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John Marshall Harlan, Civil Liberties, and the Warren Court

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JOHN MARSHALL HARLAN, CIVIL LIBERTIES, AND THE WARREN COURT*

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Justice Harlan was an indispensable component of the Warren Court. This is true not only, as a wiseacre might say, because losers are needed if there are to be winners, but because he provided a form of resistance to the dominant motifs of the Court that was intelligent, determined, professionally skillful, and, above all, principled. In a sense he defined the Court by his dissents. For this performance over sixteen years Harlan received extraordinary praise. Earl Warren himself said that "Justice Harlan will always be remembered as a true scholar, a talented lawyer, a generous human being, and a beloved colleague by all who were privileged to sit with him."[1] Judge Henry Friendly, who first worked with Harlan as a young lawyer in the early 1930s, boldly asserted that "there has never been a Justice of the Supreme Court who has so consistently maintained a high quality of performance or, despite differences in views, has enjoyed such nearly uniform respect from his colleagues, the inferior bench, the bar, and the academy."[2] There are many similar accolades.[3]

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1. Earl Warren, *Mr. Justice Harlan, As Seen by a Colleague*, 85 HARV. L. REV. 369, 370-71 (1971).

2. Henry J. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 384 (1971).

3. *See, e.g.*, Paul A. Freund, *Foreword* to THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN xiii (David L. Shapiro ed., 1969); Nathan Lewin, *Justice Harlan: "The Full Measure of the Man"*, 58 A.B.A. J. 579 (1972); Lewis F. Powell, Jr., Address at the 63rd Annual Meeting of the American Law Institute (May 15, 1986), *reprinted in* AMERICAN LAW INSTITUTE, PROCEEDINGS: 63RD ANNUAL MEETING 312 (1987); Charles Alan Wright, *Hugo L. Black:*

In this paper I shall indicate the nature and extent of Harlan's views as a counterpoint to the civil liberties rulings of the Warren Court majority. But I shall also suggest that it would be a mistake to conceive of Harlan solely in this light, as an inveterate reactionary seeking to forestall the brave new world that his brethren sought to welcome or even to create. To a surprising degree, Harlan concurred in the liberal activism of the Warren Court, picking his spots carefully and above all seeking (though not always successfully) to be true to his core values of federalism and a limited judicial function. What emerges, in sum, is not a right-wing Justice, as he is sometimes conceived, but rather someone closer to the center, a moderate figure avoiding the extremes.

I.

The subject of this paper is Justice Harlan and civil liberties, but it is palpably not possible to isolate Harlan's views on liberty from his overall judicial philosophy. In particular, it is necessary, if one is to understand Harlan fully, to take account of two overarching themes in his jurisprudence: federalism and proceduralism. Other articles in this symposium concentrate on these topics,[4] so for present purposes we need discuss them only briefly to appreciate their relevance to his civil liberties opinions.

Harlan was preoccupied with the necessity of keeping "'the delicate balance of federal-state relations' in good working order."[5] Harlan's view of federalism is perhaps best summarized in an opinion by Justice Field, which Harlan quoted approvingly: "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States . . . . Supervision over either the legislative or the judicial

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A Great Man and a Great American, 50 TEX. L. REV. 1, 3-4 (1971). The first full biography of Justice Harlan has recently appeared. *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992).

4. *See, e.g.*, Martha A. Field, *Justice Harlan's Legal Process*, 36 N.Y.L. SCH. L. REV. 155 (1991); David L. Shapiro, *Justice Harlan and Justiciability: Notes on Two Dissents*, 36 N.Y.L. SCH. L. REV. 199 (1991); Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model for How a Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 133 (1991); Donald H. Zeigler, *Justice Harlan and Implied Rights of Action*, 36 N.Y.L. SCH. L. REV. 205 (1991); Lori G. Wentworth, Note, *Justice Harlan, Justice Rehnquist, and the Values of Federalism*, 36 N.Y.L. SCH. L. REV. 255 (1991).

5. John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A. J. 943, 944 (1963); *see also* Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) ("Judicial self-restraint . . . will be achieved . . . only by . . . wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.").

action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States."[6]

Harlan's narrow conception of the state action doctrine is traceable in large part to federalist concerns. In his view, expansion of the area of federal court authority over activities that are properly the responsibility of state government simultaneously impairs "independence in their legislative and independence in their judicial departments."[7] Thus, for example, despite his strong commitment to racial equality, Harlan did not believe that land bequeathed in trust to a Georgia city as a "park and pleasure ground" for white people was unconstitutionally administered because a state court replaced public trustees with private ones and the park was municipally maintained.[8] Nor did he believe that a state constitutional amendment, adopted by referendum, that protected the right of private parties to exercise total rights over real property, including the ability to discriminate on the ground of race, was invalid because the state was thereby encouraging the discrimination.[9] And in a nonracial context, Harlan dissented from a holding that a privately owned shopping mall was the equivalent of a company town and was thus barred from prohibiting peaceful picketing of a supermarket in the mall.[10]

It is of special importance to note that Harlan saw federalism not only as part of our constitutional design,[11] "born of the necessity of achieving union," but as "a bulwark of freedom as well."[12]

> We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the

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6. Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting), *quoted in* Fay v. Noia, 372 U.S. 391, 466 (1963) (Harlan, J., dissenting); *see also* Henry v. Mississippi, 379 U.S. 443, 464-65 (1965) (Harlan, J., dissenting) (discussing the majority's disrespect for state procedures as the very "antithesis" of federalism); Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting) (criticizing the Court's entry into political matters); Griffin v. Illinois, 351 U.S. 12, 39 (1956) (Harlan, J., dissenting) (stating that the Court's interference with state matters was not justified under the Fourteenth Amendment).

7. *Fay*, 372 U.S. at 466 (Harlan, J., dissenting) (quoting Baltimore & O.R.R., 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

8. *See* Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting).

9. *See* Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Harlan, J., dissenting).

10. *See* Amalgamated Food Employees Union 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 333 (1968) (Harlan, J., dissenting).

11. *See* Pointer v. Texas, 380 U.S. 400, 409 (1965) (Harlan, J., concurring) ("[T]he American federal system is itself constitutionally ordained . . . .").

12. Harlan, *supra* note 5, at 943.

> structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches.[13]

Thus, because Harlan "believe[d] that among the constitutional values which contribute to the preservation of our free society, none ranks higher than the principles of federalism," he viewed the "Court's responsibility for keeping such principles intact [as] no less than its responsibility for maintaining particular constitutional rights."[14]

In addition to historical justifications and its "significance as an instrument of freedom,"[15] Harlan viewed federalism as essential for preserving the values of pluralism and local experimentation. No other political system "could have afforded so much scope to the varied interests and aspirations of a dynamic people representing such divergencies of ethnic and cultural backgrounds," and still "unif[y] them into a nation."[16] In *Roth v. United States*,[17] addressing the power of the states and the federal government to regulate obscenity, Harlan said:

> [O]ne of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. "State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of

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13. *Id.* at 943-44.

14. Chapman v. California, 386 U.S. 18, 57 (1967) (Harlan, J., dissenting). A similar point was made by Justice Lewis Powell:

> Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. Nor is it a matter of the wisdom or folly of certain policy choices. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting) (citations omitted).

15. Harlan, *supra* note 5, at 944.

16. *Id.*

17. 354 U.S. 476 (1957).

> providing forty-eight separate centers for such experimentation."[18]

Harlan's dedication to proceduralism was equally firm and closely related to his views on federalism. "Proceduralism" refers not only to rules that govern trials and appeals, although these are included, but also to issues of justiciability—such as standing, ripeness, abstention, and comity—that determine when the judicial power will be exercised and thus relate more broadly to the role of courts, especially the Supreme Court, in American society.

