnquist Court, one can appreciate how far the Rehnquist Court deviates from classic conservative principles concerning the judicial role in enforcing individual liberties. However else one would describe the Rehnquist Court’s ideology regarding the Bill of Rights, it should not parade under the misnomer of judicial conservatism.³

In exploring Justice Harlan’s support for the Bill of Rights, and contrasting it to the Rehnquist Court’s skepticism toward those rights, this article is divided into two major sections. The first describes four important lines of Bill of Rights cases in which Justice Harlan was particularly protective of individual liberties, even as compared with other


** Professor of Law, New York Law School; President, American Civil Liberties Union. For research assistance with this article, the author thanks Marie Costello, Bill Mills, Ramyar Moghadassi, and Catherine Siemann.

Consistent with Judge Abner Mikva’s example and advice, the notes accompanying this article are citations to authority and contain nothing of substance. See Abner J. Mikva, Goodbye to Footnotes, 56 U. COLUM. L. REV. 647 (1985).


members of the libertarian Warren Court. Justice Harlan's decisions that take an expansive view of certain individual liberties and a narrow view of governmental power to limit them contrast sharply with the Rehnquist Court's general hostility to individual rights and deference to government authority.

The second section outlines Justice Harlan's overall judicial approach to the Bill of Rights. That approach was dominated by his view that active judicial enforcement of constitutional rights was not the most effective strategy for securing individual liberty in the long run. Consequently, in contrast to other members of the Warren Court, Justice Harlan often declined to engage in activistic enforcement of the Bill of Rights. At first glance, the opinions setting forth this philosophy of judicial restraint might seem inconsistent with those outlined in the first section of this article. Both are harmonized, though, by Justice Harlan's classically conservative views: he believed that individual freedom is of supreme importance and that the preservation of such freedom generally depends on limiting federal judicial power.

II. A CLASSIC CONSERVATIVE'S STAUNCH DEFENSE OF INDIVIDUAL LIBERTY

Justice Harlan's protective stance toward certain Bill of Rights provisions distinguished him even among the members of the Warren Court, and far more so from the current Rehnquist Court. This attitude was most prominent in cases concerning the Fourth Amendment, the Establishment Clause, the Free Speech Clause, and the implied right of privacy.

A. The Fourth Amendment

In cases involving searches and seizures by federal law enforcement officers, Justice Harlan supported the stringent enforcement of the Fourth Amendment's requirements, including its requirement that searches and seizures be based on a warrant, except under exigent circumstances.4

Preliminarily, it must be stressed that Justice Harlan's interpretation of the Fourth Amendment can be found only in cases concerning searches and seizures by federal agents. Justice Harlan did not take a similarly limited view of the government's search and seizure power in cases involving state or local law enforcement officers.5 This double standard

did not at all reflect a relatively weak conception of the Fourth Amendment. Rather, it reflected Justice Harlan’s general views concerning the Fourteenth Amendment incorporation controversy. He believed that any guarantee in the Federal Constitution that was enforceable against state and local governments through the Fourteenth Amendment was applicable only in general terms. He rejected the Warren Court majority’s view that every detailed requirement associated with the Court’s interpretation of a federal constitutional guarantee also should be enforceable against state and local governments.

Justice Harlan took pains to emphasize the importance of the Fourth Amendment’s warrant requirement for searches and seizures conducted by federal officials, in this respect standing out even on the Warren Court, which zealously policed the police. For example, in *Coolidge v. New Hampshire,* Justice Harlan wrote a separate concurrence to emphasize this point. He explained that he supported the majority ruling because “a contrary result . . . would, I fear, go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law.” Similarly, in his opinion for the Court in *Giordenello v. United States,* Justice Harlan upheld strict standards for the issuance of arrest warrants to federal officers.

It is important to qualify the description of Justice Harlan’s protective attitude toward Fourth Amendment rights by noting that he bears some responsibility for initiating a development in Fourth Amendment jurisprudence that has diminished that Amendment’s protective scope. However, Justice Harlan himself repudiated that development shortly after its initiation, thus reinforcing the conclusion that he was consistently concerned with limiting the government’s search and seizure power.

