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The Two Justices Harlan on Civil Rights and Liberties: A Study in Judicial Contrasts

By Lewis I. Maddocks*

INTRODUCTION

John Marshall Harlan was a justice of the United States Supreme Court from 1877 to 1911, and his grandson, also named John Marshall Harlan, served on the Court from 1955 to 1971. Referred to here as Justice Harlan I and Justice Harlan II, respectively, the contrast in their judicial philosophies will be demonstrated through an analysis of their opinions in representative cases concerning questions of civil rights and liberties. In this area the contrast in the two Justice Harlans is seen not so much in the views which they expressed on minority rights or the importance of substantive and procedural due process, but rather in the differences in their attitudes toward the role of the Court in guaranteeing these rights.

In the representative cases discussed below, Justice Harlan I emerges as a devout nationalist—one who considered the protection of individual rights to be the responsibility of the national government.1 Although on occasion he railed against judicial legislation,2 he emerges, on the whole, as a judicial activist calling upon the Court to exercise its power and responsibility to override state legislation which had weakened the civil rights of black citizens by imposing upon them the badges of servitude.3 He was quick to oppose the increasing influx of Jim Crow legislation which became prevalent

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2 Harlan was generally an opponent of judicial legislation when Congress had enacted national legislation on the same issue. Westin, JOHN MARSHALL HARLAN AND THE CONSTITUTIONAL RIGHTS OF NEGROES: THE TRANSFORMATION OF A SOUTHERNER, 66 YALE L.J. 637, 695-96 (1957).
3 Id. at 696.
throughout the South during his years on the Court.\textsuperscript{4} Furthermore, he interpreted the Civil War Amendments very broadly\textsuperscript{5} to require total incorporation of the Bill of Rights, thus making all its provisions applicable to state laws and criminal procedures.\textsuperscript{6}

A study of Justice Harlan I's opinions does not reveal a well-defined judicial philosophy regarding the role of the Court, the balance of federalism and nationalism, or the issue of broad as opposed to strict constructionism. Rather, one finds that Harlan was deeply committed to individual rights, which he felt must be protected by the Court regardless of whether such protection was nationalist or federalist, determined by judicial activism or judicial self-restraint, or derived from broad or strict constructionism. He was convinced that the opposing philosophies of judicial self-restraint and judicial activism were not doctrines to which decisions should bend,\textsuperscript{7} but simply were instruments to be used to argue for a just result,\textsuperscript{8} whether that result was the protection of a civil right or liberty, or the protection of private property. Therefore, at times Harlan I condemned the Court for engaging in judicial legislation in violation of the principle of judicial self-restraint,\textsuperscript{9} while at other junctures he condemned the Court majority for failing to act positively and forthrightly in executing its responsibility of judicial activism.\textsuperscript{10}

Although scholars who label Justice Harlan I as a nationalist, a judicial activist and a broad constructionist can find considerable support in his opinions,\textsuperscript{11} it must be remembered that often Harlan deviated from such easy labelling, because

\begin{itemize}
\item \textsuperscript{4} \textit{Id.} at 705-09.
\item \textsuperscript{5} G. White, \textit{supra} note 1, at 133.
\item \textsuperscript{6} \textit{Id.} at 143-44.
\item \textsuperscript{7} "In this respect, Harlan stood in the classic pattern of those who espouse judicial self-restraint on behalf of majority rule but are so devoted to civil liberty that they cannot always restrain themselves." Westin, \textit{supra} note 2, at 697.
\item \textsuperscript{8} "If a solid legal ground was available to support a 'just' result, Harlan would urge it with vigor. If not, it was a rare 'outrage' case in which Harlan would not urge a less-than-solid ground with all the vigor that his moral indignation unfailingly supplied." \textit{Id.} at 696-97.
\item \textsuperscript{10} Westin, \textit{supra} note 2, at 696-97.
\item \textsuperscript{11} See, e.g., G. White, \textit{supra} note 1, at 131.
\end{itemize}
he was consistently result-oriented. His goal was not the preservation of a consistent judicial or constitutional philosophy, but rather the preservation of the economic, social, civil and political rights of the individual. Nowhere is this more apparent than in his opinions in cases involving civil rights and liberties.

In contrast, an analysis of the opinions of Justice Harlan II demonstrates that he was much concerned with judicial self-restraint and the preservation of federalism against increasing centralization of power in the national government. His opinions on civil liberties reveal a fear that incorporation of the Bill of Rights was a denial of the rights of the states to fashion a system of due process that was guided by an element of fairness and a fundamental "scheme of ordered liberty." He objected to tying the states to the rigid conformity of the specific provisions of the Bill of Rights. As shall be examined, he rejected selective incorporation more vehemently than he did the total incorporation views of his grandfather. As he explained in a concurring opinion in Pointer v. Texas, "The philosophy of "incorporation,"... subordinates all such state differences to the particular requirements of the federal Bill of Rights... and increasingly subjects state legal processes to enveloping federal judicial authority." In his opposition to total incorporation of the Bill of Rights emerges Harlan's attempt not only to provide greater flexibility for the states in determining the meaning of due process, but also to encourage the recognition of rights not enumerated in the Bill of Rights, but nevertheless worthy of protection.

Justice Harlan II contrasts with his grandfather in his carefully reasoned and disinterested intellectual approach to
cases without regard to whether a particular result reflected good public policy. Examination of Harlan II's opinions reveals that his devotion to constitutional principles rather than to obtaining the right result led to a judicial detachment and neutrality regarding the "cause" which a case involved.  

He viewed the Constitution as the articulation of rights and powers which must be preserved and believed that the Court's role was to guarantee that the principles of federalism, separation of powers and representative democracy were maintained. In his foreword to a recent book about Harlan II, Professor Paul Freund described Harlan's approach:

The positions he takes on constitutional issues, stressing continuity and tradition more strongly than is fashionable with many students, do not cloud their appreciation of the opinions themselves. Indeed, the very students who more often than not regret the Justice's position freely acknowledge that when he has written a concurring or dissenting opinion they turn to it first, for a full and candid exposition of the case and an intellectually rewarding analysis of the issues.

Harlan II's condemnation of the Court's support of "one-man, one-vote" in the legislative reapportionment cases illustrates Professor Freund's appraisal of Harlan's judicial philosophy. Harlan opposed the Court's application of the equal protection clause to strike down residence requirements for welfare recipients, as well as its use to declare invalid a state poll tax; whether the poll tax for voting was good or bad policy was irrelevant to Harlan II. In his devotion to judicial self-

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19 G. White, supra note 1, at 345.
20 Freund, Foreword to The Evolution of a Judicial Philosophy xiii (D. Shapiro ed. 1969).
21 Id. at xiv.
23 U.S. Const. amend. XIV.
Here, Harlan argued in dissent that a state might reasonably require voters to pay a nominal tax to vote in order to assure that only those who cared enough to vote would pay the fee to do so.
restraint and the precepts of federalism, he exhibited a profound trust and respect for representative democracy, as well as a deep suspicion toward a judicial elite solving problems which he felt were better left to the political branches of the government.

I. JOHN MARSHALL HARLAN I

A well-known fact about Justice Harlan I was his opposition to laws which discriminated against the newly freed blacks. This attitude is particularly interesting in light of his support of slavery during as well as prior to the Civil War. In his campaign for Congress in 1859, as the Whig Party's candidate, he strove to surpass the Democrats in championing slavery. He opposed the "tyranny of majority rule" which would take from the slaveholder what had traditionally been regarded as his property—just as in later years he deplored the tyranny of the majority which would deprive the newly freed slaves of their rights.

Even during the Civil War, as an officer in the Union Army, he recruited men for the 10th Kentucky Volunteer Infantry, promising that "if he saw any decision on the part of the Government to turn the war into a struggle for the destruction of slavery he would not only resign his commission but he would go over to the Confederates and take his regiment with him, and help them to fight their battles against the Government." Even in 1865 he expressed his opposition to the thirteenth amendment as "a flagrant invasion of the right of self-government and the state should show that it was still master in its own household.