Dissenting from the Supreme Court's "one person, one vote" decision in *Reynolds v. Sims*,[19] Harlan rejected the view

> that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot on the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements.[20]

Such a view, Harlan argued, "is not only inconsistent with the principles of American democratic society but ultimately threatens the integrity of the judicial system itself."[21] Thus, Harlan urged the Court to steer clear of "political thickets,"[22] lest "the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result."[23]

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18. *Id.* at 505 (Harlan, J., concurring in part and dissenting in part) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 493 (1954)).

19. 377 U.S. 533 (1964).

20. *Id.* at 624-25 (Harlan, J., dissenting); see also Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting), where Harlan stated that the Court's decision

> reflects to an unusual degree the current notion that this Court possesses a peculiar wisdom all its own whose capacity to lead this Nation out of its present troubles is contained only by the limits of judicial ingenuity in contriving new constitutional principles to meet each problem as it arises.

Id. at 677.

21. Harlan, *supra* note 5, at 943.

22. Whitcomb v. Chavis, 403 U.S. 124, 170 (1971) (separate opinion of Harlan, J.); Hadley v. Junior College Dist., 397 U.S. 50, 63 (1970) (Harlan, J., dissenting).

23. Reynolds v. Sims, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting); *see also* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680-81 (1966) (Harlan, J., dissenting)

Harlan went beyond articulating a vague notion of "judicial restraint," and embodied his view of the limited role of the courts in a series of rules.

First, Harlan advanced principles which limited the occasions for exercising judicial authority. He jealously guarded the Supreme Court's appellate authority, which he believed should be used "for the settlement of [issues] of importance to the public," and "should not be exercised simply 'for the benefit of the particular litigants.'"[24] Thus, Harlan urged strict adherence to the doctrines of standing[25] and abstention.[26] He repeatedly called upon the Court to follow a number of practices designed to avoid unnecessary or premature judicial intervention, including allowing administrative processes to run their course,[27] not passing on the validity of state statutes which have neither been enforced nor interpreted by state courts,[28] not addressing issues not considered

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("[T]he fact that the *coup de grace* has been administered by this Court instead of being left to the . . . political process should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.") (footnote omitted).

24. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 250 (1969) (Harlan, J., dissenting) (quoting Rice v. Sioux City Memorial Cemetery, Inc., 349 U.S. 70, 74 (1955)). Thus, Harlan had more than one occasion to remind his brethren that the Court was not akin to a state court of appeals designed to correct lower court error or assure justice for every litigant. *See* Giles v. Maryland, 386 U.S. 66, 119 (1967) (Harlan, J., dissenting); *see also* United States v. Vuitch, 402 U.S. 62, 90 (1971) (Harlan, J., dissenting) (stating that the Court should narrowly construe a statute creating a right of direct appeal).

25. *See, e.g.*, Jenkins v. McKeithen, 395 U.S. 411, 433 (1969) (Harlan, J., dissenting) (criticizing the Court for turning the principle of standing "on its head, as it attempts to create a controversy out of a complaint which alleges none"); Flast v. Cohen, 392 U.S. 83, 130 (1968) (Harlan, J., dissenting) (opposing taxpayer standing in Establishment Clause challenges because "unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government").

26. *See, e.g.*, Harrison v. NAACP, 360 U.S. 167, 176 (1959) (stating that "the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them" in order to avoid "unnecessary interference by the federal courts with proper and validly administered state concerns").

27. *See, e.g.*, Frozen Food Express v. United States, 351 U.S. 40, 45, 47 (1956) (Harlan J., dissenting) (stating that the administrative order interpreted by the majority should not have been subjected to judicial scrutiny until all administrative procedures had been exhausted). *But cf.* Abbott Laboratories v. Gardner, 387 U.S. 136, 153 (1967) (holding that access to the courts under a regulation must be permitted "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance").

28. *See, e.g.*, Berger v. New York, 388 U.S. 41, 92 (1967) (Harlan, J., dissenting)

below,[29] and refusing to hear appeals of nonfinal orders.[30] Harlan insisted that the Court avoid "'constitutional decisions until the issues are presented with clarity, precision and certainty,' and [should] refuse to decide . . . constitutional question[s] in the abstract."[31] Harlan also was steadfast in his view that an adequate and independent state law ground barred Supreme Court review of state court decisions, a "rule of constitutional dimensions going to the heart of the division of judicial powers in a federal system."[32]

("[T]he Court ordinarily awaits a state court's construction before adjudicating the validity of a state statute."); Dombrowski v. Pfister, 380 U.S. 479, 501 (1965) (Harlan, J., dissenting) (the "statute thus *pro tanto* goes to its doom without either state or federal court interpretation, and despite the room which the statute clearly leaves for a narrowing constitutional construction").

29. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 676-77 (1961) (Harlan, J., dissenting) (deciding issues not fully considered below "is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions"); NLRB v. Lion Oil Co., 352 U.S. 282, 304-05 (1957) (Harlan, J., concurring in part and dissenting in part) (deciding issues not considered below "depriv[es] this Court . . . of the considered views of the lower courts" and "represents unsound judicial administration"). *But cf.* Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting) ("While ordinarily I would not deem it appropriate to deal . . . with constitutional issues which the Court [and the court below] ha[ve] not reached, I shall do so here because such issues . . . are entangled with the Court's conclusion . . . .").

30. *See, e.g.*, Organization for a Better Austin v. Keefe, 402 U.S. 415, 420 (1971) (Harlan, J., dissenting) ("In deciding this case on the merits, the Court, in my opinion, disregards the express limitation on our appellate jurisdiction to '[f]inal judgments or decrees' . . . .") (alteration in original) (quoting 28 U.S.C. § 1257 (1988)); Mercantile Nat'l Bank at Dallas v. Langdeau, 371 U.S. 555, 572 (1963) (Harlan, J., dissenting) (asserting that the state court determination related only to venue and was thus "not in itself reviewable as a final judgment"); Parr v. United States, 351 U.S. 513, 518 (1956) ("[R]eview must await the conclusion of the 'whole matter litigated' . . . .").

31. Griffin v. Illinois, 351 U.S. 12, 32-33 (1956) (Harlan, J., dissenting) (citation omitted) (quoting Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 576 (1946)); *see also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 730 (1961) (Harlan, J., dissenting) ("[S]ound principles of constitutional adjudication dictate that we should first ascertain the exact basis of this state judgment . . . ."). *But cf.* Epperson v. Arkansas, 393 U.S. 97, 114-15 (1968) (Harlan, J., concurring) (although the issues were presented to the Court in an "opaque" opinion, "the constitutional claims having been properly raised and necessarily decided below, resolution of the matter by us can not properly be avoided").

32. Fay v. Noia, 372 U.S. 391, 464 (1963) (Harlan, J., dissenting); *see also id.* at 466 ("[D]etermination of the adequacy and independence of the state ground . . . marks the constitutional limit of our power in this sphere."); Chapman v. California, 386 U.S. 18, 46-7 (1967) (Harlan, J., dissenting) ("[T]he Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts . . . is wholly out of keeping with our federal system . . . ."); Henry v. Mississippi, 379 U.S. 443, 457 (1965) (Harlan, J., dissenting) ("I cannot account for the remand of this case in

Second, Harlan urged the Court to show deference to other decision-making authorities. In addressing whether a federal prisoner was entitled to a hearing on a second motion for relief from sentence under the federal habeas corpus statute, Harlan maintained that

> [r]ules respecting matters daily arising in the federal courts are ultimately likely to find more solid formulation if left to focused adjudication on a case-by-case basis, or to the normal rule-making processes of the Judicial Conference, rather than to *ex cathedra* pronouncements by this Court, which is remote from the arena.[33]

And, perhaps growing out of an attitude of "subservience to the facts"[34] that he developed as a trial lawyer, Harlan believed strongly in deference to the fact-finding of the trial courts, saying that "appellate courts have no facilities for the examination of witnesses; nor in the nature of things can they have that intimate knowledge of the evidence and 'feel' of the trial scene."[35]

Finally, Harlan was committed to the stable and predictable development of the law. He protested when the Court resolved important issues by way of summary disposition. For example, in the *Pentagon Papers* case,[36] Harlan recounted the "frenzied train of events" whereby, within one week from the date of decisions rendered by two courts of appeals, the Court heard argument and issued a decision.[37] Harlan

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the face of what is a demonstrably adequate state procedural ground . . . .").