Specifically, in its 1967 watershed ruling in *Katz v. United States,* the Court held that the “Fourth Amendment protects people, not places,” and declined to limit the Amendment’s scope to certain

---


7. *See, e.g., Duncan, 391 U.S. at 172 (Harlan, J., dissenting); Douglas, 372 U.S. at 361 (Harlan, J., dissenting); Mapp, 367 U.S. at 678-79 (Harlan, J., dissenting).*


9. *Id. at 492 (Harlan, J., concurring).*


12. *Id. at 351.*
protected areas. In his seminal concurring opinion in *Katz*, Justice Harlan described searches and seizures, for Fourth Amendment purposes, as those governmental intrusions that invade a "reasonable expectation of privacy." 13 He elaborated upon this concept, describing it as "an actual (subjective) expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" 14 Since then, Justice Harlan's formulation has been adopted as the Court's accepted definition of Fourth Amendment searches. 15

The *Katz* test expanded the then-accepted scope of the Fourth Amendment. Reversing *Olmstead v. United States*, 16 which had held that a wiretap does not constitute a search because it invades no physical property, *Katz* held that attaching an electronic listening device to a phone booth did constitute a search because it invaded a domain in which the search victim reasonably expected privacy—a telephone conversation. 17 In subsequent cases, however, the *Katz* definition of a search has been used to the opposite effect—to limit, rather than expand, the reach of Fourth Amendment protections. 18 In recent years, as our society has become inured to increasingly pervasive forms of mass surveillance, the definition of protected privacy in terms of societal expectations has led to a downward spiral; the more our society tolerates various forms of searches and seizures, the narrower the "reasonable expectation of privacy" will become, with the result that additional types of governmental invasions will be deemed beyond the pale of Fourth Amendment protection.

To his credit, only four years after enunciating his *Katz* standard for the Fourth Amendment's scope, Justice Harlan presciently anticipated the negative impact that the standard could have on Fourth Amendment rights. Dissenting from the majority's decision upholding a search and seizure in *United States v. White*, 19 Justice Harlan criticized the *Katz* test. He explained: "The analysis must . . . transcend the search for subjective expectations . . . . Our expectations . . . are in large part reflections of the laws that translate into rules the customs and values of the past and present." 20

13. *Id.* at 360 (Harlan, J., concurring).
14. *Id.* at 361.
20. *Id.* at 786 (Harlan, J., dissenting).
Justice Harlan’s strict enforcement of Fourth Amendment standards occasionally stimulated the ire of other members of the Warren Court, including the liberal Justice Black. For example, dissenting from one decision that had been authored by Justice Harlan, which vigorously enforced the Fourth Amendment for a criminal defendant’s benefit, Justice Black said: “[T]he importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance.”

Justice Harlan’s strong enforcement of the Fourth Amendment distinguishes him even more vividly from the current Court. As one important example, Justice Harlan is set apart from the Rehnquist Court by his insistence that the Fourth Amendment requires adherence to the warrant requirement set out in the Amendment’s second clause (the “Warrant Clause”), in addition to the general “reasonableness” standard set out in the Amendment’s first clause.

 Probably no legacy of the Warren and Burger Courts has been more quickly or thoroughly dismantled under Chief Justice Rehnquist’s leadership than the earlier Courts’ Fourth Amendment jurisprudence. The current Court construes the Fourth Amendment as if it did not even contain the Warrant Clause, stating that the only constitutional requirement is that searches and seizures meet the malleable, deferential “standard” of reasonableness. In contrast, the Warren Court treated the warrant requirement as an independent prerequisite for a lawful search and seizure, an essential element of “reasonableness.”


22. The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.


24. See, for example, Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 613 (1989), where the majority’s rewriting of the Fourth Amendment was manifested in its purported “quotation” of the amendment. As Justice Marshall pointed out in his dissent, “[t]he majority’s recitation of the [Fourth] Amendment, remarkably” omitted the Warrant Clause altogether. Id. at 637 (Marshall, J., dissenting).

25. See, e.g., United States v. United States Dist. Court for the Eastern Dist. of
Whereas the Warren and Burger Courts recognized a few "jealously and carefully drawn" exceptions to the warrant requirement, under Chief Justice Rehnquist's leadership, the Court-approved exceptions to that requirement (as well as to the Warrant Clause's other requirement, probable cause) have in large part swallowed the rule. The Rehnquist Court has allowed warrantless searches in myriad circumstances, and also has upheld searches conducted under invalid warrants, pursuant to the "good faith" exception.

Those who argue that the Rehnquist Court has adhered to conservative values in the law enforcement area would be hard-pressed to explain the stark contrast between that Court's wholesale licensing of government officers to intrude into individual privacy and freedom without prior authorization, based on no particularized suspicion, and the views of the esteemed conservative Justice Harlan. He refused to sanction government interference with private lives or property through its search and seizure power unless such interference had been authorized by an independent magistrate, based on a specific, substantiated justification.

B. The Establishment Clause

Justice Harlan also took an especially protective view of rights protected in the Bill of Rights in a series of cases that, in his view, raised Establishment Clause problems. Justice Harlan espoused an unusually strict interpretation of the Establishment Clause, even in the context of the Warren Court, which rigorously enforced that clause.

