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REQUIEM FOR ROTH: OBSCENITY DOCTRINE IS CHANGING

David E. Engdahl*

I. HARK! THE REQUIEM

IN 1957, the Supreme Court decided *Roth v. United States* and *Alberts v. California*,¹ and thereby commenced what has proved to be one of the most perplexing and politically sensitive tasks the Court has ever undertaken²—determining the constitutional limitations on the power of state and federal governments to regulate obscenity. After twelve years of decisions in the obscenity field, the regrettable truth is that “no stable approach to the obscenity problem has yet been devised by [the] Court.”³ The unreconciled conflicts among the several opinions of Supreme Court Justices written since 1957, and the new uncertainties created by the substantial changes in the personnel of the Court, make it difficult, if not impossible, to extract controlling principles from the obscenity cases. But in the cacophony which now prevails, a careful ear can pick out the opening strains of a developing theme—a theme which is quite different from that played in the most noted opinions in the cases decided since *Roth v. United States*. The symphony which seems to be emerging is a requiem for *Roth*.

The fundamental holding of *Roth* was that “obscenity is not within the area of constitutionally protected speech or press.”⁴ A bare majority of five Justices joined in the Court’s opinion in that case, and only one of those Justices is still on the Court.⁵ Chief Justice Warren concurred in the result on narrower grounds;⁶ Justice Harlan rejected the reasoning of the Court’s opinion, although

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1. 354 U.S. 476 (1957).

2. The obscenity decisions undoubtedly have aggravated the strong tensions surrounding the Supreme Court as an institution. This fact is clearly demonstrated by the congressional clamor over Justice Fortas’ obscenity opinions during the hearings on his nomination for Chief Justice.

3. A Book Named “John Cleland’s *Memoirs of a Woman of Pleasure*” v. Attorney General of Massachusetts, 383 U.S. 413, 455 (1966) (Justice Harlan, dissenting) [hereinafter *Memoirs v. Massachusetts*].

4. 354 U.S. at 485.

5. The majority in *Roth* consisted of Justices Brennan, Burton, Clark, Frankfurter, and Whittaker.

6. 354 U.S. at 495-96. Chief Justice Warren’s opinion is quoted in the text accompanying note 46 *infra*.

he partially concurred in the result; and Justices Black and Douglas joined in a spirited dissent. In the years since *Roth*, those Justices who opposed the decision at the outset have not retreated from their positions, while the supporters of the *Roth* rationale on the Court have dwindled and have fallen into disagreement among themselves over its subsequent application.

A. *The Present Cacophony*

It will be well, before proceeding to assess the current vitality—or morbidity—of the *Roth* rationale, to fix in mind the several conflicting doctrines which certain members of the Supreme Court still maintain.

The view which Justice Douglas holds toward the suppression of obscenity was expressed in his dissenting opinion in *Roth*. In that dissent, he admitted that “[f]reedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it”;⁷ indeed, he insisted that “[a]s a people, we cannot afford to relax that standard.”⁸ But he observed, referring to the scientific evidence, that “it is by no means clear that obscene literature . . . is a significant factor in influencing substantial deviations from the community standards.”⁹ He concluded that “[t]he absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society’s interest in literature, except and unless it can be said that the particular publication has an impact on actions that the government can control.”¹⁰ Justice Douglas flatly rejected the majority’s ipse dixit that “obscenity is not within the area of constitutionally protected speech or press,” and said, “I would give the broad sweep of the First Amendment full support. I have the same confidence in the ability of our people to reject noxious literature as I have in their capacity to sort out the true from the false in theology, economics, politics, or any other field.”¹¹ In the cases decided since *Roth*, Justice Douglas has not softened his position. In *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts (Memoirs v. Massachusetts)*,¹² he reiterated his view “that the First Amendment does

7. 354 U.S. at 514.

8. 354 U.S. at 514.

9. 354 U.S. at 510.

10. 354 U.S. at 511.

11. 354 U.S. at 514.