33. Sanders v. United States, 373 U.S. 1, 32 (1963) (Harlan, J., dissenting); *see also* California v. Lo-Vaca Gathering Co., 379 U.S. 366, 377 (1965) (Harlan, J., dissenting) (concluding that when complex technical matters are involved, "the informed expertise of [an administrative agency] is a necessary adjunct to satisfactory judicial resolution of particular cases"); Hardy v. United States, 375 U.S. 277, 300 (1964) (Harlan, J., dissenting) (stating that decisions which concern the procedures governing *in forma pauperis* appeals are "best left to the discrete treatment by the Judicial Councils in the various Circuits").

34. John E.F. Wood, *John M. Harlan, As Seen by a Colleague in the Practice of Law*, 85 HARV. L. REV. 377, 379-80 (1971).

35. Mesarosh v. United States, 352 U.S. 1, 23 (1956) (Harlan, J., dissenting); *see also* Time, Inc. v. Pape, 401 U.S. 279, 294 (1971) (Harlan, J., dissenting) (the Court should not be the "ultimate arbiter of factual disputes" in libel cases); Beck v. Ohio, 379 U.S. 89, 100 (1964) (Harlan, J., dissenting) (the Court "should be extremely slow to upset a state court's inferential finding" with respect to disputed questions of fact); United States v. Shotwell Mfg. Co., 355 U.S. 233, 243 (1957) (the truth or falsity of testimony and affidavits "is a matter for the District Court to determine").

36. New York Times Co. v. United States, 403 U.S. 713 (1971).

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

identified a number of pertinent issues (including some unfavorable to the government's position),[38] and noted that the "time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve."[39]

The pervasive effect of Harlan's commitment to federalism and proceduralism will be evident throughout our discussion of his civil liberties rulings.[40]

II.

We may now look more closely at Harlan's dissents from the principal civil liberty themes of the Warren Court. Perhaps the most central of these is "equality," an idea that "[o]nce loosed . . . is not easily cabined."[41] Harlan vigorously opposed egalitarian rulings of many kinds. He was most vehement in condemning the reapportionment decisions, first in *Baker v. Carr*,[42] in which the Court acknowledged federal jurisdiction to decide the issue whether state legislative districts were malapportioned, then in *Reynolds v. Sims*,[43] in which the Court established the one person-one vote rule, and in the many sequels to these rulings.[44] Harlan never became reconciled to what he regarded as a wholly unjustified encroachment into the political realm, saying in *Reynolds* that "[i]t is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States."[45]

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38. *See id.* at 753-55. For example, Harlan raised the question of whether the Attorney General was authorized to bring the suits against the newspapers in the name of the United States. *See id.* at 753-54.

39. *Id.* at 755 (footnote omitted); *see also* United States v. Chicago, 400 U.S. 8, 15 (1970) (Harlan, J., dissenting) ("[W]ithout briefs and oral argument by the parties on the merits of the question, I would refrain from choosing between the conflicting constructions . . . pressed upon the Court by the parties."); Travia v. Lomenzo, 381 U.S. 431, 434-35 (1965) (Harlan, J., dissenting) (opposing the Court's denial of a stay and motion to accelerate an appeal, stating that "these matters bristle with difficult and important questions").

40. For Harlan's views on stare decisis, also important to these themes, see *infra* notes 149-61 and accompanying text.

41. ARCHIBALD COX, THE WARREN COURT 6 (1968).

42. 369 U.S. 186 (1962).

43. 377 U.S. 533 (1964).

44. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50, 59 (1970) (Harlan, J., dissenting); Avery v. Midland County, 390 U.S. 474, 488 (1968) (Harlan, J., dissenting).

45. *Reynolds*, 377 U.S. at 615 (Harlan, J., dissenting).

Closely related to the reapportionment cases are those dealing with the right to vote. Here, too, Harlan dissented, from the ruling that invalidated Virginia's poll tax,[46] from a decision that opened school board elections to a man who was neither a parent or a property-holder in the district,[47] and from the decision upholding Congress's power to extend the franchise to eighteen year olds.[48]

The poll tax case illustrates an aspect of the Court's egalitarianism to which Harlan especially objected: its acceptance of the idea that government has an obligation to eliminate economic inequalities as a way to permit everyone to exercise human rights. The leading case in this regard was *Griffin v. Illinois*,[49] in which a sharply divided bench held that where a stenographic trial transcript is needed for appellate review, a state violates the Fourteenth Amendment by refusing to provide the transcript to an impoverished defendant who alleges reversible errors in his trial. Harlan's dissent maintained that "[a]ll that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action."[50] He later dissented in *Douglas v. California*,[51] where the Court held that a state could not deny counsel to a convicted indigent who seeks the only appeal he has by right to a higher court.

Another example of this genre is Harlan's protests at efforts to transform welfare payments into an entitlement. Harlan maintained that states could deny such payments to otherwise eligible welfare applicants, who had not resided in the state for a year or more.[52]

Harlan also found himself out of step with the prevailing view on criminal procedure, where the Warren Court rewrote the book,[53]

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46. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 680 (1966) (Harlan, J., dissenting).

47. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 634 (1969) (Stewart, J., joined by Black and Harlan, JJ., dissenting).

48. *See* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Harlan, J., concurring in part and dissenting in part).

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

50. *Id.* at 34 (Harlan, J., dissenting).

51. 372 U.S. 353, 360 (1963) (Harlan, J., dissenting).

52. *See* Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting).

53. The Burger and Rehnquist Courts have again rewritten the book on criminal procedure, adopting positions that in general would have been congenial to Justice Harlan. *See* McCleskey v. Zant, 111 S. Ct. 1454 (1991); Coleman v. Thompson, 111 S. Ct. 2546 (1991); Teague v. Lane, 489 U.S. 288 (1989); *see also* HERMAN SCHWARTZ, THE BURGER YEARS 143-88 (1987) (discussing the Burger Court's decisions in the area of criminal justice). There is no attempt in this article to trace doctrinal development in this and other subjects on which Justice Harlan wrote.

transforming the law relating to confessions and line-ups, the privilege against self-incrimination, wiretapping and eavesdropping, and the admissibility of illegally obtained evidence, among other aspects of criminal cases. The linch-pin of most of these rulings was the doctrine of selective incorporation, by which the protections of the first eight amendments to the Constitution that were deemed "fundamental" were applied by the Court to state criminal trials under the Fourteenth Amendment's Due Process Clause.[54] Rejecting Harlan's view that the Due Process Clause established a general test of "fundamental fairness" not tied to the particular provisions of the Bill of Rights, the Court completed a massive reform of criminal procedure in an astonishingly brief period of time.[55] Harlan vigorously dissented from most of the key decisions, including those applying the exclusionary rule to illegally seized evidence,[56] incorporating the privilege against self-incrimination,[57] creating the *Miranda* rules for warning individuals being taken into police custody,[58] and establishing the requirement of a jury trial in criminal cases.[59] He equally opposed the Court's conclusion that the guarantees of the Bill of Rights that were "selectively" incorporated should apply to the states in exactly the way in which they applied to the federal government.[60] In these cases he asserted that a healthy federalism was inconsistent with the assertion of national judicial power.[61]

Harlan also objected in the interests of federalism to extensions of congressional power. The two most significant cases of this sort were

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54. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

55. *See generally* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS (1980) (discussing the five year period in the mid-1960s when the Court's rulings in constitutional criminal procedure cases imposed new restrictions on law enforcement's use of interrogation practices in eliciting criminal confessions).