Justice Harlan's especially stringent construction of the Establishment Clause appeared in cases that centrally focused on free exercise values. Whereas the majority essentially exalted free exercise concerns over countervailing establishment concerns, Justice Harlan struck a different balance. Specifically, the majority maintained that when a general government measure would impose a substantial burden on the religious beliefs of certain individuals, the government must make exceptions to that general measure in order to accommodate the religious beliefs; such

---


accommodation would be excused only if the government could show that it would undermine a compelling state interest.

For example, in *Sherbert v. Verner*, the majority applied these principles to a state’s general rule that, to be eligible for unemployment compensation, an individual must be available for Saturday work. The Court ruled that the state had to make an exception to this general eligibility requirement for a Seventh-Day Adventist, whose religious beliefs forbade Saturday work. Dissenting, Justice Harlan wrote that these governmentally compelled accommodations of religion—and only of religion—fell afoul of the Establishment Clause, because they required government to treat religiously grounded beliefs with a special solicitude not afforded to any other type of belief.

It must be stressed that Justice Harlan was not unsympathetic to the free exercise claims of religious dissenters. He believed, though, that there were other constitutionally permissible means for accommodating those claims. First, the state could voluntarily create religiously based exceptions. Second, the state could create neutral exceptions that would exempt all whose conscientious beliefs—whether religious or secular—would be burdened by the general measure at issue.

Because Justice Harlan dissented from Warren Court decisions that strictly scrutinized government measures limiting the free exercise of religion, he might well have agreed with the result—although not with the reasoning—of the Rehnquist Court’s recent decision in *Employment Division v. Smith*. In *Smith*, the Court rejected the free exercise claims of individuals who had smoked peyote in religious ceremonies of the Native American Church, and who argued that there should be a religiously based exemption from the state’s general prohibition against peyote use. Justice Harlan may well have concluded that, regardless of how meritorious these individuals’ free exercise claims were, the state could not be required to make an exception to its criminal drug laws for religious reasons alone, because that would violate the Establishment Clause.

In contrast, the *Smith* Court’s holding that the state did not have to exempt the religiously motivated use of peyote was not based on its heightened sensitivity to Establishment Clause concerns. Rather, the *Smith*

31. See *id.* at 410.
33. See *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting).
34. See *Welsh*, 398 U.S. at 356, 359 n.9, 361 n.12 (Harlan, J., concurring).
Court's holding was grounded on its diminished sensitivity to Free Exercise Clause concerns. In *Smith*, the Rehnquist Court did not reach the issue of whether any religious exemption that was mandated by the Free Exercise Clause would have violated the Establishment Clause, because it concluded that the Free Exercise Clause did not mandate any religious exemptions. Had the Rehnquist Court considered an argument that the requested exemption violated the Establishment Clause, it almost certainly would have rejected that argument, given its narrow view of this Clause.

Justice Harlan's invigorated view of the Establishment Clause, like his strict enforcement of the Fourth Amendment's Warrant Clause, markedly sets him apart from Chief Justice Rehnquist and his ideological allies. Again, the striking contrast between the Establishment Clause interpretation espoused by Justice Harlan, a respected conservative, and that espoused by Chief Justice Rehnquist belies the description of the latter as a conservative. Whereas Justice Harlan thought that even the Warren Court did not give sufficient scope to the Establishment Clause in the context of the free exercise accommodation cases discussed above, Chief Justice Rehnquist consistently has argued—with growing support among his Supreme Court colleagues—that the Warren and Burger Courts interpreted the Establishment Clause too broadly.

Specifically, Chief Justice Rehnquist repeatedly has questioned the *Lemon* test for assessing whether government measures comport with the Establishment Clause. This test, which was enunciated in a 1971 opinion by then-Chief Justice Warren Burger, drew upon decisions from the Warren Court, and stated that a government measure would constitute an unconstitutional establishment of religion if it failed any one of the following three criteria: (1) if it did not have a secular purpose, (2) if its primary effect was to advance or inhibit religion, or (3) if it caused an excessive entanglement between government and religion.