Harlan I challenged the Emancipation Proclamation as being unconstitutional, a conservative position which he continued a year later when he supported the candidacy of Mc-

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24 See Westin, supra note 2, at 705-09.
25 Id. at 638-52. In fact, Harlan came from a slave-owning family.
26 Id. at 643.
27 Id. at 705-09.
29 Cincinnati Daily Gazette, July 7, 1865.
30 G. White, supra note 1, at 131.
Clellan rather than that of Lincoln for President. In 1865, when he was asked by Colonel John Combs to run for Congress as the Conservative Union candidate, Harlan refused. In his letter to Combs, he stated his belief that the thirteenth amendment would "destroy the peace and security of the white man in Kentucky," and he pleaded for a "thorough union of all citizens who . . . are opposed to the admission of the Negro to the ballot-box or to the enjoyment of political privileges." Although later Harlan radically changed his opinion regarding the rights of blacks, in his arguments at this time can be seen his opposition to a principle he would never accept—unlimited majority rule. In his letter to Colonel Combs, Harlan wrote that the amendment was "a direct interference, by a portion of the States with local concerns of other States, and . . . at war with the genius and spirit of our republican institutions. . . . If three-fourths of the States and two-thirds of each branch of Congress can . . . abolish slavery in Kentucky, the same power can establish slavery in Ohio."

Quite naturally, during Harlan I's campaign for Governor of Kentucky in 1871, the opposition took advantage of his past statements and confronted him with them at every opportunity. On one occasion when his opponent, Governor Leslie, pointed out how Harlan had changed in his views on the thirteenth amendment, Harlan replied:

I have acquiesed in the irreversible results of the recent war; I recognize my errors in some respects. It can be said of no man that he has changed no opinion within the last ten years in the pressure of the stirring events of that period. Let it rather be said of me that I am right rather than consistent.

There is herein an indication of the result-oriented approach by Harlan toward the issues he faced. A consideration of his views on the subject of civil rights while a Supreme Court Jus-

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23 Abraham, supra note 9, at 453.
24 15 Lexington Observer & Reporter, June 1, 1865, reprinted in Hartz, John M. Harlan in Kentucky, 1855-77, 14 THE FISON CLUB HIST. Q. 17, 29 (1940).
25 Id. at 30.
26 Cincinnati Daily Gazette, May 25, 1871.
tice will demonstrate that the "right result" was invariably that the rights of the minority black must not be violated by the tyranny of the white majority.

A. Justice Harlan I's Approach to Civil Rights and Liberties

During the period that Justice Harlan I was on the Supreme Court bench he the Court faced several cases involving challenges to the civil rights of the newly-freed blacks. It is in this area that Justice Harlan I is best known, for it is here that he took positions which were contrary to the views of all other justices of the Court at the time, but which very much represent the majority views of the Court since 1954. As the lone dissenter in both the Civil Rights Cases and in Plessy v. Ferguson, Harlan represented a voice in the wilderness in support of a broad interpretation of the Civil War Amendments.

1. Justice Harlan I and the Civil Rights Acts

A number of civil rights acts were passed by Congress to implement the post-Civil War Amendments. The most direct challenge to the constitutionality of these laws to come before the Court after Harlan I's appointment were the Civil Rights Cases involving two sections of the Civil Rights Act of 1875. In its 9-1 opinion declaring these sections invalid, the majority

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31 Justice Harlan served on the bench from 1877 to 1911.
32 "Harlan almost never failed to uphold the civil rights of black plaintiffs, never invalidated civil rights legislation when it pertained to freed blacks, and regularly dissented from cases that left black petitioners without a remedy against either discrimination by states or attacks by private citizens." G. White, supra note 1, at 133.
33 109 U.S. 3 (1883) (Harlan, J., dissenting).
34 163 U.S. 537 (1896) (Harlan, J., dissenting).
35 The first section of this act stated:
That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
Civil Rights Act, ch. 31, § 1, 18 Stat. 335 (1875).

The second section placed penalties on any person who violated this law by denying the aforementioned accommodations to any person for reason of race or previous condition of servitude.
held that the enforcement section of the fourteenth amendment only would allow the national government to pass legislation to counteract the effects of discriminatory state laws. The majority held that laws directly prohibiting private acts of discrimination were not permitted by this section of the amendment. Thus the Court held that Congress could not constitutionally enact legislation which would make illegal any action that violated the fourteenth amendment. Rather the federal government must wait until a state governmental institution had passed or enforced laws contrary to the fourteenth amendment. Once this occurred, Congress could pass legislation to correct this situation in order to offset the effects of the state action and to provide the victim of such action a remedy.

The Court held that the thirteenth amendment was inapplicable in the Civil Rights Cases. Congress had the power to enforce this amendment through legislation, but legislation aimed at prohibiting the denial to equal accommodations was not the type of legislation permitted. The Court reached this conclusion because the civil rights legislation did not involve the imposition of badges of slavery or involuntary servitude on the parties involved.

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42 109 U.S. at 11.
43 Another important point is that the fourteenth amendment prohibits state action only and these cases concerned the actions of private individuals outside state authority, and thus outside the provisions of the fourteenth amendment. Speaking for the majority, Justice Bradley said:

The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.

Id. at 17.
44 Id. at 13.
45 Id. at 13-41.
46 Id. at 24.
47 Id. at 24. The Court reasoned:

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.
In his dissent, Harlan argued that the thirteenth and fourteenth amendments not only prevented racial discrimination by state law and agencies of the state, but through their enforcement clauses gave Congress the power to forbid discriminatory acts by individuals and corporations exercising public functions and wielding power under state authority. Harlan stated that railroads were public highways and, even though owned by private corporations, were established by the authority of the state; thus the railroad operators had a responsibility to serve the public without discrimination. In the matter of public amusements, Harlan pointed out that “a license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public.”

The Civil War Amendments generated a great deal of controversy over the intentions of their framers. Justice Harlan argued that because the Amendments were drafted by the same group in Congress who wrote the Civil Rights Acts, one need merely to read the Acts to determine the intentions of the drafters when they proposed the three new Constitutional amendments. To Harlan it was beyond dispute that these measures were drafted with the following purposes in mind: to guarantee beyond question that the freedmen would not continue to exist in a condition of servitude, that they would be citizens of the United States with all the legal and political rights and privileges which had been traditionally enjoyed by the white man, and that they would not be hindered in their desire to exercise their political power through the sufferage.

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4 Id. at 43.
5 Id. at 39.
6 Id. at 41. Harlan even justified this position on the principle expounded in Munn v. Illinois, 94 U.S. 111 (1876), that property becomes “clothed with public interest” when it is used in a public manner and affects the community at large. Thus Congress could make it illegal for any owner or operator of a common accommodation “to deny the full enjoyments of the accommodation thereof because of race or color.” 109 U.S. at 42.
7 Id. at 35-36. Harlan noted the willingness of the Court to uphold the Fugitive Slave Act of 1793 but not the Civil Rights Act of 1875. He argued that the same reasoning which upheld federal protection of masters could be used to uphold the
Another case which demonstrates the conflict between Harlan I and the other justices over interpretation of the Civil Rights Acts and their relation to the Civil War Amendments is that of Hodges v. United States, in which Hodges and others were indicted in the United States District Court of Eastern Arkansas for the crime of intimidation with the use of deadly weapons of black citizens in the free exercise of their right to obtain employment in a lumber plant. They were convicted in the lower federal court of violating the Civil Rights Act of 1870. On appeal the Supreme Court reversed the convictions.

Rights of their former slaves. The rights of masters were protected by upholding the Fugitive Slave Law under article IV and thus, by the same token, the Civil Rights Laws should be upheld under the fourteenth amendment as protecting the rights of the newly-freed slaves. Harlan believed that the fourteenth amendment was designed to safeguard their rights just as much as article IV was designed to protect their masters.

The force of Harlan's dissent in these cases makes the following observations interesting and relevant:

His opinions are strong, well written and leave very little doubt as to what he meant. . . . When he dissented he never hesitated to criticise [sic] the opinion of the Court. There was often a touch of indignation in the language he used, and almost an inability to understand how his colleagues could have differed from him, could be seen in each sentence. He had absolute confidence in the correctness of his own opinion and with his great power of judgment and vigor of expression made a wonderfully strong presentation of his view of any case. . . . In questions concerning civil rights he was inflexible. . . . He was a fearless Judge—absolutely independent and determined to do the right as he saw it.


52 203 U.S. 1 (1906) (Harlan, J., dissenting).

53 Shortly before Justice Harlan's appointment, the Court had declared invalid two sections of the 1870 Act which made it a crime to interfere with the right to vote. The Court held that since these provisions were not limited to denial of the right to vote on the basis of race, they were therefore an invalid implementation of the fifteenth amendment. United States v. Reese, 92 U.S. 214 (1875). The section applicable in the Hodges case provided:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

§ 5508, Rev. Stat., reprinted in 203 U.S. at 5.
on the ground that Congress can only prohibit state actions, not those of private citizens.