56. *See* Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

57. *See* Malloy v. Hogan, 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

58. *See* Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

59. *See* Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

60. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (Harlan, J., dissenting) (double jeopardy); Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring) (confrontation); *Malloy*, 378 U.S. at 14 (Harlan, J., dissenting) (self-incrimination); see also Williams v. Florida, 399 U.S. 78, 117-18 (1970) (Harlan, J., concurring in part and dissenting in part), where Harlan noted in a separate opinion that the necessary consequence under the incorporation doctrine of the holding that a twelve person jury is not required in state criminal trials is, through a "backlash," the application of the same lesser standard in federal cases.

61. *See, e.g.*, *Benton*, 395 U.S. at 801 (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

Katzenbach v. Morgan[62] and *United States v. Guest*,[63] in which the Court adopted broad theories in sustaining, respectively, the authority of Congress to invalidate state English language literacy tests for voting as applied to individuals who completed sixth grade in Puerto Rican schools and to punish private action that interferes with constitutional rights.

At the same time Harlan, often contrary to the majority, deferred to congressional judgments that resulted in an impairment of civil liberties. For example, he conceded broad authority to Congress over citizenship, rejecting any constitutional right to prevent involuntary denationalization,[64] he protested a softening of the immigration law that provided for deportation of an alien who had ever been a member of the Communist Party, however nominally,[65] and he opposed a constitutional right to travel abroad, first recognized in *Kent v. Dulles*[66] and solidified in *Aptheker v. Secretary of State*.[67] In all these cases he refused to overturn actions of the elected branches of government that resulted in severe and arguably unjustified harm to individuals.

There is no doubt, in light of these cases and others, that Justice Harlan was a regular and frequent dissenter from some of the Warren Court's key liberal decisions. In addition, especially in his early Terms, there were many important cases in which Harlan was part of a majority that rejected constitutional theories supported by the liberal Justices. For example, he wrote the prevailing opinions in cases rejecting First Amendment claims by individuals who were held in contempt by the House UnAmerican Activities Committee and were denied admission to the practice of law for refusing to respond to questions concerning Communist activities,[68] and by a man sentenced to prison because of his membership in the Communist Party.[69] These cases have not been overruled, but later decisions have overturned majority opinions which Harlan joined that, for example, permitted states to question criminal

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62. 384 U.S. 641 (1966).

63. 383 U.S. 745 (1966).

64. *See* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (Harlan, J., dissenting); Trop v. Dulles, 356 U.S. 86, 114 (1958) (Frankfurter, J., joined by Burger, Clark, and Harlan, JJ., dissenting); Perez v. Brownell, 356 U.S. 44 (1958).

65. *See* Rowoldt v. Perfetto, 355 U.S. 115, 121 (1957) (Harlan, J., dissenting).

66. 357 U.S. 116 (1958).

67. 378 U.S. 500 (1964).

68. *See* Konigsberg v. State Bar, 366 U.S. 36 (1961); Barenblatt v. United States, 360 U.S. 109 (1959).

69. *See* Scales v. United States, 367 U.S. 203 (1961). Another particularly harsh decision in this area was Flemming v. Nestor, 363 U.S. 603 (1960), in which Harlan, writing for the Court, upheld the denial of social security benefits to an alien who was deported because he had been a member of the Communist Party many years before.

suspects without regard to the privilege against self-incrimination,[70] and that denied women the right to serve on juries equally with men.[71] These cases must also be counted among those in which Harlan was out of step with the liberal activism that characterized the Warren Court.[72]

III.

But this is far from the whole story. Justice Potter Stewart, one of Harlan's closest colleagues, recognized this when he said: "I can assure you that a very interesting law review article could someday be written on 'The Liberal Opinions of Mr. Justice Harlan.'"[73] In virtually every area of the Court's work, there are cases in which Harlan was part of the consensus and, indeed, in which he spoke for the Court.

Harlan joined *Brown II*[74] and *Cooper v. Aaron*,[75] decisions instrumental in protecting the principle of the initial school desegregation case, *Brown I*.[76] He also joined every opinion decided while he was on the Court that applied *Brown* to other sorts of state-enforced segregation.[77]

He concurred in *Gideon v. Wainwright*,[78] the case granting a right to counsel to accused felons, and wrote the opinion of the Court in *Boddie v. Connecticut*,[79] which held that a state could not deny a divorce to a couple because they lacked the means to pay the judicial filing fee.

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70. *See* Lerner v. Casey, 357 U.S. 468 (1958), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

71. *See* Hoyt v. Florida, 368 U.S. 57 (1961), *overruled by* Taylor v. Louisiana, 419 U.S. 522 (1975).

72. For discussion of these themes, see Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); J. Harvie Wilkinson III, *Justice John Marshall Harlan and the Values of Federalism*, 57 VA. L. REV. 1185 (1971).

73. *See* John Marshall Harlan, 1899-1971, Memorial Addresses Delivered at a Special Meeting of the Association of the Bar of the City of New York by Mr. Justice Potter Stewart, Former Attorney General Herbert Brownell, and Professor Paul Bator (Apr. 5, 1972).

74. Brown v. Board of Educ., 349 U.S. 294 (1955).

75. 358 U.S. 1 (1958).

76. Brown v. Board of Educ., 347 U.S. 483 (1954).

77. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (public accommodations); Griffin v. County Sch. Bd., 377 U.S. 218 (1964) (public schools); Goss v. Board of Educ., 373 U.S. 683 (1963) (public schools); Watson v. City of Memphis, 373 U.S. 526 (1963) (recreational facilities); Peterson v. City of Greenville, 373 U.S. 244 (1963) (public accommodations).

78. 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

79. 401 U.S. 371 (1971).

Although both these cases were decided under the Due Process Clause, they amounted, at bottom, to judicially mandated equalization of economic circumstance in situations where Harlan concluded that it would be fundamentally unfair to deny poor people what others could afford.

In the criminal procedure area, while opposing the exclusionary rule in state prosecutions, he consistently supported a strong version of the Fourth Amendment protection against unreasonable searches and seizures by federal authorities,[80] including application of the principle to wiretapping and eavesdropping.[81] He also wrote separately in support of a ruling that extended criminal due process protections to juveniles accused of delinquency.[82] And he wrote an opinion overruling earlier cases upholding the federal registration requirements for gamblers, concluding that they could avoid prosecution for violation of the statutes by pleading the privilege against self-incrimination.[83]

Turning to free expression, one finds a host of important cases in which Harlan supported that constitutional right. For example, he wrote the important opinion in *NAACP v. Alabama*,[84] which held that it was a form of freedom of association protected by the First Amendment for individuals to join civil rights groups anonymously when exposure would have entailed great personal risks. He joined *New York Times Co. v. Sullivan*,[85] which first imposed limits on libel judgments against the media, and some (though not all) of the sequels to that case.[86] He joined opinions that barred states from refusing to seat an elected legislator

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80. *See, e.g.*, Jones v. United States, 357 U.S. 493 (1958) (no probable cause to search); Giordenello v. United States, 357 U.S. 480 (1958) (defective arrest warrant).

81. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). *But cf.* Berger v. New York, 388 U.S. 41, 89 (1967) (Harlan J., dissenting) (opposing application of exclusionary rule where state engaged in electronic eavesdropping).

82. *See In re* Gault, 387 U.S. 1, 65 (1967) (Harlan, J., concurring in part and dissenting in part).

83. *See* Marchetti v. United States, 390 U.S. 39 (1968) (overruling Lewis v. United States, 348 U.S. 419 (1955), and United States v. Kahriger, 345 U.S. 22 (1953)).

84. 357 U.S. 449 (1958); *see also* Talley v. California, 362 U.S. 60, 66 (1960) (Harlan, J., concurring) (invalidating a Los Angeles ordinance prohibiting the circulation of anonymous handbills as a violation of free speech and association).

85. 376 U.S. 254 (1964).

86. *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727 (1968) (holding that sufficient evidence is required to show that defendant had serious doubts as to the truth of the alleged defamatory statement to invoke actual malice standard); Garrison v. Louisiana, 379 U.S. 64 (1964) (holding that the *New York Times* case limits state power to impose sanctions for criticism of public officials in criminal cases as well as civil cases). *Cf.* Rosenblatt v. Baer, 383 U.S. 75, 96 (1966) (Harlan, J., concurring in part and dissenting in part) (stating that an impersonal attack on government operations will not constitute defamation unless it is specifically directed at plaintiff).

because of his sharply critical views on the Vietnam War,[87] and from convicting a leader of the Ku Klux Klan for "seditious" speech.[88] And he wrote for the Court to protect the right of a black man, unnerved by the shooting of a civil rights leader, to express himself strongly about the country while burning the flag.[89]

Harlan also wrote a number of opinions, all curbing variants of McCarthyism, that nominally were decided on nonconstitutional grounds but rested on First Amendment principles. In the first of these, *Cole v. Young*,[90] which invalidated the discharge of a federal food and drug inspector, Harlan interpreted a statute authorizing dismissals of government employees "in the interests of national security"[91] to apply only to jobs directly concerned with internal subversion and foreign aggression. The next year, in what Anthony Lewis has described as a "masterfully subtle opinion,"[92] Harlan construed the Smith Act[93] to permit prosecution of Communist Party leaders only for speech amounting to incitement to action rather than for "abstract doctrine" advocating overthrow.[94] A third instance involved companion cases in which the government had revoked the naturalization of two persons who were asserted to have obtained their citizenship improperly.[95] The government contended that they were Communists and therefore not "attached to the principles of the Constitution of the United States" as required by the applicable statute.[96] Harlan's opinion found that "clear, unequivocal and convincing evidence"[97] was lacking that the individuals were aware, during the relevant period prior to their becoming citizens, that the Communist Party was engaged in illegal advocacy. During the 1950s these decisions were milestones in lifting the yoke of political repression.

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87. *See* Bond v. Floyd, 385 U.S. 116 (1966).

88. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

89. *See* Street v. New York, 394 U.S. 576 (1969).

90. 351 U.S. 536 (1956); *see also* Vitarelli v. Seaton, 359 U.S. 535 (1959) (holding a security discharge invalid because an agency failed to follow prescribed procedures); Service v. Dulles, 354 U.S. 363 (1957) (same).

91. *Cole*, 351 U.S. at 551.

92. Anthony Lewis, *Earl Warren*, *in* THE WARREN COURT: A CRITICAL ANALYSIS 1, 15 (Richard H. Sayler et al. eds., 1968).

93. 18 U.S.C. § 2385 (1988).

94. *See* Yates v. United States, 354 U.S. 298, 318-27 (1957).

95. *See* Maisenberg v. United States, 356 U.S. 670 (1958); Nowak v. United States, 356 U.S. 660 (1958).

96. *Nowak*, 356 U.S. at 662 (quoting the Nationality Act of 1906, ch. 3592, § 4, 34 Stat. 596, 598, *repealed by* Act of Oct. 14, 1940, ch. 876, § 504, 54 Stat. 1172).

97. *Id.* at 663 (quoting Schneiderman v. United States, 320 U.S. 118, 158 (1943)).

Freedom of religion also showed Harlan as frequently, but not invariably, protective of constitutional guarantees. He joined decisions that prohibited organized prayer in the public schools,[98] and that invalidated a requirement that state officials declare a belief in God.[99] And while approving state loans of textbooks to church schools,[100] he balked when tax-raised funds were used to reimburse parochial schools for teachers' salaries, textbooks, and instructional materials.[101] Similarly, while unwilling to grant constitutional protection to adherents to Sabbatarian faiths who objected to Sunday closing laws and to unemployment compensation laws that required a willingness of the applicant to work on Saturdays,[102] Harlan wrote a powerful opinion during the Vietnam War declaring that a statute that limited conscientious objection to those who believed in a theistic religion "offended the Establishment Clause" because it "accords a preference to the 'religious' [and] disadvantages adherents of religions that do not worship a Supreme Being."[103]

In all of these cases, Harlan emphasized that "[t]he attitude of government towards religion must . . . be one of neutrality."[104] Harlan was sophisticated enough to appreciate that neutrality is "a coat of many colors."[105] Nevertheless, as Professor Kent Greenawalt has observed, "no modern justice ha[s] striven harder or more successfully than Justice Harlan to perform his responsibilities in [a neutral] manner."[106]

A final area of civil liberties, sexual privacy, is of particular importance because Harlan produced the most influential opinions on this subject written by anyone during his tenure on the Court. In the first case, a thin majority, led by Justice Frankfurter, refused to adjudicate, on the ground that there was no threat of prosecution, the merits of a Connecticut law that criminalized the sale of contraceptives to married and unmarried people alike.[107] Harlan's emotional opinion[108]—a rarity for him—not only differed with this conclusion but extensively defended the proposition

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98. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

99. *See* Torcaso v. Watkins, 367 U.S. 488 (1961).

100. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

101. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

102. *See* Sherbert v. Verner, 374 U.S. 398, 418 (1963) (Harlan, J., dissenting).

103. Welsh v. United States, 398 U.S. 333, 357 (1970) (Harlan, J., concurring).

104. *Allen*, 392 U.S. at 249.

105. *Id.*

106. Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 984 (1978).

107. *See* Poe v. Ullman, 367 U.S. 497 (1961).

108. *See id.* at 522 (Harlan, J., dissenting).

that Connecticut's law violated the Due Process Clause of the Fourteenth Amendment, a position that prevailed four years later in *Griswold v. Connecticut*.[109] It is impossible to know whether Harlan would have extended this reasoning to support the result in *Eisenstadt v. Baird*,[110] which held that a state could not punish the distribution of contraceptives to unmarried persons, or to *Roe v. Wade*'s[111] recognition of abortion as a personal right, both decided soon after he retired. But I am confident that, at a minimum, he would have protected the right of a married woman to proceed with an abortion that was dictated by family considerations.

Harlan's participation in the major thrusts of the Warren Court was not confined to civil liberties and civil rights. In economic cases, too, he often went along with the majority's support of government regulation of business, despite the fact that his private practice of law often involved the defense of antitrust and other actions involving the government, and he was acutely aware of the effect of regulation on business. To be sure, he frequently voted to limit the impact of regulatory statutes,[112] but there are also many important antitrust cases in which he sided with the government or private plaintiff.[113]

IV.