12. 383 U.S. 413 (1966).

not permit the censorship of expression not brigaded with illegal action."¹³ He declared that "[t]he Court's contrary conclusion in *Roth*, where obscenity was found to be 'outside' the First Amendment, is without justification."¹⁴ If there has been any change in Douglas' view, the change has been toward greater adamancy. In *Ginzburg v. United States*,¹⁵ he wrote in dissent:

[T]he First Amendment allows all ideas to be expressed—whether orthodox, popular, offbeat, or repulsive. . . . The theory is that people are mature enough to pick and choose, to recognize trash when they see it, to be attracted to the literature that satisfies their deepest need, and hopefully, to move from plateau to plateau to finally reach the world of enduring ideas.

I think this is the ideal of the Free Society written into our Constitution. . . . It is shocking to me for us to send to prison anyone for publishing anything, especially tracts so distant from any incitement to action as the ones before us.¹⁶

Justice Douglas continues to insist that identical restraints on governmental suppression are imposed by the first amendment upon the national government and, by the incorporation of the first amendment into the fourteenth, upon the states. Until those restraints are relaxed by constitutional amendment, he maintains, obscenity can be suppressed by any level of government no more readily than any other expression that is not demonstrably and sufficiently related to illegal action.¹⁷

Justice Black concurred in Douglas' dissent in *Roth*, and has also concurred in some of Douglas' subsequent obscenity opinions.¹⁸ In the opinions which Justice Black himself has written on the subject, he has confirmed his conviction that "the *Roth* case was wrongly decided."¹⁹ Obscenity censorship laws are, he contends, "in plain violation of the unequivocal prohibition . . . against 'abridging the freedom of speech, or of the press.'"²⁰ He stated in *Ginzburg* that "the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expres-

13. 383 U.S. at 426.

14. 383 U.S. at 428.

15. 383 U.S. 463 (1966).

16. 383 U.S. at 491-92.

17. *Ginsberg v. New York*, 390 U.S. 629, 650-71 (1968) (dissenting opinion).

18. *E.g.*, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 703 (1968); *Ginsberg v. New York*, 390 U.S. 629, 650 (1968).

19. *A Quantity of Books v. Kansas*, 378 U.S. 205, 214 (1964) (concurring opinion).

20. *A Quantity of Books v. Kansas*, 378 U.S. 205, 214 (1964) (concurring opinion).
See also *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (concurring opinion).

sion of ideas of any kind (as distinguished from conduct). . . ."²¹ And since, in Black's view, the first amendment is made applicable to the states through the fourteenth amendment, the states, too, have "vast power to regulate conduct but no power at all . . . to make the expression of views a crime."²²

While Black and Douglas have never softened their stand, however, they have not been successful in persuading their colleagues on the Court to adopt their views. Of the Justices who are currently sitting on the Court, none but Black and Douglas themselves has ever endorsed their view.

Justice Harlan's position, to which he has consistently adhered since propounding it in his dissent in *Roth*,²³ is more complex than that shared by Douglas and Black. In the first place, Harlan rejects, as he always has, the doctrine that the fourteenth amendment incorporates, in any literal sense, the provisions of the Bill of Rights.²⁴ Rather, he insists that the restraints imposed on the federal government by the first amendment may differ substantially from those imposed on the states by the fourteenth amendment. In Harlan's view, "[f]ederal suppression of allegedly obscene matter should . . . be constitutionally limited to that often described as 'hard-core pornography.'"²⁵ He does not attempt to justify even this degree of federal censorship in terms of standards which are applicable to other categories of speech; he merely notes offhandedly that "[t]he Federal Government may be conceded a limited interest in excluding from the mails such gross pornography, almost universally condemned in this country."²⁶

But while tolerating federal censorship only of "hard-core pornography," Harlan would apply a different standard to the states under the fourteenth amendment. He has described that standard

21. *Ginzburg v. United States*, 383 U.S. 463, 476 (1966) (dissenting opinion).

22. *Mishkin v. New York*, 383 U.S. 502, 518 (1966) (dissenting opinion). *See also* cases cited note 20 *supra*.