In his dissent, Harlan I argued that the challenged sections of the act should be upheld under both the thirteenth and fourteenth amendments. The infringement of the right to contract for one's own labor was slavery within the meaning of the thirteenth amendment. 4 Harlan found support in Allgeyer v. Louisiana 5 for the argument that the acts of Hodges were a

4 Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom . . . . So, legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the Constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment.

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Id. at 27 (Harlan, J., dissenting).

Harlan quoted from Strauder v. West Virginia, 100 U.S. 303, 310 (1879): "A right of immunity, whether created by the Constitution or only guaranteed by it, may be protected by Congress." Harlan pointed out that similar views were expressed by the Court majority in Prigg v. Pennsylvania, 16 Pet. 539 (1842) and United States v. Reese, 92 U.S. 214 (1876).

To support his view that the thirteenth amendment not only protected individuals from the incidents of slavery, Harlan quoted liberally from the majority opinion in the Civil Rights Cases in which Justice Bradley enunciated what constitutes the "badges and incidents of slavery" which the thirteenth amendment was designed to prevent. Among them was the disability to make contracts. Harlan then asked:

If the Thirteenth Amendment established freedom and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the Thirteenth Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the constitution?

203 U.S. at 35.

Jacobus ten Broek supports this view:

The striking thing then about the Thirteenth Amendment is that it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement. The Amendment was seen by its drafter and sponsors as doing the whole job . . . .


55 165 U.S. 578 (1897).
violation of the fourteenth amendment. In *Allgeyer*, the Court had interpreted the word "liberty" in the due process clause to include

not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work when he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter all contracts which may be proper, necessary and essential to the carrying out to a successful conclusion the purposes above mentioned.65

Although Harlan I recognized that the foregoing referred to state action, he asserted that this definition of liberty was nothing more nor less than the freedom established by the thirteenth amendment; thus, that amendment prohibited its violation by private individuals. Anyone who is deprived of the foregoing rights because of his race is hindered in the exercise of rights secured to freemen by the thirteenth amendment.67 Thus the *Hodges* case re-emphasized Justice Harlan’s defense of individual rights as he supported blacks in their struggle to achieve equality of opportunity.

2. *The Separate but Equal Doctrine*

No case clarifies the unique position of Justice Harlan I on civil rights more vividly than *Plessy v. Ferguson*,68 in which the "separate but equal" doctrine was established. In 1890, the state of Louisiana enacted a statute requiring segregation

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64 Id. at 589, quoted at 203 U.S. at 36. In examining Harlan’s views, one author made the following observation:
He believed that they should occupy the position that historically they were intended to occupy by the thirteenth and fourteenth amendments. He believed that the law should be interpreted as it was meant and not as the court thought expedient and wise. Though it may be true that his relation to the negro in political matters may have made him more violent in his dissents, any one who will look fairly at the question must conclude that his doctrine was legally correct.

67 203 U.S. at 36.

68 163 U.S. 537 (1896) (Harlan, J., dissenting).
on railroad passenger coaches based on race. The law was attacked on the ground that it violated the thirteenth and fourteenth amendments. Plessy, seven-eights Caucasian and one-eighth Negro, being a passenger between two points within the state, was assigned by railroad officers to the coach used by those of the colored race, but he insisted that he had a right to sit in the coach reserved for whites. He was ejected from the train and placed in the parish jail to answer the charges of having violated the act.

The majority of the Court, with Justice Brown as spokesman, disposed immediately of the charge that the act violated the thirteenth amendment. That the act was not such a violation was considered too clear for argument; in fact, the Court felt that even the plaintiff was not relying heavily on such a position. The majority saw no relation between involuntary servitude and the provisions of the Louisiana statute. "A statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude." The Court held that the law was still valid because the fourteenth amendment demanded nothing more than the legal equality of the races.

Harlan based his dissent on his belief that the Louisiana statute was nothing less than an attempt to thwart the freedoms guaranteed the Negro race by the Civil War Amendments. The thirteenth amendment, according to Harlan, was designed to prevent "the imposition of any burdens or disabilities that constitute badges of slavery or servitude." In conjunction with the fourteenth amendment, the thirteenth

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59 The law provided that "all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches in each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations," except for street railways. A fine or imprisonment was provided for if a railway officer or a passenger refused to abide by the provisions of this law. The only persons specifically exempted were nurses attending children of another race. 1890 La. Acts, No. 111 §§ 1, 3.
60 163 U.S. at 542.
61 Id. at 543.
62 Id. at 544.
63 Id. at 555.
amendment also protected all civil rights that pertain to freedom and citizenship. To Harlan, the Louisiana statute and other similar legislation excluding blacks from various activities had the effect of placing blacks in the condition of a "subject race." The fact that the statute technically applied to blacks and whites alike did not persuade Harlan:

Everyone knows that the statute in question has its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodations for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

Harlan's basic objection to the statute was that it interfered with the individual liberty of citizens. Black and white citizens who wished to travel together should have every right to do so, and any government which forbade it on the ground of race was infringing on these citizen's individual liberty as certain as a law which would forbid both races equal use of the streets. The point that Harlan expressed most eloquently in his dissent is that the Constitution does not recognize a "caste" system and that any laws which create such a system are unconstitutional.

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerate classes among citizens. . . . The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.

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64 Id. at 556.
65 Id. at 557.
66 Id.
67 Id. at 559.
Speaking prophetically, Harlan stated, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." Harlan viewed the legislation as a direct barrier to solving racial friction.

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they can not be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

Running like a thread throughout Harlan's dissenting opinion is his refusal to accept a narrow definition of the phrase "civil rights." To consider the rights of blacks in this case as merely "social," rather than "legal" or "political," and consequently unworthy of constitutional protection was to Harlan a position beyond consideration. Harlan condemned the Court for upholding a law which "practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."

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68 Id.
69 Id. at 560.
70 Id. at 561. Harlan noted:
This question is not met by the suggestion that social equality cannot exist between the white and black races in this country . . . for social equality no more exists between two races travelling in a passenger coach or a public highway than when members of the same race sit by each other in a street car or in the jury box . . . or when they approach the ballot-box to exercise the high privilege of voting.

Id.

71 Id. at 562. One of the clearest statements by Harlan relative to his views concerning discrimination was made in a dissenting opinion in which the Court had upheld a Kentucky statute making it illegal for a college to teach both white and black students. Berea College v. Kentucky, 211 U.S. 45 (1908) (Harlan, J., dissenting). Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply
B. Nationalization of the Bill of Rights

The Supreme Court’s interpretation of the Bill of Rights was limited during Justice Harlan I’s tenure to the question of whether these rights were applicable to the states through the due process clause of the fourteenth amendment.\(^7\) Since the Court did not deal with the meaning of the first amendment, as such, until after World War I,\(^7\) civil liberties considerations focused on whether the procedural due process rights of persons accused of crime were “nationalized,” that is, binding on state courts to the extent that they were binding on the federal courts. The following cases demonstrate that Justice Harlan I took a position in support of total incorporation of the Bill of Rights as a lone dissenter—a position which was opposed not only by his grandson, but by nearly all other Justices of the Court.

One of the earlier cases in this group, and probably the most famous, is *Hurtado v. California.*\(^7\) California’s constitution provided that indictment by the grand jury might be replaced by an indictment by information; the California legislature passed a law implementing this change. On February 20, 1882, the district attorney of Sacramento County made and filed an information against Hurtado, charging him with murder. In May, Hurtado was brought to trial and convicted of murder in the first degree, with the day of execution fixed for July 20. The Supreme Court of California affirmed the judgment of the district court. After a second execution date

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because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

*Id.* at 69.

\(^7\) “[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV, § 1.

\(^7\) The incorporation of the provisions of the first amendment has been settled matter for some time. See, e.g., De Jonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

\(^7\) 110 U.S. 516 (1884) (Harlan, J., dissenting).
had been set and another appeal entered, the case was finally brought to the United States Supreme Court on a writ of error. In upholding the California statute, the majority held that the framers of the fourteenth amendment had not intended to include all the provisions of the Bill of Rights in the word "liberty" of the due process clause. The Court held that what constitutes due process of law varies from state to state according to the view of each state legislature. The important factor is that each state interpret due process so as to preserve the elements of a "fair" trial; and what is "fair" is not to be measured by a particular form or procedure. The Court reasoned that if the intention had been to apply grand jury indictments to state procedures, it would have been specifically provided for in the fifth amendment.