The Warren Court ended in mid-1969, but Harlan remained for two more Terms, a brief period in which he was the leader of the Court. Possessing seniority and an unmatched professional reputation, he took advantage of the replacement of Earl Warren and Abe Fortas by Warren Burger and Harry Blackmun to regain the position of dominance that Justice Frankfurter and he shared until Frankfurter retired in August, 1962. Thus, as Chief Judge Friendly noted, against Harlan's average of 62.6 dissenting votes per Term in the period between 1963 and 1967, he cast only 24 such votes in the 1969 Term and 18 in the 1970 Term.[114]

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109. 381 U.S. 479 (1965); *see also id.* at 499 (Harlan, J., dissenting).

110. 405 U.S. 438 (1972).

111. 410 U.S. 113 (1973).

112. *See, e.g.*, FTC v. Procter & Gamble Co., 386 U.S. 568, 581 (1967) (Harlan, J., concurring); United States v. Continental Can Co., 378 U.S. 441, 467 (1964) (Harlan, J., dissenting).

113. *See, e.g., Procter & Gamble*, 386 U.S. at 581 (Harlan, J. concurring); White Motor Co. v. United States, 372 U.S. 253 (1963); Brown Shoe Co. v. United States, 370 U.S. 294, 357 (1962) (Harlan, J., dissenting in part and concurring in part); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 214 (1959) (Harlan, J., concurring).

114. Friendly, *supra* note 2, at 388.

This new situation meant that Harlan could reassert conservative themes in his own opinions or join such expressions in the opinions of others. For example, during this period he adhered to his longstanding opposition to expansion of the constitutional rights of poor people to public assistance by voting with the majority in the leading case rejecting welfare as an entitlement.[115]

Similarly, he prevailed in a series of criminal justice decisions, including those that confined the reach of the Confrontation Clause, denied a jury trial in juvenile delinquency proceedings and permitted the closing of such hearings to the public, and authorized capital sentencing without guidelines.[116] And in an important case that involved both the rights of poor people and procedural due process, Harlan joined Justice Blackmun's opinion rejecting Fourth Amendment claims and sustaining the power of caseworkers to make unannounced visits to the homes of welfare recipients to check their eligibility and to provide rehabilitative assistance.[117]

In the First Amendment area Harlan also maintained longstanding positions, but here he was more often in dissent. The most notable occasion was the *Pentagon Papers* case,[118] where he would have permitted the prior restraint of newspaper publication of an extensive and politically embarrassing history of the Vietnam War. He also dissented in an important libel case[119] and in two decisions confining the authority of bar examiners to probe into the associations of applicants.[120] But he prevailed in another bar admission case, recalling issues from earlier days, that sustained questions about Communist associations,[121] and he again joined the majority in an obscenity prosecution that rejected privacy as well as free speech claims.[122]

With regard to the breadth of the judicial role, he maintained his opposition to expansion of the state action doctrine, even when the

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115. *See* Dandridge v. Williams, 397 U.S. 471, 489 (1970) (Harlan, J., concurring).

116. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 557 (1971) (Harlan, J., concurring); McGautha v. California, 402 U.S. 183 (1971).

117. *See* Wyman v. James, 400 U.S. 309 (1971).

118. New York Times Co. v. United States, 403 U.S. 713, 752 (1971) (Harlan, J., dissenting).

119. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62 (1971) (Harlan, J., dissenting).

120. *See In re* Stolar, 401 U.S. 23, 34 (1971) (Harlan, J., dissenting); Baird v. State Bar, 401 U.S. 1, 8 (1971) (Harlan, J., dissenting).

121. *See* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). Harlan consistently upheld regulation of the bar in the face of claims under the First Amendment. *See, e.g.*, NAACP v. Button, 371 U.S. 415, 448 (1963) (Harlan, J., dissenting); Konigsberg v. State Bar, 366 U.S. 36 (1961).

122. *See* United States v. Reidel, 402 U.S. 351, 357 (1971) (Harlan, J., concurring).

consequence was to limit racial equality.[123] He took a similar position when he joined a majority opinion rejecting a Fourteenth Amendment claim against an amendment to a state constitution that provided for a community referendum before a low-rent housing project could be constructed or acquired.[124]

While Harlan was fortifying his formidable conservative record under Chief Justice Burger, he nevertheless adhered to a balanced judicial profile by supporting some of the Court's liberal activist rulings. Thus, in the equality area, he maintained his support for desegregation,[125] and he joined the new Chief Justice's opinion expanding remedies against discriminatory employment tests.[126] And as noted above, his opinion in *Boddie*,[127] which invalidated a state statute that denied poor couples the right to a divorce because they could not afford court filing fees, came during this period. Harlan's reliance on the Due Process Clause to reach this result was criticized,[128] and the doctrine has not survived, but the case stands as a rare example of Harlan's reaching out to right an economic imbalance that prejudiced poor people in American society.[129] In another such case involving criminal justice, Harlan joined the Court's opinion prohibiting the incarceration of indigents who were unable to pay criminal fines.[130] He continued his deep concern for Fourth Amendment

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123. *See* Palmer v. Thompson, 403 U.S. 217 (1971). *But cf.* Adickes v. Kress & Co., 398 U.S. 144 (1970) (holding that a state-enforced custom compelling segregation in restaurants is sufficient state action for Fourteenth Amendment purposes).

124. *See* James v. Valtierra, 402 U.S. 137 (1971).

125. *See Adickes*, 398 U.S. at 144; Northcross v. Board of Educ., 397 U.S. 232 (1970).

126. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

127. Boddie v. Connecticut, 401 U.S. 371 (1971); *see supra* note 79 and accompanying text.

128. *See, e.g., The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 104-13 (1971) (arguing that Harlan was mistaken in his view that the rationale for procedural due process was that commencement of a lawsuit effectively forecloses the opportunity for extra-judicial settlement and that the actual rationale for procedural due process springs from the Court's power to settle conclusively legal relations by final judgment). *But see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1462-63, 1639-40 (2d ed. 1988) (citing with approval Harlan's belief that constitutional protection for the poor rests better in the Due Process Clause because it contains a "natural limiting principle" and arguing that the Court has not subsequently drawn valid distinctions between the application of the Due Process Clause to a divorce case as opposed to bankruptcy, contract or "any case").

129. For another example, see Goldberg v. Kelly, 397 U.S. 254 (1970), in which Harlan joined Justice Brennan's path-breaking opinion granting welfare recipients pre-termination procedural rights.

130. *See* Williams v. Illinois, 399 U.S. 235 (1970); *see also* Tate v. Short, 401 U.S. 395, 401 (1971) (Harlan, J., concurring) (joining majority's holding for reasons set forth

rights,[131] and he wrote an extensive concurring opinion in support of "beyond reasonable doubt" as the proper standard of proof in juvenile delinquency hearings.[132] And in the First Amendment field he wrote a widely cited opinion that protected display in a state courthouse of a "scurrilous epithet" ("fuck the draft") in protest against conscription.[133]

V.

What should one conclude from the many decisions in which Justice Harlan, a conservative, supported constitutional rights, often in highly controversial cases in which the Court was split? That he was in step with the majority of the Warren Court? Plainly not. There are too many instances where he marched separately. That he was essentially a civil libertarian? No again. Not only are there too many cases to the contrary, but at a basic level that is not the way Harlan reacted to injustice. This is not to say that he was insensitive to human suffering or unmoved by evidence of arbitrariness. It is rather that something else was at the core.

In my opinion, that something was Harlan's deep, almost visceral, desire to keep things in balance, to resist excess in any direction. Many times during my year with him he said how important it was "to keep things on an even keel." To me, that is the master key to Harlan and his jurisprudence. One recalls Castle, the hero of Graham Greene's novel *The Human Factor*, as he muses on those who are "unable to love success or power or great beauty."[134] Castle concluded that it is not because these people feel unworthy or are "more at home with failure."[135] It is rather that "one wanted the right balance."[136] In reflecting on some of his own perplexing and self-destructive actions, Castle decided that "he was there

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in *Williams*).