Under Chief Justice Rehnquist's much narrower view of the Establishment Clause, a government measure might violate all three prongs of the *Lemon* test and still be constitutional. He believes that the Establishment Clause enjoins only two limited types of government

---

37. See *Smith*, 494 U.S. at 890.
measures regarding religion: (1) the government's literal establishment of a particular religion—i.e., the creation of a state church, parallel to the Church of England in Great Britain, and (2) government discrimination among religions. 42 Chief Justice Rehnquist's constricted view is supported by several other members of the current Court. 43 These Justices clearly would view a governmental measure designed to accommodate religious beliefs as compatible with their circumscribed view of the Establishment Clause. Indeed, they expressly have upheld government measures that took account of religious beliefs, and have rejected Establishment Clause challenges to such measures, explaining that the government should accommodate its citizens' religious beliefs. 44

Thus, the Rehnquist Court has inverted the previous Courts' interpretations of when governmental accommodation of religion is appropriate. The Warren and Burger Courts ruled that government must take minority religious beliefs into account in protecting those who hold such beliefs from generally applicable laws, passed by majoritarian governmental institutions, which have an adverse impact on their beliefs. Conversely, these Courts ruled that government must not take majoritarian religious beliefs into account as rationales for enacting general measures. In the reverse of that pattern, the Rehnquist Court has ruled that government has no obligation to take minority religious beliefs into account by shielding them from generally applicable laws that burden their religious beliefs. Moreover, Chief Justice Rehnquist and other members of his Court have said that government may adopt measures that enshrine majoritarian religious beliefs.

C. The Free Speech Clause

The third line of cases in which Justice Harlan enunciated an even stronger interpretation of Bill of Rights freedoms than did other members of the Warren and Burger Court majorities involves free speech. Justice Harlan's eloquent opinion in Cohen v. California 45 stands as perhaps the Court's most ringing endorsement of broadly interpreting the First Amendment's Free Speech Clause. Certainly, the earlier opinions by Justices Holmes and Brandeis powerfully championed an expansive protection of "political speech," which could contribute to the public

42. See Wallace, 472 U.S. at 106 (Rehnquist, J., dissenting).
43. See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., joined by Rehnquist, C.J., and White and Scalia, JJ., dissenting); Wallace, 472 U.S. at 84, 90, 91 (Burger, C.J., White, and Rehnquist, JJ., dissenting).
44. See, e.g., Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); Allegheny, 492 U.S. at 573.
“marketplace of ideas.” Justice Harlan built upon those opinions, though, to champion even speech that might not contribute to any public discussion. He repudiated any attempt to circumscribe the Free Speech Clause in terms of instrumental concerns about societal interests. Instead, Justice Harlan celebrated the Clause as a libertarian vehicle for individual self-expression of emotions, as well as ideas, valuable in and of itself.

Consistent with his conservative belief in limiting governmental power over important spheres of individuality and autonomy, Justice Harlan stated in Cohen:

The constitutional right of free expression is . . . [i]ntended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the . . . belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

In accordance with this expansive view of free speech, Justice Harlan strictly narrowed the countervailing societal concerns that might justify governmental constraints upon individual self-expression. In Cohen, he specifically said that the offensiveness of certain expression to a majority in the community would not justify restraining the expression. State governments may not, he said, “act[] as guardians of public morality.”

Again, therefore, Justice Harlan’s conservative views contrast with the views of the Rehnquist Court, which has shown substantial deference to majoritarian sensibilities as a basis for limiting expression. Most recently, in Barnes v. Glen Theatre, Inc., the Court upheld an absolute prohibition upon a certain form of expression which it deemed to be within the ambit of the Free Speech Clause—nude dancing—on the ground that this type of expression offended the moral sensibilities of the majority in the community. Chief Justice Rehnquist’s plurality opinion sustained the prohibition because it “furthers a substantial government interest in protecting order and morality.” In contrast, Justice Harlan stated in


48. Id. at 24.

49. See id. at 22-23.

50. Id. at 22.


52. Id. at 2462.
Cohen that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." Although the Rehnquist Court has not expressly overturned the landmark Cohen decision, it has sharply limited that decision's reach, and implemented instead a radically shrunken vision of our "system of freedom of expression."

D. The Implied Right of Privacy

One of Justice Harlan's most celebrated opinions, his dissent in Poe v. Ullman, is a landmark in the Court's recognition of the implied constitutional right of privacy. Although the majority did not reach the merits of the claim in that case—a challenge to Connecticut's law banning the sale of contraceptives (even to married couples)—Justice Harlan's dissent explained not only why the majority should have reached the merits, but also why the law should be found unconstitutional.

His widely cited dissenting opinion was the first Supreme Court endorsement of an implied right of privacy in the context of reproductive decisions. It laid the groundwork for the majority's decision invalidating the very same statute in Griswold v. Connecticut four years later. Justice Harlan incorporated that influential dissent into his concurrence in Griswold. His powerful reasoning, which recognized unenumerated rights under a natural law approach, has been cited in subsequent Supreme Court landmarks developing this important realm of individual rights.