Justice Harlan I, in his dissenting opinion, traced the origins of due process to the Magna Carta and in its phrase "by the law of the land." He also quoted freely from English and American jurists and political leaders to demonstrate that the rights of Englishmen were also the rights of the colonists. Both Harlan and the Court agreed that "due process" applies to both state and federal governments, but contention focused on the interpretation of that phrase. The Court held then, as it has ever since, that due process means "fundamental fairness"; thus there has been an adherence to "selective" incorporation rather than the total incorporation that Harlan advocated. Harlan maintained that if the states could abolish an indictment by grand jury they likewise could ignore the guarantees against double jeopardy and compulsory self-incrimination. It is interesting to note that later courts did precisely what Harlan said they would not do, by allowing states to disregard the double jeopardy and self-incrimination provisions, as in Palko v. Connecticut and Adamson v. California.

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75 Id. at 535-36.
76 Id. at 535.
77 Id. at 542 (Harlan, J., dissenting).
78 Id. at 543-45.
79 Id. at 547.
80 302 U.S. 319 (1937) (double jeopardy).
In *Maxwell v. Dow*, Harlan again argued for total incorporation of the Bill of Rights. In *Maxwell*, the state of Utah had convicted a defendant of a felony by an eight-man jury instead of the twelve-man jury required in federal courts. The majority held that a state had as much right to alter the number of a petit jury as it did to abolish the grand jury, as in *Hurtado*. The Court held that the privileges and immunities clause did not apply to this state law and that the defendant's due process rights were not denied.

Harlan urged in *Maxwell* that both the privileges and immunities clause and the due process clause of the fourteenth amendment precluded the trial process adopted in Utah. Harlan noted that if the jury could be reduced to eight members without violating the fourteenth amendment, then a state could reduce the number to three jurors. Harlan maintained that not only was the sixth amendment incorporated into the fourteenth amendment, but so was the remaining Bill of Rights.

With a trace of irony, Harlan also pointed out that because many decisions upheld property rights under the due process clause, it was not unreasonable to expect the Court to use the clause to protect the life and liberty of the citizen. He argued:

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82 176 U.S. 581 (1900) (Harlan, J., dissenting).
83 Id. at 602-03.
84 Id.
85 Harlan explained:

It does not solve the question before us to say that the first ten amendments had reference only to the powers of the National Government and not to the powers of the States. For if prior to the adoption of the Fourteenth Amendment it was one of the privileges or immunities of citizens of the United States that they should not be tried for crimes in any court organized or existing under National authority except by a jury of twelve persons, how can it be that a citizen of the United States may be now tried in a state court for crime . . . by eight jurors, when that amendment expressly declares that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States?”

86 Id. at 612.
87 Id. at 613.
88 Id. at 612.
89 Id. at 614-17.
90 Id. at 614.
If then the 'due process of law' required by the Fourteenth Amendment does not allow a State to take private property without just compensation, but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the settled usages and the modes of proceeding authorized at the time the Constitution was adopted and which was expressly forbidden in the National Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.\textsuperscript{90}

Justice Harlan expressed his impatience toward those members of the Court who would permit nothing to threaten the rights of property but would not condemn judicial procedures which placed an individual defendant's life or liberty in jeopardy.

Harlan voiced concern that if the states could take away one right enumerated in the Bill of Rights, they could take away all others. In the following statement we find the clearest expression of Harlan's position in favor of complete nationalization of the Bill of Rights:

The right to be tried when charged with a crime by a jury of twelve persons is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments, originally limited only the powers of the National Government . . . since the adoption of the Fourteenth Amendment, the privileges and immunities are, in my opinion, also guarded against infringement by the States.\textsuperscript{91}

Harlan viewed the Bill of Rights as sacred elements of liberty, and he found it inconceivable that simply because a defendant was tried in a state court he should enjoy less protection than if the trial were held in federal court. In Maxwell, Harlan in his lone dissent stated that "[i]t does not solve the question before us to say that the [Bill of Rights] had reference only to the powers of the national government and not to the state."\textsuperscript{92} Harlan warned in his conclusion of the far-reach-
ing consequences of the Maxwell decision:

I take it no one doubts that the great men who laid the foundations of our government regarded the preservation of the privileges and immunities specified in the [Bill of Rights] as vital to the personal security of American citizens. To say of any people that they do not enjoy those privileges and immunities is to say that they do not enjoy real freedom.

... [T]he Constitution of the United States does not stand in the way of any state striking down guarantees of life and liberty that English-speaking people have for centuries regarded as vital to personal security, and which the men of the revolutionary period universally claimed as the birthright of freemen.

Another famous case regarding nationalization of the Bill of Rights was Twining v. New Jersey, in which Harlan I dissented once again. In Twining, defendants, who were convicted of fraud, invoked their right not to take the stand in their own defense. The judge instructed the jury that it could take into consideration the failure of the accused to defend themselves. The question of whether the guarantee against self-incrimination was incorporated into the due process clause was answered by the Court in the negative on the basis that it was not regarded as a fundamental right.

Harlan I vigorously dissented in an opinion later to be adopted by a majority of the Court.

"[I]t is common knowledge," argued Harlan in Twining, "that the compelling of a person to incriminate himself shocks or ought to shock the sense of right and justice of every one who loves liberty." To Harlan, the majority's narrow interpretation of the fourteenth amendment would prevent that amendment from discouraging the violation of other rights by the states. "[A]s I read the opinion of the court," Harlan commented,

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4 Id. at 615-17.
4 211 U.S. 78 (1908) (Harlan, J., dissenting).
5 Id. at 107-110.
7 211 U.S. at 123.
the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.\(^{98}\)

\(^{98}\) Id. at 125. In other cases Harlan I consistently argued for extension of the Bill of Rights. For example, he argued as a dissenter in support of the incorporation of the right of a unanimous verdict by a petit jury in the annexed Hawaiian Islands. Hawaii v. Mankichi, 190 U.S. 197 (1903) (Harlan, J., dissenting). To Harlan, the "Constitution follows the flag," therefore the Bill of Rights applied to any lands coming under United States jurisdiction. Id. at 239. According to the majority, the annexation resolution continued the existing laws and judicial procedures of the Islands, so far as they were not contrary to the United States Constitution, until Congress should determine otherwise. The guarantee of a unanimous verdict by a petit jury provided in federal court procedure was not regarded by the majority as a fundamental right. Id. at 218.

In Kepner v. United States, 195 U.S. 100 (1904), a case involving double jeopardy, the defendant was acquitted of embezzlement. On appeal the Supreme Court of the Philippines, pursuant to a military order allowing appeals from acquittals, reversed the lower court decision and sentenced him to prison. The United States Supreme Court reversed this action holding that double jeopardy had occurred. Double jeopardy was held invalid here because Congress had repealed the military order when setting up a civilian government; this congressional act provided immunity from double jeopardy. Id. at 133-34. Justice Harlan concurred without comment, but in Trono v. United States, 199 U.S. 521 (1905) (Harlan, J., dissenting), he stated that the reason for his concurrence had been that he felt that when the Philippines had been acquired its inhabitants became entitled to all the rights of the Bill of Rights, thus the existence of a military government order was irrelevant. Id. at 535.

In Dorr v. United States, 195 U.S. 138 (1904) (Harlan, J., dissenting), another Philippine Islands case, the Supreme Court held that in the absence of a statute of Congress expressly conferring the right of trial by jury, the right is not a necessary implement in judicial procedure in the Philippine Islands. The majority held that trial by jury is not a fundamental right, following the reasoning in the Mankichi case. Id. at 148-49. Three of the four dissenters in Mankichi joined the majority in Dorr because of the Mankichi decision. One dissenter, however, maintained his position—Harlan. He remained adamant in his view that guarantees for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.

Id. at 154. In the Trono case, referred to above, Harlan dissented from a majority decision which held that a second trial could result in a stiffer penalty than in the
II. JOHN MARSHALL HARLAN II

Justice Harlan II was born in Chicago in 1899, the son of John Maynard Harlan, a prominent Chicago attorney, and the grandson of Harlan I. In 1920 he received his A.B. degree from Princeton. A Rhodes Scholar, Harlan spent three years at Balliol College, Oxford, where he received B.A. and M.A. degrees. He also studied law at Balliol College, and completed his law studies at New York Law School. Harlan II worked in the New York law firm of Root, Clark, Buckner and Howland, except for two years spent with the staff of Emory Buckner, who was United States Attorney for the Southern District of New York. Harlan remained at Root, Clark until 1942, attaining partnership status in 1931.