131. *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

132. *See In re* Winship, 397 U.S. 358, 368 (1970) (Harlan, J., concurring).

133. Cohen v. California, 403 U.S. 15, 16, 22 (1971). This is the leading opinion of the Court recognizing "the communicative power of speech's emotive content." Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 ILL. L. REV. 95, 101; *see also* Daniel A. Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan, and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283 (contrasting Harlan's *Cohen* opinion with Professor Bickel's belief that obscenities erode social values and create "pollution of our common moral environment").

134. GRAHAM GREENE, THE HUMAN FACTOR 148 (Vintage ed. 1978).

135. *Id.* at 149.

136. *Id.*

to right the balance. That was all."[137] Harlan was not a man who avoided success or power or, if one knew Mrs. Harlan, great beauty, but nevertheless in his own eyes he was there to right the balance. It is significant that he entitled a major speech at the American Bar Association *Thoughts at a Dedication: Keeping the Judicial Function in Balance.*[138]

There is evidence of balance not only in the decisions discussed above but in his elaborate views on doctrines of justiciability. These are closely related to his frequent preoccupation with judicial modesty or, put negatively, his opposition to excessive judicial activism, which in turn is related to the central theme of his judicial universe—federalism. As I suggested in 1969, "[h]is pervasive concern has been over a judiciary that will arrogate power not rightfully belonging to it and impose its views of government from a remote tower, thereby enervating the initiative and independence at the grass roots that are essential to a thriving democracy."[139]

Harlan's thinking on jurisdictional issues was also related to his long years as a practicing lawyer where he customarily represented defendants in litigation. In that role he had to be "constantly aware that it is easier and quicker to achieve victory on grounds such as want of federal jurisdiction, lack of standing or ripeness, or failure to join an indispensable party, than to prevail on the merits of a lawsuit."[140] That this earlier sensitivity to issues of justiciability carried over to his judicial years is seen in the many instances where Harlan urged jurisdictional rules to avoid decision of controversial cases.[141]

On the other hand, reflecting his balanced approach, Harlan wrote or joined many opinions that expanded the Court's jurisdiction. Perhaps the most notable was *Poe v. Ullman*,[142] where he vigorously rejected, in dissent, Justice Frankfurter's reasoning in dismissing an early challenge to Connecticut's birth control law on the ground that the statute was not being enforced. Again, in *NAACP v. Alabama*,[143] the first case explicitly recognizing a freedom of association, his opinion for the Court proceeded to its First Amendment conclusion only after overcoming difficult procedural obstacles involving the doctrines of standing and independent

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137. *Id.*

138. *See* Harlan, *supra* note 5.

139. Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 271 (1969).

140. *Id.* at 254.

141. *See supra* notes 24-32 and accompanying text.

142. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

143. 357 U.S. 449 (1958).

and adequate state grounds. And in the first school-prayer case,[144] and again in the ruling that ordered the House of Representatives to seat Adam Clayton Powell,[145] both cases of unusual sensitivity, Harlan joined majority opinions that rejected substantial justiciability defenses.[146]

Harlan's often unappreciated willingness to expand judicial authority can be seen in several cases involving the broadening of remedies in civil rights and economic cases alike. In one case, again differing with Frankfurter, he wrote to sanction the expansion of federal remedies against municipal officials who violated an individual's civil rights.[147] In a second ruling, involving a provision of the Securities and Exchange Act that prohibited false and misleading proxy statements in respect to mergers, Harlan agreed that a stockholder could sue for rescission and damages even though the statute was silent on whether private lawsuits could be used to enforce it.[148]

Stare decisis is another area relating to legal process and the judge's role in which Harlan sometimes manifested an activist spirit. He recognized that the doctrine "provides the stability and predictability required for the ordering of human affairs over the course of time and a basis of 'public faith in the judiciary as a source of impersonal and reasoned judgments.'"[149] And while the principle should not be "[w]oodenly applied" and "[n]o precedent is sacrosanct,"

> [s]urely if the principle of *stare decisis* means anything in the law, it means that precedent should not be jettisoned when the rule of yesterday remains viable, creates no injustice, and can reasonably be said to be no less sound than the rule sponsored by those who seek change, let alone incapable of being demonstrated wrong.[150]

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144. *See* Engel v. Vitale, 370 U.S. 421 (1962).

145. *See* Powell v. McCormack, 395 U.S. 486 (1969).

146. For another Harlan opinion that adopted a broad view of standing, see Parmelee Transp. Co. v. Atchison, Topeka & Santa Fe R.R., 357 U.S. 77 (1958).

147. *See* Monroe v. Pape, 365 U.S. 167, 192 (1961) (Harlan, J., concurring).

148. *See* J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

149. Williams v. Florida, 399 U.S. 78, 127 (1970) (Harlan, J., concurring in part and dissenting in part) (quoting Moragne v. State Marine Lines, Inc., 398 U.S. 375, 403 (1970)).

150. *Id.* at 128-29; *see also* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (Harlan, J., dissenting) (criticizing the majority for overruling a case which it had upheld for nearly ten years "by a remarkable process of circumlocution"); Mapp v. Ohio, 367 U.S. 643, 676 (1961) (Harlan, J., dissenting) (stating that "justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied").

There are therefore many instances where Harlan vigorously protested the overruling of precedent.[151]

Like other Justices, Harlan would often follow a case from which he had dissented when it was initially decided.[152] What is striking is that he followed this principle even as it carried him to dissent from the Court's failure to follow precedent with which Harlan disagreed. Thus, in *Green v. United States*,[153] the Court held that where a defendant is convicted of a lesser included offense and then secures a reversal of the conviction, the defendant may be retried only for the lesser included offense. Although Harlan dissented in *Green*, he dissented again in *North Carolina v. Pearce*,[154] where he found, contrary to the Court, that *Green* mandated the conclusion that a defendant once "convicted and sentenced to a particular punishment may not on retrial be placed again in jeopardy of receiving a greater punishment than was first imposed."[155]

But there are also many contrary instances which betoken Harlan's flexibility. Thus, Harlan wrote separately in the *Gideon* case to give *Betts v. Brady*[156] "a more respectful burial than has been accorded" by the Court.[157] Harlan reasoned that the *Brady* rule, by which indigent defendants were afforded appointed counsel only in "'special circumstances,' . . . has continued to exist in form while its substance has been substantially and steadily eroded. . . . To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system."[158] In *Marchetti v. United States*[159] he spoke for the Court in overruling a decision that

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151. *See, e.g., Afroyim*, 387 U.S. at 268 (Harlan J., dissenting) (opposing the overruling of Perez v. Brownell, 356 U.S. 44 (1958)); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan J., dissenting) (opposing the overruling of Wolf v. Colorado, 338 U.S. 25 (1949)). *See generally* Dorsen, *supra* note 139, at 257 (discussing factors in Harlan's background and character which may have produced his profound respect for precedent).

152. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (following Ker v. California, 374 U.S. 23 (1963), and Mapp v. Ohio, 367 U.S. 643 (1961)); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Harlan, J., concurring) (following Benton v. Maryland, 395 U.S. 784 (1969)); Burns v. Richardson, 384 U.S. 73, 98 (1966) (Harlan, J., concurring) (following Reynolds v. Sims, 377 U.S. 533 (1964)).

153. 355 U.S. 184 (1957).

154. 395 U.S. 711, 744 (1969) (Harlan, J., concurring in part and dissenting in part).