54. This phrase was coined by Yale Law School Professor Thomas Emerson. See Thomas I. Emerson, The System of Freedom of Expression 3-4 (1970).
56. See id. at 508-09.
57. See id. at 522-55.
58. Justice Harlan's approach to the right of privacy has been employed or expanded upon by the Court in a number of important subsequent privacy cases. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977); Roe v. Wade, 410 U.S. 113, 115 (1973); Eisenstadt v. Baird, 405 U.S. 438, 448-49 (1972). In contrast, Justice Douglas's rationale in Griswold, that the right of privacy is found within the penumbra of the Bill of Rights, was never subsequently adopted by the Court. Outside of two dissenting opinions by Douglas himself—Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting), and Schmerber v. California, 384 U.S. 757, 778 (1966) (Douglas, J., dissenting)—no Supreme Court opinion has expressed the view that a right of privacy derives from the penumbra of the Bill of Rights.
59. 381 U.S. 479 (1965).
60. See id. at 499 (Harlan, J., concurring).
61. See, e.g., Hodgson v. Minnesota, 110 S. Ct. 2926, 2943 (1990); Akron v. Akron
Once again, the conservative Justice Harlan's leadership in the judicial articulation of an implied privacy right contrasts sharply with the Rehnquist Court's leadership in the judicial retrenchment from this right. In its most recent pronouncements on the subject, the Rehnquist Court has been reluctant both to recognize any such rights,\(^\text{62}\) and to accord them any meaningful judicial protection even if they are recognized.\(^\text{63}\)

This particular contrast illustrates a more general disparity between the classic conservatism of Justice Harlan and the neo-conservatism of Chief Justice Rehnquist: Justice Harlan was willing to give broad scope to the Constitution's protection of individual liberties, extrapolating from express textual protections to infer additional protections from the broad purposes underlying the specific language. It is noteworthy, for example, that Justice Harlan was the first Justice to articulate not only the implied constitutional right of privacy governing matters of sexuality and reproduction, but also the implied constitutional freedom of association.\(^\text{64}\)

In contrast, Chief Justice Rehnquist and other Justices who now dominate the Court's majority have evinced a deep hostility to recognizing any implied constitutional rights. Justice Harlan perceived the Constitution as creating islands of government authority amidst a sea of individual freedom, whereas Chief Justice Rehnquist and his brethren view the Constitution as creating islands of individual freedom amidst a sea of government authority.\(^\text{65}\)

III. JUSTICE HARLAN'S PHILOSOPHY THAT ACTIVE JUDICIAL ENFORCEMENT OF THE BILL OF RIGHTS IS NOT THE MOST EFFECTIVE STRATEGY FOR SECURING LIBERTY

I will now turn from Justice Harlan's decisions concerning particular Bill of Rights provisions to broad themes which unify his Bill of Rights jurisprudence more generally. Probably the most general overall theme, which links the entire corpus of Justice Harlan's opinions in this field, is that he did not, in general, champion vigorous judicial enforcement of the Bill of Rights.

---


\(^\text{64}\) See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

\(^\text{65}\) This metaphor was previously used by Professor Stephen Macedo. See STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION 32 (1987); see also Calvin R. Massey, The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law, 1990 WIS. L. REV. 1229, 1260.
As the first section of this article demonstrated, there were important exceptions to the foregoing generalization. With respect to significant liberties protected by the Bill of Rights, Justice Harlan urged—and practiced—vigorous judicial enforcement. These opinions emphasize that Justice Harlan's general reluctance to expand federal judicial power for purposes of enforcing the Bill of Rights stemmed not from any disregard for individual rights, but rather, from a distrust of expanded federal governmental power—including federal judicial power. Justice Harlan's suspicion of increased federal power derived precisely from his concern that, in the long run, it could well undermine individual freedom.

In light of the inroads that the activist Rehnquist Court has made into individual liberty, as illustrated in the preceding section, Justice Harlan's views in this regard have proven sadly prophetic. They remind us of the value of taking the long-range perspective that characterized his Bill of Rights writings, looking beyond the immediate results in a particular case to its broader implications for liberty generally and in the long run.

Justice Harlan's judicial approach to the Bill of Rights entails three interrelated subthemes, each of which will be discussed in turn: that judicial enforcement of the Bill of Rights is not the only effective strategy for advancing individual freedom, that liberty could be better protected through strategies other than vigorous judicial review, and that a uniform national standard for individual rights, prescribed by the Supreme Court, could undermine such rights.66

Justice Harlan's belief that a judicially enforced Bill of Rights was not the only effective strategy for securing individual liberty was forcefully stated, for example, in a speech he delivered in 1963. He said:

It is, I think, frequently overlooked that the Bill of Rights, even in the guardianship of the Supreme Court, is not the sole bulwark against the diminution or loss of things that are associated with what is called the American way of life. Three other factors are, I think, of equal, though perhaps less obvious, importance.