During World War II, Harlan served as a colonel in charge of the Operational Analysis Section of the Eighth Air Force in England. This section was composed of civilian experts in a variety of fields who had been assembled to advise the commander of the force responsible for the United States' share of the bombing operations in Europe. After the war, Harlan returned to private practice where he specialized in corporate law.

In 1954 Harlan was appointed by President Eisenhower to the United States Court of Appeals for the Second Circuit to replace the illustrious Augustus Hand. In November of that year, President Eisenhower appointed Harlan to the United States Supreme Court to succeed Justice Jackson. Many

original trial when the appeal is instituted by the defendant. The Court held that a defendant waives his right against double jeopardy when he appeals a decision. 199 U.S. at 533. In his dissent Harlan argued that acquittal in the court of first instance of the serious crime of murder made consideration of the charge by a higher court constitute double jeopardy. The fact that the appeal was brought by the accused was immaterial to Justice Harlan. Id. at 536.

99 EVOLUTION, supra note 14, at xviii. David Shapiro presented an excellent biographical sketch of Harlan II in a Biographical Note included in EVOLUTION at xvii. For the brief background information presented here the author is indebted to that source and it is suggested that it be consulted for additional facts concerning Harlan II's biography.

100 Id.
101 Id. at xx.
102 Id. at xxii.
103 Id. at xxii-xxiii.
104 Id. at xxiii.
southern senators were leery of Harlan because of his grandfather's position on civil rights while he served on the Supreme Court. Conservatives opposed him because of the fear that he would be a "One Worlder," since he had been a Rhodes Scholar and a member (though inactive) of the Atlantic Union Committee which advocated closer alliance with NATO countries. Senator Eastland of Mississippi, Chairman of the Senate Judiciary Committee, opposed him, saying, "[W]orld Government is the issue in this case." The Daughters of the American Revolution opposed him because of his defense of what it referred to as the "well-known leftist 'Bertram' Russell." In spite of this opposition, Harlan II's nomination was confirmed in March 1955, and he remained on the bench until his retirement in 1971.

Justice Harlan II came to the Court when its involvement with civil liberties was at its height. His response to the difficult problems of racial discrimination and the plight of the criminal defendant has been described as conservative; such a label is generally inappropriate because of his sensitivity to the "importance of protecting the fundamental freedoms of the individual from impairment by any governmental body, state or federal." This section will examine representative opinions by Harlan II as contrasted with the decisions of his grandfather. Thus, focus will be on cases concerning civil rights and nationalization of the Bill of Rights. As this discussion will demonstrate, the pattern which emerges in Harlan II's opinions is "attributable in part to his fear that the judiciary will arrogate excessive authority in a system marked by a separation of powers, and his concern lest the Congress, the legal profession and the general public lose confidence in the judiciousness and self-restraint of the members of the Court."
A. Civil Rights and Justice Harlan II

In the area of civil rights, a diversity of cases came before the United States Supreme Court during Justice Harlan II’s tenure. First were the cases which involved challenges to the constitutionality of the Civil Rights Acts of the 1960’s, including *Heart of Atlanta Motel v. United States,* and *Katzenbach v. McClung.* In both decisions Harlan joined a unanimous Court in upholding the 1964 Act. In another group of cases, Harlan joined a unanimous Court in upholding the implementation of the school desegregation decision in *Brown v. Board of Education* by striking down the closing of schools in Prince Edward County, Virginia, to avoid integration, in upholding federal court orders requiring school integration in Little Rock, Arkansas, and in upholding school busing plans in Holmes County, Mississippi and in Charlotte-Mecklenburg, North Carolina. In fact, in the Charlotte case, *Swann v. Board of Education,* the Court upheld busing and racial quotas and gerrymandering to remove “all vestiges of state-imposed segregation.” Most important for analytical purposes here are the cases in which the Court dealt with the constitutionality of state and local anti-trespass laws which were invoked against students participating in sit-in demonstrations during the civil rights movement in the 1950’s and 1960’s.

1. Anti-Trespass Laws and the Federal System

Justice Harlan II was most often at odds with the majority of the Court in his views concerning state and local anti-trespass statutes. He sided consistently with those who favored upholding these laws, with the effect of aligning himself

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18 *Id.* at 15.
with the dissenters in some cases and with the majority in others. An analysis of these cases illustrates that for Justice Harlan II the element of federalism "inherent in our constitutional structure, is an essential aspect of the division of governmental authority that serves to safeguard the individual from the dangers of monolithic rule."

In *Hamm v. City of Rock Hill*, students were arrested and convicted of violating state trespass laws when they "sat-in" at a lunch counter in Rock Hill, South Carolina. The Court majority held the convictions invalid because the 1964 Civil Rights Act made state trespass laws invalid as they applied to public accommodations refusing to serve customers on the basis of race. The Court, in a 5-4 decision, stated that:

> [T]he Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still-pending convictions are abated by its passage.

The key point espoused by the majority was that under the supremacy clause the federal Civil Rights Act requires that all contrary state laws no longer stand.

Harlan II, in his *Hamm* dissent, attacked the majority's view that the Civil Rights Act of 1964 abated the criminal trespass laws of the states as they applied to sit-in demonstrations. Harlan agreed that:

> [T]he abatement doctrine serves a useful and appropriate

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121 *Evolution*, supra note 14, at 1.
123 Id. at 308.
124 Id. at 315.
125 The Court is referring to two actions dealt with simultaneously: the lunch counter in Rock Hill, and a tearoom in the Gus Blass Company's department store in Little Rock, Arkansas.
126 Id. at 308 (footnote added).
127 Id. at 315.
purpose in a framework of the legislation of a single political sovereignty. The doctrine strikes a jarring note, however, when it is applied so as to affect the legislation of a different sovereignty, as the federal doctrine is now used to abate these state convictions. Our federal system tolerates wide differences between state and federal legislative policies, and the presumption of retroactive exculpation that readily attaches to a federal criminal statute which unreservedly repeals earlier federal legislation cannot, in my opinion, be automatically thought to embrace exoneration from earlier wrongdoing under a state statute.\textsuperscript{127}

Harlan declared that he would not decide whether such state racial trespass laws would be valid after the passage of the Civil Rights Act of 1964. He simply found no evidence that Congress intended to have the Civil Rights Act pre-empt such trespass laws enacted before 1964.\textsuperscript{128}

In \textit{Bell v. Maryland},\textsuperscript{129} another trespass case, the Court reversed the conviction of twelve black students who were involved in a sit-in demonstration and who refused to leave a Baltimore restaurant, thus violating Maryland’s criminal trespass law. Between the time the Maryland Court of Appeals affirmed their conviction and the United States Supreme Court granted certiorari, the state of Maryland passed a public accommodations statute making it unlawful for restaurants to deny services to any person because of race. In a 6-3 decision, the Court vacated the conviction and remanded the case to the state court so that it might consider the effect of the new public accommodations law.\textsuperscript{130}

Justice Harlan II did not write a dissenting opinion but

\textsuperscript{127} Id. at 323-24.
\textsuperscript{128} Id. at 325.
\textsuperscript{130} Id. at 242. In a concurring opinion, Justice Douglas sounds like Justice Harlan I:

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the "State" violates the Fourteenth Amendment.

\textit{Id.} at 260.
joined the dissenting views of Justice Black that the fourteenth amendment "does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be."\textsuperscript{131} Rather, United States citizens "have been taught to call for police protection to protect their rights whenever possible."\textsuperscript{132} A citizen is not "cast outside the law's protection" because of his "personal prejudices, habits, attitudes, or beliefs. . . ."\textsuperscript{133}

Our sole conclusion is that Section 1 of the Fourteenth Amendment, standing alone, does not prohibit privately owned restaurants from choosing their own customs. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise.\textsuperscript{134}

In \textit{Bouie v. City of Columbia},\textsuperscript{135} a companion case decided with \textit{Hamm}, the Court in a 6-3 decision again overturned the conviction of sit-in demonstrators, with Justices Harlan and White concurring in a dissenting opinion written by Justice Black. Here, two black college students entered a Columbia, South Carolina, drug store which extended service to blacks in all departments except its restaurant. The students sat down and refused to leave when asked to do so. They were arrested and convicted of trespassing, and the conviction was upheld by the South Carolina Supreme Court.