23. 354 U.S. 476, 496-508 (1957). *See* *Ginsberg v. New York*, and *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 629, 676, at 704-11 (1968) (concurring in the former and dissenting in the latter); *Keney v. New York*, 388 U.S. 440 (1967) (separate opinion); *Mishkin v. New York*, 383 U.S. 502, 515 (1966) (concurring opinion); *Memoirs v. Massachusetts*, 383 U.S. 413, 455-60 (1966) (dissenting opinion).

24. *See, e.g., Pointer v. Texas*, 380 U.S. 400, 408-09 (1965) (concurring opinion).

25. *Memoirs v. Massachusetts*, 383 U.S. 413, 457 (1966) (dissenting opinion); *Ginzburg v. United States*, 383 U.S. 463, 493 (1966) (dissenting opinion). For the definition of "hard-core pornography," Justice Harlan refers to Justice Stewart's description in *Ginzburg v. United States*, 383 U.S. 463, 497, 499 (1966) (dissenting opinion).

26. *Memoirs v. Massachusetts*, 383 U.S. 413, 457 (1966) (dissenting opinion).

in varying terms in his different opinions. In his concurring opinion in *Alberts v. California*,²⁷ Harlan wrote:

We can inquire only whether the state action so subverts the fundamental liberties implicit in the Due Process Clause that it cannot be sustained as a rational exercise of power. . . . The States' power to make printed words criminal is, of course, confined by the Fourteenth Amendment, but only insofar as such power is inconsistent with our concepts of "ordered liberty."²⁸

Having found that the California legislature had judged, notwithstanding the conflict of scientific evidence, that printed words can deprave or corrupt one who reads them, Harlan determined "that it is not irrational, in our present state of knowledge, to consider that pornography can induce a type of sexual conduct which a state may deem obnoxious to the moral fabric of society."²⁹ Moreover, Harlan found that, besides the prevention of illegal behavior, there were other interests which might be protected by a state prohibition of obscene materials, and that those interests were within the proper cognizance of state regulation.³⁰ He therefore concluded: "I cannot say that the suppression [of such materials] would so interfere with the communication of 'ideas' in any proper sense of that term that it would offend the Due Process Clause."³¹ In his dissenting opinion in *Jacobellis v. Ohio*, Harlan stated: "As to the states, I would make the federal test one of rationality."³² Explaining further, he said that he "would not prohibit [the states] . . . from banning any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material."³³ Later, dissenting in *Memoirs v. Massachusetts*, he said, "From my standpoint, the Fourteenth Amendment requires of a State only that it apply criteria rationally related to the accepted notion of obscenity and that it reach results not wholly out of step

27. *Alberts* was decided with *Roth v. United States*, 354 U.S. 476 (1957). Harlan concurred in the judgment in *Alberts* although he dissented from the judgment in *Roth*.

28. 354 U.S. at 501. In support of his conclusion, Justice Harlan cited *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

29. 354 U.S. at 501-02.

30. 354 U.S. at 502.

31. 354 U.S. at 503.

32. 378 U.S. 184, 204 (1964).

33. 378 U.S. at 204.

with current American standards."³⁴ More recently, he has said that he "would withhold the federal judicial hand from interfering with state determinations except in instances where the state action clearly appears to be but the product of prudish overzealousness."³⁵

Harlan, however, has been no more successful than Black and Douglas have been in persuading other Justices to accept his point of view. On their face, the cases claim continuing loyalty to *Roth*. Whether that seeming loyalty is anything more than superficial is the question which must now be answered.

B. *The Emergent Symphony*

1. *Roth and Its Progeny*

Having held in *Roth* that "obscenity" is excluded from constitutional protection, the Court was faced with the task of defining that term. In *Roth*, the Court ventured the following definition: "Obscene material is material which deals with sex in a manner appealing to prurient interest."³⁶ To make the standard more precise, the Court adopted the following formulation of the test: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."³⁷ Justice Brennan, who wrote the Court's opinion in *Roth*, has taken the lead in developing obscenity doctrine in the subsequent cases. In *Jacobellis v. Ohio*,³⁸ Brennan translated the test of the utter lack of "redeeming social importance," language which in *Roth* had seemed merely descriptive of obscenity,³⁹ into a test of obscenity *vel non*. He stated in *Jacobellis*: "obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance' It follows that material dealing with sex in a manner that advocates ideas . . . or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection."⁴⁰ Brennan further insisted in *Jacobellis* that the "contemporary community standards" aspect of the *Roth* test contem-

34. 383 U.S. 413, 458 (1966).

35. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 708 (1968) (dissenting opinion).

36. 354 U.S. 476, 487 (1957).

37. 354 U.S. at 489.

38. 378 U.S. 184 (1964).

39. See 354 U.S. at 484.

40. 378 U.S. at 191.

plated national, rather than local, community standards.⁴¹ Only Justice Goldberg was willing to endorse Brennan's opinion in *Jacobellis*, although four other members of the Court concurred with the result in separate opinions.⁴² Finally, in *Memoirs v. Massachusetts*,⁴³ Justice Brennan again announced the judgment of the Court, and delivered an opinion in which he said that under the definition of obscenity established in *Roth*,

as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.⁴⁴

On the same day on which he delivered his *Memoirs* opinion, Brennan delivered the opinion of the Court in *Ginzburg v. United States*,⁴⁵ which drew its inspiration from Chief Justice Warren's concurring opinion in *Roth*. Warren had written:

The defendants . . . were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide.⁴⁶

Brennan took this "pandering" rationale, which Warren had offered as an alternative to the *Roth* rationale, and incorporated it

41. 378 U.S. at 192-95; cf. *Mishkin v. New York*, 383 U.S. 502 (1966).

42. Justices Black and Stewart wrote separate opinions concurring in the result. Justice Douglas joined Black's opinion, and Justice White concurred in the result without opinion.

43. 383 U.S. 413 (1966).

44. 383 U.S. at 418. The lawyer who argued for *Memoirs* in the Supreme Court, and who deserves the greatest credit for the development of "social value" as an independent test of obscenity, has written an excellent book about his efforts, culminating in *Memoirs*, to establish that test. CHARLES REMBAR, *THE END OF OBSCENITY* (1968). Rembar's book does more than describe the course of litigation ending with *Memoirs*. For the layman and beginning law student it provides some exceptionally good and understandable discussions of some difficult legal concepts; and for lawyers it affords considerable insight into the strategy of a successful advocate.

When he concludes, however, that "In *Memoirs* the [social value] theory became a rule of law," (*id.* at 489) Rembar exaggerates the significance of Brennan's *Memoirs* opinion. Of the three Justices who endorsed that opinion, only Brennan himself now remains on the Court; and the endorsement of his value theory that Rembar finds in the separate opinions of Stewart, Harlan, and Douglas (*see id.* at 480-81) is anything but clear.

45. 383 U.S. 463 (1966).

46. 354 U.S. 476, 495-96 (1957), quoted in 383 U.S. at 467.

into the *Roth* test itself, saying that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publication, that fact may be decisive in the determination of obscenity."⁴⁷ He continued:

It is important to stress that this analysis simply elaborates the test by which the obscenity *vel non* of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.⁴⁸

Four Justices dissented in *Ginzburg v. United States*.⁴⁹ Moreover, some of the Justices who silently concurred in Brennan's conclusion did not agree with his reasoning in *Ginzburg*, as their opinions in other cases make clear.⁵⁰ In *Memoirs v. Massachusetts*, six of the Justices demurred to Brennan's reasoning, although some of them did concur in the result.⁵¹ Thus, Justice Brennan's formulation of the *Roth* test "as elaborated in subsequent cases" was subscribed to by only two of his colleagues: Chief Justice Warren and Justice Fortas. Both Warren and Fortas have left the Court, and consequently the only present Justice who has endorsed the *Memoirs* formulation is Justice Brennan himself. Even more significant, only three of the Justices who are now on the Court have genuinely endorsed even the reasoning of *Roth*: Justices Brennan, White, and Stewart. Justice Stewart professes loyalty to *Roth*, but insists that obscenity must be limited in meaning to "hard-core pornography."⁵² His brethren seem to feel that Justice Stewart's definition of obscenity is "not dissimilar" to that propounded by Brennan in *Memoirs*,⁵³ but Stewart himself found enough of a distinction that he refused to join in Brennan's *Memoirs* opinion and instead con-

47. *Ginzburg v. United States*, 383 U.S. 463, 470 (1966).