The first is the peculiar genius of our federal system under which we have achieved national solidarity and unparalleled strength and at the same time kept governmental authority workably diffused between the federal establishment and the states . . .

The second is the principle of diffusion of power within the federal government itself . . . .

66. For an extended exploration of some of these themes, see J. Harvie Wilkinson III, Justice John M. Harlan and the Values of Federalism, 57 VA. L. REV. 1185 (1971).
The third factor is enlightened public opinion.\textsuperscript{67}

I believe that Justice Harlan's emphasis on the importance of public opinion as a guarantor of liberty is worth noting. He elaborated on this point as follows:

With respect to decisions of the Supreme Court, the final expositor of the Constitution under our system, this factor is no less essential than in other aspects of the democratic process. . . . Given adequate enlightenment . . . it disrespects the character of our people to suppose that they will not understand the Constitution. . . . [The American people] are a . . . fair-minded people whose ultimate support can be counted on for any constitutional decision which, with due regard for the claims of history, is grounded on principles that are manifestly fair and right. To doubt these things is to foresee a future that has no anchors to the past.\textsuperscript{68}

Justice Harlan also urged lawyers to engage in the important process of public education about freedom:

Public enlightenment in this field is a function not merely of a free and responsible press, but also, and to an important extent, of the bar, to whom the public is entitled to look both for guidance in the understanding of constitutional decisions and leadership in respect for law.\textsuperscript{69}

Justice Harlan's emphasis on public education as a pillar on which to support individual liberty leads to the second subtheme in his philosophical approach to the Bill of Rights: his opinion that individual rights could be more effectively protected through strategies other than invigorated judicial review.

Justice Harlan resisted the reliance on courts as instruments of social change because he believed that better and more durable social reforms could be effected through the political process. Because of popular participation in the political process, he believed that rights which were protected through that process would have greater public acceptance than rights that the public viewed as created by and imposed on them by an unelected judiciary. Accordingly, he reasoned, judicially recognized rights were less stable and secure than rights protected through the elected


\textsuperscript{68} \textit{Id.} at 922-23.

\textsuperscript{69} \textit{Id.} at 922.
branches of government. Justice Harlan expressed this viewpoint, for example, in his dissent from the Warren Court's famous decision in *Miranda v. Arizona*:

> It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. . . . [T]he practical effect of the decision . . . must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy . . . though this Court has been more patient in the past.

Justice Harlan is wrong in suggesting that decisions such as *Miranda*, which resolve important and controversial public policy issues, inevitably would chill public debate on those issues. To the contrary, such decisions can as easily stimulate public dialogue about, and legislative responses to, the underlying issues. For example, the Court's decisions in *Brown v. Board of Education* and its progeny are widely credited with inspiring the civil rights movement, and with laying the groundwork for Congress's passage of the 1964 Civil Rights Act.

Just as the Court's civil rights decisions sparked significant supportive public response and legislative action, other Supreme Court decisions have sparked significant negative public response and legislative attempts to counteract them. The very decision that provoked Justice Harlan's above-cited dissent—*Miranda*—is one important example in that category. The Court's decision in *Roe v. Wade* is another significant example.

71. Id. at 524 (Harlan, J., dissenting)
75. 410 U.S. 113 (1973).
76. See, e.g., *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 759
Far from lulling citizens and government officials into passive acceptance of the Court's resolutions of the underlying issues, both of these decisions apparently mobilized citizens and elected officials to push for measures that would limit and even overturn the Court's rulings. Moreover, such efforts have been highly successful. One measure of their success is the popular election of Presidents who emphasized, and followed through on, campaign pledges to appoint Supreme Court Justices who would respect "law and order" and the "right to life."\textsuperscript{77}

For the foregoing reasons, Justice Harlan exaggerated the danger that the public and government agencies would be foreclosed from addressing pressing social issues that the Supreme Court held to be governed by the U.S. Constitution. There is, nevertheless, some real danger that Supreme Court activism might curb the activism of other government bodies. This leads to the third subtheme in Justice Harlan's general approach to the Bill of Rights: his belief that a single national standard, imposed by the Supreme Court, could ultimately erode individual rights.

Some commentators have described the issues presented by this subtheme by contrasting an "old freedom" with a "new freedom."\textsuperscript{78} The "old freedom" consists of the dispersion of power throughout the branches and levels of government through separation of powers and federalism. The "new freedom," instead, consists of the exercise of federal judicial power to interpret expansively the Bill of Rights and its binding effect upon all units of government.