Speaking for the Court in \textit{Bouie}, Justice Brennan reversed the conviction on the ground that the students, having been permitted to enter the drug store and be served in all departments but the restaurant, were not given fair warning of a criminal prohibition required by the trespass statute, thus their conviction was a violation of the due process clause of the fourteenth amendment.\textsuperscript{136} Justice Brennan stated that

\begin{itemize}
  \item \textsuperscript{131} Id. at 327-28.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id. at 343.
  \item \textsuperscript{134} Id.
  \item \textsuperscript{135} 378 U.S. 347 (1964).
  \item \textsuperscript{136} Id. at 350.
\end{itemize}
there was nothing in the statute to indicate that it also prohibited refusal to leave the premises when ordered to do so.\textsuperscript{137}

Again, Harlan joined a dissent by Black in which the rationale of state trespass laws was further explained:

\[\text{[It has long been accepted as the common law of that State that a person who enters upon the property of another by invitation becomes a trespasser if he refuses to leave when asked to do so. We cannot believe that either the petitioners or anyone else could have been misled by the language of this statute into believing that it would permit them to stay on the property of another over the owner's protest without being guilty of trespass.} \textsuperscript{138}\]

The dissents in these cases illustrate two interrelated points about Harlan's judicial approach. First, the balance between state and federal government must be preserved; and, secondly, the state has the power to enact legislation aimed at protecting the property of its citizens. That the statutes may be invoked for prejudicial motives of exclusion of a certain race from entering private property is irrelevant to the validity of the law in question. Justice Harlan I undoubtedly would have agreed with the majority in these cases; the ability to invoke state laws to exclude systematically members of a certain race from private business open to the public is essentially another manifestation of the "separate but equal doctrine." Justice Harlan II adopted a dispassionate view of the fact that the law is used in support of actions apparently discriminatory in nature. He struck his balance in favor of undergirding the federal system.

2. \textit{Fair-Housing Statutes and Equal Protection}

Justice Harlan II's dissenting opinion in \textit{Reitman v. Mulkey}\textsuperscript{139} further illustrates his somewhat detached attitude toward laws which foster racial discrimination. The \textit{Reitman} case involved an amendment to California's constitution, supported by the electorate in an initiative and referendum,

\textsuperscript{137} Id. at 362.

\textsuperscript{138} Id. at 366-67. (footnotes omitted).

\textsuperscript{139} 387 U.S. 369 (1967) (Harlan, J., dissenting).
which would forbid the state to deny anyone the right to sell his or her property to whomever he or she chooses. The California Supreme Court held this referendum to be a violation of the equal protection clause of the fourteenth amendment. In a 5-4 decision, the United States Supreme Court affirmed the California Supreme Court decision. The Court, in a decision by Justice White, held that according to the Supreme Court of California, Proposition 14, the relevant constitutional amendment, not only repealed existing fair housing laws but also authorized racial discrimination as a state policy. Thus, the state was involved in discrimination through its involvement and encouragement via this provision.

In a dissenting opinion, joined by Justices Clark, Black and Stewart, Justice Harlan II declared that he was "wholly at a loss to understand how this straightforward effectuation of a change in the California Constitution [could] be deemed a violation of the Fourteenth Amendment." Adopting the same position as that assumed in the anti-trespass cases, Harlan emphasized the futility in attempting to eradicate racial prejudice and discrimination by utilization of the equal protection clause.

The Equal Protection Clause . . . which forbids a State to use its authority to foster discrimination based on factors such as race . . . does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded.

Harlan felt that California, "acting through the initiative and referendum, [had] decided to remain 'neutral' in the realm of private discrimination affecting the sale or rental of private

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140 Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

CAL. CONST. art. I, § 26, quoted at 387 U.S. at 371.

141 387 U.S. at 374-75.

142 Id. at 388-89.

143 Id.
California simply repealed its previously enacted fair-housing statutes, which was no more unconstitutional than a state's failure to have passed the laws in the first place. Harlan argued that the fourteenth amendment should not be used as a device to invalidate Proposition 14:

The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

To the claim of the majority that the referendum constituted in effect a state endorsement of private discrimination, Harlan responded that there were no findings of fact as to what the referendum's effect would be. A law's constitutional validity is determined by what the law does, not by what those who voted for it wanted it to do, and it must not be forgotten that the Fourteenth Amendment does not compel a State to put or keep any particular law about race on its books. The Amendment only forbids a State to pass or keep in effect laws discriminating on account of race. California has not done this.

A state enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect.

Harlan concluded that the Court majority's argument that adoption of the amendment constituted state encouragement of discrimination established a principle which could make passage of future anti-discrimination laws difficult. Opponents of future laws could argue that a state would be unable to ever repeal the legislation lest it be charged with en-

144 Id.
145 Id. at 389.
146 Id. at 390-91.
couraging discrimination, thus violating the equal protection clause.\\footnote{Id. at 395.}

It is apparent that Harlan II assumed a strict constructionists's view regarding the California amendment. He saw no state-imposed or encouraged discrimination on its face: "The amendment is by its terms inoffensive, and its provisions require no affirmative governmental enforcement of any sort."\\footnote{Id. at 392.}

\begin{quote}
\textit{In NAACP v. Button, 371 U.S. 415 (1963) (Harlan, J., dissenting), which is indirectly related to the civil rights movement, Harlan II dissented from a decision which overturned the action of the state of Virginia against the activities of the NAACP. The NAACP maintained an action to enjoin the enforcement of a Virginia statute which prohibited agents of organizations from soliciting legal business in connection with an action to which it was not itself a party and in which it had no pecuniary right or liability. The Virginia Supreme Court of Appeals upheld the applicability and constitutionality of the statute. The United States Supreme Court reversed on First Amendment grounds. Id. at 428.}

Justice Harlan II dissented, arguing that it was not unreasonable for a state to enforce the American Bar Association's canon of ethics which forbids a lawyer from soliciting business. He felt that it was proper for the NAACP to acquaint blacks with their rights and to advise them to assert those rights through legal proceedings, but that it was also proper for the state to forbid the NAACP from soliciting business for their lawyers. \textit{Id. at 449-49.} "The interest which Virginia has here asserted is that of maintaining high professional standards among those who practice law within its borders." \textit{Id. at 455.} Harlan also argued that the state has a right to prevent "ambulance-chasing" and to utilize such a statute for protection of the attorney-client relationship:

\begin{quote}
When an attorney is employed by an association or corporation to represent individual litigants . . . the lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyers it employs, is not subject to strict professional discipline as an officer of the court. In addition, the lawyer necessarily finds himself with a divided allegiance—to his employer and to his client—which may prevent full compliance with his basic professional obligations. \textit{Id. at 460.}

Harlan illustrated this idea by raising a hypothetical problem: a Black parent might want to attack segregation through discussions with the local school board or allow the local authorities a longer time for compliance, while the NAACP might push for an immediate lawsuit. In such a situation the lawyer would be torn in his allegiance between the organization which pays his salary and the client. Placed in jeopardy is "that undivided allegiance that is the hallmark of the attorney-client relation," and the state has a right to guarantee that undivided allegiance by statute. \textit{Id. at 462.}

Harlan also denied that the Virginia statute had a detrimental effect on freedom of expression and association. Speaking specifically to this point, he stated:

\textit{The important function of organizations like the petitioner in vindicating constitutional rights is not of course to be minimized, but that function is not, in my opinion, substantially impaired by this statute. Of cardinal im-}
In *Reitman* Harlan II exemplified the non-activist, the thoughtful, precise examiner of a state action that he felt fell within what may, on its face, be reasonable action based on motives which cannot be proved to be sinister or discriminatory.

**B. Nationalization of the Bill of Rights: Justice Harlan and Fundamental Fairness**

On no other issue in this study in judicial contrasts between the two Justices Harlan is the difference more apparent than on the subject of the application of the Bill of Rights to the states through the fourteenth amendment. In fact, Justice Frankfurter in *Adamson v. California* referred to Justice Harlan I when he stated that there had been only one “eccentric exception” to the Court’s refusal to accept total incorporation of the Bill of Rights. Harlan II was opposed not only to total incorporation but even to the selective incorporation approach adopted by the Court majority. In discussing civil rights as the subject relates to the applicability of the Bill of Rights to state government, Harlan II stated that “there is no such thing in our constitutional jurisprudence as a doctrine of civil rights at large standing independent of other constitutional limitations or giving rise to rights born only out of the personal predilections of judges as to what is good.” Promoting the principles of federalism involves the toleration, even encouragement, of “differences between federal and state protection of individual rights, so long as the differing policies alike are founded in reason and do not run afoul of dictates of fundamental fairness.” One commentator has noted the

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332 U.S. 46 (1947) (Frankfurter, J., concurring).