48. 383 U.S. at 475-76.

49. Justices Black, Douglas, Harlan, and Stewart.

50. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413, 441-55 (1966) (Justice Clark, dissenting). It is never safe to assume that silent acquiescence in a majority opinion indicates an endorsement of anything more than the result reached. See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* ch. 3 (1964).

51. Chief Justice Warren and Justice Fortas joined Brennan's opinion; Justices Black, Douglas, and Stewart concurred in the result in separate opinions.

52. *Mishkin v. New York*, 383 U.S. 502, 518 (1966) (dissenting opinion); *Ginzburg v. United States*, 383 U.S. 463, 499 (1966) (dissenting opinion); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

53. See *Redrup v. New York*, 386 U.S. 767, 770 (1967).

curred separately.⁵⁴ Justice White also professes loyalty to *Roth*, but he dissented from the decision in *Memoirs*, and from Justice Brennan's formulation of the *Roth* test in that case. White insists that "social importance" or "social value" under *Roth* "is not an independent test of obscenity but is relevant only to determining the predominant prurient interest of the material"⁵⁵ Justice Marshall, too, claims adherence to *Roth*, but in reality he has vitiated the fundamental holding of that case. Thus, even among the Justices who profess adherence to *Roth*, there is substantial disagreement as to the meaning and application of the *Roth* test. All of the other incumbent Justices who are currently on the Court have flatly rejected *Roth's* basic proposition that obscenity is without constitutional protection.⁵⁶

This writer's conviction that the bell has tolled for *Roth* rests, however, upon more than the simple observation that *Roth's* adherents do not constitute a majority of the members of the present Court. The conviction is based primarily upon the reasoning which received the endorsement of a majority of the Justices in two recent obscenity cases: *Ginsberg v. New York*⁵⁷ and *Stanley v. Georgia*.⁵⁸

2. *Ginsberg v. New York*

There are three particular elements of the *Roth* obscenity doctrine which are challenged by the holding in *Ginsberg v. New York*. First, although there has been some dissent,⁵⁹ the adherents of *Roth* have generally agreed with Justice Brennan that the "contemporary community standards" aspect of the *Roth* test contemplates the national community, not state and local communities.⁶⁰ Second, at least partially because of the first proposition, ad-

54. 383 U.S. 413, 421 (1966).

55. *Memoirs v. Massachusetts*, 383 U.S. 413, 462 (1966) (dissenting opinion).

56. No attempt has been made to determine the position of Chief Justice Burger on obscenity questions from his opinions in lower court cases. Whatever views he might have expressed in his former position, it is to be expected that as a Justice his views might change. He is no longer bound as a lower court judge, but may develop his own position on the questions as he chooses.

57. 390 U.S. 629 (1968). This case should not be confused with *Ginzburg v. United States*, 383 U.S. 463 (1966). See text accompanying notes 15-16, 45, 47, 49 *supra*. *Ginsberg* has been called "perhaps the final element in a relatively integrated concept of obscenity." Krislov, *From Ginzburg to Ginsberg: The Unhurried Children's Hour in Obscenity Litigation*, 1968 SUP. CT. REV. 153. This writer would rather call it the first element of a new doctrinal approach to obscenity.

58. 394 U.S. 557 (1969).

59. *E.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 200-01 (1964) (Chief Justice Warren, joined by Justice Clark, dissenting).

60. *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964).

herents of the *Roth* test seem generally agreed with Justice Brennan that "[s]ince it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law";⁶¹ thus the question of the obscenity of materials cannot be left to the decision of state and lower federal courts, but the Supreme Court itself must shoulder the "difficult, recurring, and unpleasant task."⁶² Third, under *Roth* the possibility of harm resulting from obscenity is irrelevant.⁶³ In *Roth*, the Court explicitly rejected the harmfulness of materials as a criterion, observing that because obscenity is not protected speech, it is unnecessary to consider its relationship to harmful conduct.⁶⁴ *Ginsberg* casts doubt upon each of these propositions.