To Justice Harlan, individual liberty was ultimately better protected by the old freedom. Accordingly, his opinions stressed "the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms."\textsuperscript{79} For example, in his dissent from the Warren Court's decision that ordered reapportionment of state legislatures, \textit{Reynolds v. Sims},\textsuperscript{80} Justice Harlan wrote: "The Constitution is an instrument of government, fundamental to which is the


\textsuperscript{78} See, e.g., Wilkinson, supra note 66, at 1210-12.


\textsuperscript{80} 377 U.S. 533 (1964).
premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens.”

Justice Harlan's conception of federalism as a fundamental bulwark against invasion of individual rights is consistent with his view that "federalism was, above all, a constitutional mandate, not merely a desirable policy which his fellow Justices were free to follow [or ignore] at their discretion." He consistently expressed these views in his separate judicial opinions. In one concurrence, for example, Justice Harlan stated that “[i]t is too often forgotten in these times that the American federal system is itself constitutionally ordained.” Similarly, in a dissent, Justice Harlan wrote that “[c]onstitutionally principled adjudication, high in the process of which is due recognition of the just demands of federalism, leaves ample room for the protection of individual rights.”

Because of Justice Harlan’s respect for federalism, which he viewed as constitutionally mandated, he openly espoused a double standard for judicial review of state and federal measures. As discussed in Part II of this article, for example, Justice Harlan believed that the Fourth Amendment’s limitations on searches and seizures—which, in his view, were strict—did not apply wholesale to searches and seizures conducted by state or local law enforcement officers.

Consistent with his strong view of federalism, Justice Harlan followed the same dualistic approach to individual rights in the obscenity area as well. He repeatedly expressed his view that a state standard for banning obscenity passed federal constitutional muster, even though the very same standard might well violate the First Amendment if it were enacted at the federal level.

Those who know that Justice Harlan is an admired exponent of judicial conservativism would probably be surprised to learn that he frequently sided with the Warren Court's judicial liberals and activists in interpreting the Bill of Rights in a federal context. Yet the same Justice Harlan who often interpreted the Bill of Rights broadly in a federal context also strongly resisted the application of this broad federal

81. Id. at 625 (Harlan, J., dissenting).
82. Wilkinson, supra note 66, at 1212.
85. See supra notes 4-7 and accompanying text.
interpretation to state and local governments. The seeming inconsistency between these two strands of Justice Harlan’s Bill of Rights opinions is explained by the fact that he was less concerned about what substantive standards should apply in a particular situation than with the importance of preventing a single federal standard from controlling nationwide. He voiced this underlying concern, for example, in his dissent in Malloy v. Hogan, which held that the Fifth Amendment privilege against compulsory self-incrimination also applies to the states under the Fourteenth Amendment:

If the power of the States to deal with local crime is unduly restricted, the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources. Such a shift . . . may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects.

Justice Harlan’s belief that a uniform national standard on individual rights could work to the detriment of such rights was based on two principal grounds. First, he thought that a single standard would decrease the possibility that state governments would adopt more rights-protective standards. Justice Harlan was willing to risk some marginal infringement of liberty within a single state, because that would avert what he viewed as a greater threat to liberty—the imposition of a single national, freedom-limiting standard. For example, in Roth v. United States, Justice Harlan explained:

The fact that the people of one State cannot read some of the works of D.H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both the letter and the spirit of the First Amendment.

Justice Harlan’s second major basis for believing that a uniform national standard could have a negative impact on liberty was his fear that, if the Court realized that the standard it formulated would bind state and

87. 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).
88. Id. at 28.
89. See, e.g., cases cited supra note 86.
90. 354 U.S. at 476.
91. Id. at 506 (Harlan, J., concurring in part and dissenting in part).
local officials as well as federal agents, the Court might be tempted to
dilute the constitutional standard in order to minimize its interference with
state and local governments. The net impact on freedom could well be
negative, should the Court’s price for imposing every detailed
interpretation of the Bill of Rights upon the states be to “water[] down
protections against the Federal Government . . . so as not unduly to
restrict the powers of the States.”

IV. CONCLUSION

In summary, Justice Harlan often differed with the liberal majority on
the Warren Court not about which rights should be protected, but rather,
about how they should be protected. Thus, the two sets of opinions that
are described in Parts II and III of this article—opinions in which Justice
Harlan strictly enforced particular Bill of Rights guarantees and those in
which he urged federal judicial restraint in deference to other mechanisms
for enforcing those guarantees—are not, as they might superficially
appear, inconsistent with each other. Rather, these two sets of cases
should be understood as counterpart sides of the same coin: Justice
Harlan’s belief that the greatest long-range danger to liberty is posed by
expanded federal governmental power, including federal judicial power.