Id.
"traditional notion implicit in the concept of federalism that the state shall play a large and important role in ordering the lives of its citizens," and Justice Harlan's position is that the Bill of Rights must be interpreted and applied in accordance with this principle inherent in the balance of federalism. Harlan maintained that so long as state policy was fundamentally fair to the individual, the national Bill of Rights should have no application.

1. Due Process and State Criminal Procedure

The opinions of Justice Harlan II in cases concerning issues of the administration of criminal justice reveal "his philosophy of due process and his attitudes about that clause and its relationship to civil liberties." His views are forcefully explained in Duncan v. Louisiana, in which Gary Duncan had been convicted of battery in a Louisiana court, an offense punishable by two years in prison and a fine of $300. During the trial Duncan had requested and was denied a jury. He appealed the case to the United States Supreme Court, which upheld Duncan's claim by a 7-2 decision. Said Justice White for the majority: "[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."

Harlan II, in dissent, maintained that "[T]he question in this case is whether the State of Louisiana, which provides trial by jury for all felonies, is prohibited by the Constitution from trying charges of simple battery to the court alone. In my view, the answer . . . is clearly 'no.'" To Harlan the question was nothing more than whether the trial process was fair. He felt that primary responsibility for criminal justice procedures had always been with state judicial systems, and were limited only by provisions of the Constitution, such as

122 Ledbetter, supra note 107, at 390.

123 Id. at 396.


125 Id. at 149.

126 Id. at 172 (Harlan, J., dissenting).

127 Id. at 187.
the due process clause. Harlan explained:

The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules that may be in force in the federal courts except where such rules are also found to be essential to basic fairness.¹⁵⁸

Harlan II particularly attacked the idea (held so strongly by his grandfather) that the first eight amendments of the Bill of Rights were incorporated by the fourteenth amendment's due process clause to apply with equal limitation on the states.¹⁵⁹ He not only opposed the concept of total incorporation, but also selective incorporation; in fact, he found more virtues in the former than in the latter, on the basis that total incorporation was at least consistent.¹⁶⁰ In Duncan, Harlan II pleaded for determining the disposition of a case on the basis of whether a fair trial had been conducted. Specifically, he upheld Justice Cardozo’s approach in Palko v. Connecticut¹⁶¹ of applying specific provisions of the Bill of Rights to the states on the basis of whether fundamental fairness existed in the case being judged.¹⁶² Harlan stated:

There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft. The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. . . . [T]he Court has chosen to impose upon every State one means of trying criminal cases; it is a good means, but it is not the only fair means, and it is not demonstrably better than the alternatives States might devise.¹⁶³

¹⁵⁸ Id. at 172.
¹⁵⁹ Id. at 174.
¹⁶⁰ Id. at 176.
¹⁶² 391 U.S. at 186-87.
¹⁶³ Id. at 192-93. Justice Black, the consistent advocate of total incorporation,
In other cases involving incorporation of the Bill of Rights, Justice Harlan II also dissented. He dissented, for example, in *Mapp v. Ohio,*\(^{164}\) in which the exclusionary rule was made applicable to the states; in the case of *Malloy v. Hogan*\(^{165}\) in which states were bound by the fifth amendment's provision on self-incrimination; and in *Miranda v. Arizona,*\(^{166}\) which broadened the scope of the incorporation of the fifth and sixth amendments. On the other hand, he supported incorporation of the right to a speedy trial in *Klopfer v. North Carolina,*\(^{167}\) right to counsel in *Gideon v. Wainwright,*\(^{168}\) and prohibition against cruel and unusual punishment in *Robinson v. California.*\(^{169}\) It is important to note that he did not support these rights because of any selective theory of incorporation. His support of some rights and rejection of others was based on whether the state procedures satisfied the test of fundamental fairness. For example, in his support of the Court's decision in *Gideon v. Wainwright,*\(^{170}\) Harlan II stated his agreement "with the Court that the right to counsel in a case such

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concurring in the Court's opinion, presented an attack on Harlan's views that could have been issued by Harlan's grandfather:

[The "fundamental fairness" test is one on a par with that of shocking the conscience of the Court. Each of such tests depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values. . . . I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights.

*Id.* at 168-70.


\(^{165}\) 378 U.S. 1 (1964) (Harlan, J., dissenting).

\(^{166}\) 384 U.S. 436 (1966) (Harlan, J., dissenting).


I would rest decision of this case not on the "speedy trial" provision of the Sixth Amendment, but on the ground that this unusual North Carolina procedure, which in effect allows state prosecuting officials to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.

*Id.* at 226-27.

\(^{168}\) 372 U.S. 335 (1963) (Harlan, J., concurring).


\(^{170}\) 372 U.S. 335, 352 (Harlan, J., concurring).
as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment.”

However, he countered any expansive interpretation of his opinion:

When we hold a right or immunity, valid against the Federal Government, to be ‘implicit in the concept of ordered liberty’ and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States . . . . In what is done today I do not understand the Court to depart from the principles laid down in Palko v. Connecticut . . . or to embrace the concept that the Fourteenth Amendment ‘incorporates’ the Sixth Amendment as such.

That the right to counsel was not a right to be afforded in all state proceedings was borne out in Harlan’s dissent in Douglas v. California, which concerned the right of an indigent convicted man to have counsel appointed to handle an appeal, which service was provided by the state as a matter of right. The majority held that both the due process clause and the equal protection clause had been violated by California when counsel was denied. Concerning the due process clause, Justice Harlan II felt California had not violated any rights provided therein. Harlan II believed that the California system of appellate procedure provided adequate review of any alleged errors in the original trial. According to the procedure in California, the state appellate courts were required to appoint counsel for an indigent appellant except when “in their judgment such appointment would be of no value to either the defendant or the court.”

This judgment can be reached only after an independent investigation of the trial record by the reviewing court. And even if counsel is denied, a full appeal on the merits is accorded to the indigent appellant, together with a statement of the reasons why counsel was not assigned. There is

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111 Id. at 352.
112 Id.
113 372 U.S. 353 (1963) (Harlan, J., dissenting). This was a companion case to Gideon v. Wainwright.
114 Id. at 358.
nothing in the present case, or any other case that has been cited to us, to indicate that the system has resulted in injustice.  

Harlan judged that the *Gideon* case, decided the same day, was irrelevant because the fourteenth amendment did not guarantee the right of appellate review.\(^{17}\) What was important to Harlan was whether an indigent appellant was treated fairly: he was satisfied that the appellant under California procedure "receives the benefit of expert and conscientious legal appraisal of the merits of his case on the basis of the trial record, and whether or not he is assigned counsel, is guaranteed full consideration of his appeal."\(^{18}\) He argued that the right to counsel on appeal was no more to be required in state courts than in appeals to the United States Supreme Court: "But as conscientiously committed as this Court is to the great principle of 'Equal Justice Under Law,' it has never deemed itself constitutionally required to appoint counsel to assist in the preparation of each of the more than 1000 *pro se* petitions for certiorari currently being filed each Term."\(^{19}\)

In *Miranda v. Arizona*,\(^{20}\) Harlan dissented because he felt the Court had exaggerated police violations of due process and had placed rules on law enforcement officers that would impede their ability to operate effectively.\(^{21}\) Harlan determined that the only true test was whether the suspects had confessed voluntarily. To place upon state and local police the requirements of the warnings "is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all."\(^{22}\) This, said Harlan, is "voluntariness with a vengeance." He felt that "[s]ociety has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."\(^{23}\)

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\(^{17}\) 372 U.S. at 364.
\(^{18}\) Id. at 365.
\(^{19}\) Id.
\(^{20}\) Id. at 366. *Ross v. Moffit*, 417 U.S. 600 (1974), held that an indigent does not have right to counsel in a discretionary appeal.
\(^{22}\) Id. at 517.
\(^{23}\) Id.
As another example of his devotion to judicial self-restraint, Harlan pointed in *Miranda* to the number of studies that were being undertaken by various study groups, as well as some legislatures, to find solutions to the many problems related to criminal justice institutions and procedures:

> [T]he practical effect of the decision made today 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 or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

This is not only a plea for judicial self-restraint but also a plea for federalism. State legislators should delineate judicial and criminal justice procedures that reflect their best judgment of how law and order can most effectively be maintained. Judicially created limitations should be imposed only in response to obvious violations of fundamental fairness.