155. *Id.* at 751; *see also* Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 503-04 (1971) (Harlan, J., dissenting) (arguing that an earlier case from which he dissented should be controlling).

156. 316 U.S. 455 (1942).

157. Gideon v. Wainwright, 372 U.S. 335, 349 (1963) (Harlan, J., concurring).

158. *Id.* at 350-51.

159. 390 U.S. 39 (1968).

denied the privilege against self-incrimination to gamblers prosecuted for failing to register and pay taxes. In *Moragne v. States Marine Line, Inc.*,[160] in a celebrated opinion, he overruled a case that "rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and . . . has produced litigation-spawning confusion in an area that should be easily susceptible of more workable solutions."[161]

Finally, one may point to cases in which Harlan exhibited a trait familiar to all of his law clerks—his exceptional open-mindedness and willingness to listen to new arguments. In these cases he dissented from the Court's refusal to hear oral argument on constitutional claims, although in each of them he was not predisposed to agree on the merits of the appeal. Thus, he joined Justice Douglas's dissent from the refusal to hear a plea of the Veterans of the Abraham Lincoln Brigade that the organization was improperly ordered to register as a Communist front organization under the Subversive Activities Control Act.[162] Similarly, despite his earlier *Barenblatt* ruling upholding the authority of the House UnAmerican Activities Committee to probe political associations,[163] he would have heard a challenge to contempt citations issued by the Committee against an uncooperative witness.[164] And in perhaps the most far-reaching action, he would have set down for oral argument a complaint by Massachusetts that raised the issue of the legality of the Vietnam War,[165] although he ordinarily accorded great deference to decisions of the elected branches of government on matters of war and peace.[166]

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160. 398 U.S. 375 (1970).

161. *Id.* at 404. Other cases in which Harlan was willing to overrule obsolete precedents, with "particularly acute analyses," William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1390 (1988), include Lear, Inc. v. Adkins, 395 U.S. 653 (1969), and Walker v. Southern Ry., 385 U.S. 196, 199 (1966) (Harlan, J. dissenting).

162. *See* Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Bd., 380 U.S. 513, 514 (1965) (Douglas, J., joined by Black and Harlan, JJ., dissenting).

163. *See* Barenblatt v. United States, 360 U.S. 109 (1959).

164. *See* Stamler v. Willis, 393 U.S. 217 (1968); *see also* Wiseman v. Massachusetts, 398 U.S. 960, 960 (1970) (Harlan, J., dissenting from denial of writ of certiorari) (urging review of a decision of the Massachusetts Supreme Court enjoining distribution of the film *Titticut Follies*, a documentary about life at the Bridgewater State Hospital for the criminally insane).

165. *See* Massachusetts v. Laird, 400 U.S. 886 (1970).

166. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713, 752 (1971) (Harlan, J., concurring).

VI.

The pattern of decisions provides ample proof that Harlan was not a one-dimensional Justice. What is less clear is the source of his drive to keep things in balance, to eschew an extreme ideology.

Two possibilities may be suggested. The first is the familiar notion that in any society, patricians (like Harlan) are concerned less with results in particular controversies, and certainly less about pressing any group against the wall, than with assuring the smooth functioning of institutions without the precipitation of volatility or deep-seated enmities. This means that dissent should be allowed an outlet, that minorities should be able to hope, that political power should not become centralized and therefore dangerous. Thus, his decisions supporting desegregation, a strong federal presence, and law and order. Thus also his fears about court-dominated legislative reapportionment and about the "incorporation" of the Bill of Rights through the Fourteenth Amendment that enhanced judicial authority and represented too dramatic a break with established doctrine. But thus also Harlan's willingness to take reformist steps, to overrule outdated precedent selectively and before a problem worsened, and above all to listen closely to many voices.

These traits are consistent with Harlan's warm embrace of federalism principles. It should be recalled that the idea of federalism is, itself, a kind of balance—a way of dividing governmental authority to prevent a too-easy dominance of public life by a single institution or faction. The *Federalist Papers* are explicit in extolling, as a "guard against dangerous encroachments" the division of power "between two distinct governments" so that the "different governments will control each other."[167] Years ago I reflected on whether the national government or the states and local governments are the securer bulwark of—or the greater threat to—civil liberty.

> Local units are closer to the people but offer more opportunity for undetected discrimination and repression. The national government acts more visibly and with more formal regard for minority interests, but its vast power is a civil liberties time bomb that in this century has brought us the Palmer Raids, McCarthyism, and Watergate.[168]

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167. THE FEDERALIST NO. 51, at 322, 323 (James Madison) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 28 (Alexander Hamilton) (discussing the manner in which state governments would protect their citizens against encroachments by the national government, and vice-versa).

168. Norman Dorsen, *Preface* to THE FUTURE OF OUR LIBERTIES ix, xi (Stephen C. Halpern ed., 1982); *cf.* Norman Dorsen, *Separation of Powers and Federalism*, 41 ALB.

Whatever the proper resolution of this question, it is clear that Justice Harlan believed, as much as he believed in any principle, that federalism was "a bulwark of freedom."[169]

A second source of Harlan's overall philosophy is legal process theory, which had its heyday during almost exactly the period that he served on the Supreme Court. In the early 1950s, Henry Hart produced a draft of the work that he and Albert Sacks published at Harvard Law School in a "tentative edition" in 1958 (it was also the final edition).[170] The moderate philosophy embodied in these materials was tailor-made to Harlan's personality. It emphasized the central role that procedure plays in assuring judicial and legislative objectivity[171] and the corollary "principle of institutional settlement,"[172] which holds that judgments properly arrived at by institutions operating within their appropriate sphere of authority should be accepted as binding on the entire society until duly changed.

Not surprisingly, Harlan was attracted to this theory, which enabled him to take constitutional steps[173] as long as they were not too long or jarring, while simultaneously offering him ample institutional reasons for resisting excessive judicial authority. This approach was often enlisted in opinions that were inhospitable to civil liberties, but Harlan's reliance on legal process also led him at times to activist results, whether through the protection of individual rights or the overruling of outmoded precedent.

By 1971, when Harlan left the Supreme Court, legal process theory, buffeted by events in society at large, was beginning to lose its hold, even at Harvard, and the more extreme philosophies of law and economics and critical legal studies moved to the forefront.[174] The struggle within the Court became ever more polarized as in succeeding years strong civil

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L. REV. 53, 69 (1977) (proposing that local government units have historically been less responsive to minority concerns within their jurisdictions and that progress for minorities has come at the hands of the federal government).

169. *See supra* notes 11-14 and accompanying text.

170. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed. 1958).

171. *See id.* at 715-16.

172. *Id.* at 4-5.

173. The Hart & Sacks materials did not address constitutional problems, and it is doubtful whether the authors intended their work to apply to such issues. *See* Norman Dorsen, *In Memoriam: Albert M. Sacks*, 105 HARV. L. REV. 11, 13 n.12 (1991). Nevertheless, many judges and scholars have applied legal process themes to constitutional cases. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

174. For a recent and provocative discussion of the evolution of legal process and its successor theories, see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

libertarians, which Harlan was not, waged battle with doctrinaire conservatives, which Harlan also was not.

It fell to John Marshall Harlan, by nature a patrician traditionalist, to serve on a Supreme Court which, for most of his years, was rapidly revising and liberalizing constitutional law. In these circumstances, it is not surprising that Harlan would protest the direction of the Court and the speed with which it was traveling. He did this in a remarkably forceful and principled manner, thereby providing balance to the institution and the law it generated. Despite this role, Harlan joined civil liberties rulings on the Court during his tenure to the degree that his overall jurisprudence can fairly be characterized as conservative primarily in the sense that it evinced caution, a fear of centralized authority, and a respect for process.