To Justice Harlan, the judicial activism that his Warren Court brethren
deployed to advance individual liberty could also endanger liberty. His
focus was not on the temporary impact of the Court’s decisions, because
he recognized that judicial activism that one day is wielded to promote
individual rights may be wielded the next day to retard such rights.

Indeed, the constitutional philosophy of the Rehnquist majority has
demonstrated the accuracy of Justice Harlan’s foresight. In two significant
respects, the Rehnquist Court is implementing a sharply different
constitutional philosophy than that of the classic conservative, Justice
Harlan. First, the Rehnquist Court is practicing judicial activism, rather
than restraint, in terms of deciding which cases and issues to review. Furthermore, the Rehnquist majority exercises its aggressively asserted
judicial review power in order to sustain governmental authority, and
majoritarian preferences, at the cost of individual and minority group
rights. In contrast, Justice Harlan exemplified a philosophy of judicial
restraint, in order to limit government power—including the power of the
federal courts—and to protect individual freedom; when he departed from

93. See Nadine Strossen, Introduction, 7 N.Y.L. SCH. J. HUM. RTS. 1, 5-7 (Symp.
1990); see also Hon. Stephen Reinhardt, Limiting Access to the Federal Courts: Round Up
his general presumption that judicial power should be cautiously deployed, it was also in service of the goal of protecting liberty.

At the time that this article is being written, the foregoing development—and civil libertarians’ attendant fear of active Supreme Court Justices who interpret the Bill of Rights expansively—is crystallized in the debate surrounding President Bush’s nomination of Judge Clarence Thomas to the Supreme Court. Many advocates of individual and minority group rights cite Judge Thomas’s beliefs in “natural law” and a judge’s obligation to interpret the Constitution in light of natural law principles, as a basis for opposing—or at least questioning—his appointment. They correctly point out that judicial activism in service of unwritten higher law principles could be invoked, for example, to protect the rights of a fetus, to the detriment of women’s rights.95

Justice Harlan’s philosophy concerning judicial enforcement of the Bill of Rights was consistent with his qualities that Professor Van Alstyne extolled when he said that Justice Harlan represented an example of “virtue as practice,” insofar as he judged constitutional matters truthfully.96 Justice Harlan resisted the temptation to impose his views about individual freedoms upon all branches and levels of government and upon all citizens nationwide, in the belief that judicial restraint in the long run would best serve those freedoms. In addition to practicing the virtue of “patience” through his own style of adjudication, Justice Harlan urged it upon others as well, also in an attempt to maintain limits on government power and to preserve individual liberty. He repeatedly asked for “patience on the part of those who might like to see things move faster among States.”97


A commentator who has analyzed Justice Harlan's judicial philosophy has well summarized the close interlinking between his virtues, as described by Professor Van Alstyne, and his classic conservativism. J. Harvie Wilkinson III stated:

To withstand the temptation to seize the many opportunities that a Justice has to impose his views on others requires a rare combination of human virtues. These include humility and tolerance, resistance to fad and contemporaneity, and contentment with decisions often noted more for their craftsmanship than their capacity for headlines.98

Justice Harlan's belief in the type of individual virtue which Professor Van Alstyne says he exemplified is demonstrated by the conclusion of an address he gave in 1963. Justice Harlan ended that lecture with a passage from Confucius, explaining that the passage "seems to me to fit well the needs of a free society in these turbulent times when the importance of individual excellence is too often lost sight of through preoccupation with the grandiose."99 The Confucius passage, which fittingly expresses Justice Harlan's own "virtue in practice," reads:

The ancients who wished to illustrate illustrious virtue throughout the empire first ordered well their own States.
Wishing to order well their States, they first regulated their families.
Wishing to regulate their families, they first cultivated their persons.
Wishing to cultivate their persons, they first rectified their hearts.
Wishing to rectify their hearts, they first sought to be sincere in their thoughts.
Wishing to be sincere in their thoughts, they first extended to the utmost their knowledge.
Such extension of knowledge lay in the investigation of things.
Things being investigated, knowledge became complete.

From the emperor down to the mass of the people, all must consider the cultivation of the person the root of every thing besides.

98. Wilkinson, supra note 66, at 1189.
It cannot be, when the root is neglected, that what should spring from it will be well ordered.\textsuperscript{100}

\textsuperscript{100} \textit{Id.} at 923-24 (quoting CONFUCIUS, \textit{The Great Learning}, in \textit{The Book of Ritual}, reprinted in 1 JAMES LEGGE, \textit{The Chinese Classics} 221-23 (1861)).