An excellent example of Harlan's devotion to federalism appears in his concurring opinion in *In re Gault*.

Writing for the 8-1 majority, Justice Fortas held that juvenile justice proceedings, like adult criminal proceedings, should guarantee the right to timely and adequate notice, the right to counsel, the right of confrontation, the right of cross-examination and recognition of the privilege against self-incrimination. Harlan concurred in this result, but agreed with Fortas only as regards the right to notice and the right to counsel. He added that "[T]he court must maintain a written record, or its

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184 Id. at 522.
185 Id. at 524.
187 Id. at 33-34.
188 Id. at 41.
189 Id. at 56.
190 Id. at 57.
191 Id.
equivalent, adequate to permit effective review on appeal or in collateral proceedings." He felt, however, that the remaining rights enumerated by Justas Fortas ought to be carefully defined so as not to convert juvenile court proceedings into ordinary criminal trials and thus thwart an important purpose of these specialized courts. "[T]he Court should now impose no more procedural restrictions than are imperative to assure fundamental fairness, and that the States should instead be permitted additional opportunities to develop without unnecessary hindrance their systems of juvenile courts."

Harlan II also discussed two ancillary considerations. First, many children are brought to juvenile court who are not guilty of criminal conduct. As programs are developed for treating these juveniles, the state acts in loco parentis, concerned more with protection than punishment. The "Fourteenth Amendment does not demand that [these efforts] be constricted by the procedural guarantees devised for ordinary criminal prosecutions." Second, Harlan II reminds us that juvenile courts are presently under earnest study throughout the nation:

I very much fear that this Court, by imposing these rigid procedural requirements, may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the systems of juvenile courts. It is appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies 'every quality of the law but its age.'

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182 Id. at 72.
183 Id. at 75.
184 Id. at 76.
185 Id. at 77.
186 Id. at 77-78 (emphasis added). This phrase, "every quality of the law but its age," originated with Justice Brewer's majority opinion in Hurtado v. California, 110 U.S. 516, 529 (1884), a case in which, it will be recalled, Justice Harlan I was the lone dissenter. Another case in which Justice Harlan II dissented because he felt state judicial proceedings were being limited unduly was Fay v. Noia, 372 U.S. 391 (1963). In Fay, three men were convicted of murder and sentenced to life imprisonment. The sole evidence against each was a signed confession taken by police who were utilizing coercive tactics. Noia was afraid to appeal because a new trial might result in his execution. Was his failure to appeal a deliberate attempt to by-pass available state
Many cases demonstrate that Harlan II operated on the assumption that the purpose and effect of the fourteenth amendment was to require the states to follow fair procedures in criminal prosecution; the question of fairness should be determined not by the Bill of Rights but on the basis of the particular case. In *Estes v. Texas*,\(^9\) which reflected this attitude, the Court reversed Estes' conviction for swindling because it determined his due process rights had been violated by the use of television in the courtroom and feared his case had been prejudiced by the use of film clips on regular news programs.\(^9\)

In a concurring opinion Justice Harlan demonstrated his habit of weighing both sides carefully to arrive at what appears to be the favorable side of an almost evenly balanced issue:

"Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment."\(^9\)

procedures? Justice Brennan, speaking for the majority said:

"Under no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate by-passing of the state court system. For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. . . . He declined to play Russian Roulette in this fashion. This was a choice by Noia not to appeal, but under the circumstances it cannot realistically be deemed a merely tactical or strategic litigation step, or in any way a deliberate circumvention of state procedures."

*Id.* at 439-40 (footnotes omitted).


\(^{10}\) *Id.*

\(^{11}\) *Id.* at 587.
It is difficult to imagine Justice Harlan I, who seemed never in doubt about what truth and virtue required, experiencing such agony in arriving at an opinion. Notice that for Justice Harlan II the problem was not only a matter of balancing countervailing values, but also a matter of recognizing that there are possible situations in which the use of television might not violate due process, especially a trial in which there has been little publicity.\(^{200}\) Such was obviously not the case in the trial of Estes.

2. Justice Harlan II and the Right to Privacy

"It is sometimes surmised, without a careful reading of the opinions and the rationale involved, that because Justice Harlan is frequently not on the side of the Court's 'civil liberties' he is an anti-liberal, etc.\(^{201}\) An analysis of Harlan's opinions in *Poe v. Ullman*\(^{202}\) and *Griswold v. Connecticut*\(^{203}\) reveals that the principles of "ordered liberty" which Harlan faithfully applied were flexible enough to condemn invasions of privacy as violations of the fourteenth amendment.

*Poe v. Ullman* involved a challenge to the Connecticut birth control law under declaratory judgment procedure. Suit was instituted to obtain birth control information and to allow doctors the freedom to disseminate such information. By a 5-4 vote the Court, in a decision written by Justice Frankfurter, dismissed the appeal on the ground that there was no true controversy since the law had been enforced only once in its history. Thus, the Court reasoned, there was little if any reason to fear prosecution.\(^{204}\)

Harlan II dissented. He stated, "I cannot agree that their enjoyment of this privacy is not substantially impinged upon when they are told that if they use contraceptives . . . the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of

\(^{200}\) Id. at 590.
\(^{201}\) Ledbetter, *supra* note 107, at 405.
\(^{203}\) 381 U.S. 479 (1965) (Harlan, J., concurring).
\(^{204}\) Id. at 507-08.
Harlan also argued that this was a violation of the fourteenth amendment's due process clause, not because the right was nationalized, but because it affected the deprivation of a fundamental right, namely, the right of marital privacy.

It is interesting to compare *Poe v. Ullman* to the more famous decision on this issue, *Griswold v. Connecticut*, decided four years later. In this case the state did prosecute persons for violating the anti-contraceptive statute. In a 7-2 decision, the Court declared the Connecticut statute unconstitutional. The majority decision written by Justice Douglas held that the right of marital privacy was “within the zone of privacy created by several fundamental constitutional guarantees.”

Harlan II concurred in the *Griswold* decision, but not the rationale, for the reasons he had articulated in *Poe v. Ullman*. He thought that the law violated the due process clause because it violated the basic values “implicit in the concept of ordered liberty” as expressed by Justice Cardozo in *Palko*. Harlan concluded: “While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.”

**CONCLUSION**

Justice Harlan I perceived the Court's rule to be the defender of individual rights. It has been pointed out that Harlan participated in thirty-nine cases dealing with civil rights of Blacks in the United States. “In every case where the Supreme Court upheld the claimed rights of Negro petitioners, Justice Harlan was with the majority,” but dissented

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205 Id. at 536.
206 Id. at 539.
207 381 U.S. 479 (1965) (Harlan, J., concurring).
208 Id. at 485.
209 Id. at 500. See note 161 *supra* and accompanying text for a discussion of *Palko*.
210 Id. at 500.
211 Westin, *supra* note 2, at 697.
in “every case where the Court declared federal civil rights legislation to be unconstitutional or unconstitutionally applied.” Harlan I’s opinions were not governed by a strict judicial philosophy. Thus at times Harlan I was a judicial activist in his passion for civil rights, while at other times he was a proponent of judicial self-restraint. His conception of substantive justice invariably led him to support the “just” result in a case; in the civil rights cases dealing with Blacks he offered unfailing support. As one scholar noted, “Harlan stood in the classic pattern of those who espouse judicial self-restraint on behalf of majority rule but are so devoted to civil liberty that they cannot always restrain themselves.”

In contrast, Justice Harlan II criticized the attempts of judicial activists to use the Court as a tool of social reform. He pleaded on several occasions for a Court which limited its role to interpreting the laws and the Constitution. The role of effecting social change, he argued, was proper for the political branches of government and the states, but not for the Court. Thus, he maintained that there was no doctrine of civil rights in Constitutional jurisprudence, that reasonable exercises of the state legislative power were never to be restricted even though statutes might foster private discrimination based in racial prejudices, and that principles of federalism militated against incorporation of the Bill of Rights so long as the states nurtured policies favoring dictates of fundamental fairness. His detached position regarding individual rights asserted in a particular case stands in stark contrast to the passionate support which his grandfather undeviatingly provided as the lone dissenter in civil rights cases several decades before.