In *Ginsberg v. New York*, Justice Brennan wrote the opinion of the Court, Justices Stewart and Harlan submitted separate concurring opinions, and Justices Fortas, Black, and Douglas dissented. The departures from traditional *Roth* doctrine in Justice Brennan's opinion are particularly interesting because Justice Brennan himself wrote the opinion in *Roth* and had fully accepted the *Roth* doctrine in his opinions in *Jacobellis* and *Memoirs*, and because his opinion in *Ginsberg* was joined by Chief Justice Warren and Justices White and Marshall, all of whom have professed loyalty to *Roth*.⁶⁵

Ginsberg involved a New York statute that prohibited the selling to minors of some pictures or publications which were "harmful to

61. *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964).

62. *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964). Here again, there has been some dissent. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 202-03 (1964) (Chief Justice Warren, joined by Justice Clark, dissenting). But even Justice Harlan, who rejects the *Roth* test, agrees that it places the onus of decision on the Supreme Court. See his dissenting opinions in *Memoirs v. Massachusetts*, 383 U.S. 413, 459-60 (1966), *Jacobellis v. Ohio*, 378 U.S. 184, 203 (1964), and *Roth v. United States*, 354 U.S. 476, 497 (1957).

63. For a discussion of the disconnection of obscenity controls from apprehended harm, see Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

64. 354 U.S. 476, 486-87 (1957). It may be assumed that material which deals with sex, but which is not obscene, could be suppressed if it were, in Douglas' phrase, "so closely brigaded with illegal action as to be an inseparable part of it." *Roth v. United States*, 354 U.S. 476, 514 (1957) (dissenting opinion). We may disregard the occasional overbroad statements indicating the contrary [e.g., "Our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene....," *Smith v. California*, 361 U.S. 147, 152 (1959)]. Nonobscene material dealing with sex surely has no greater protection, whether or not any less protection, than political expression. However, there have been no cases in which nonobscene material dealing with sex has been found so related to illegal action as to justify suppression on that ground.

65. For a discussion of Justice Marshall's position, see text accompanying note 87 *infra*.

minors."⁶⁶ The phrase "harmful to minors" was defined by the statute in terms substantially equivalent to the criteria for obscenity which were endorsed in Justice Brennan's opinion in *Memoirs*,⁶⁷ except that each element of the statutory definition specifically referred to minors.⁶⁸ The Supreme Court in affirming the conviction

66. Law of June 7, 1965, ch. 327, [1965] 1 Laws of N.Y. 1066, as amended, N.Y. PENAL LAW §§ 235.20-21 (McKinney 1967), provides:

Exposing minors to harmful materials

1. Definitions. As used in this section:

(a) "Minor" means any person under the age of seventeen years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful or morbid interest of minors, and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and

(iii) is utterly without redeeming social importance for minors.

(g) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and

(ii) the age of the minor, provided however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:

(a) any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or

(b) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of subdivision two hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

3. It shall be unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

4. A violation of any provision hereof shall constitute a misdemeanor.

67. See text accompanying notes 43-44 *supra*. For a similar, but less careful, attempt to codify the language of Supreme Court obscenity cases, see *Cain v. Commonwealth*, 437 S.W.2d 769 (Ky.), *appeal docketed*, 38 U.S.L.W. 3095 (U.S. July 16, 1969) (No. 347), *construing* KY. REV. STAT. § 436.101 (Supp. 1968).

68. See note 66 *supra*.

of the defendant for violating the statute explicitly noted that "the 'girlie' picture magazines involved in the sales here are not obscene for adults"⁶⁹ The Court could have upheld this statute without the slightest compromise of *Roth*. It could have reasoned that the special interests of the state in protecting its children and in protecting parental control over their upbringing justify the suppression, with regard to minors, of constitutionally protected expression, upon the application of a less rigorous test than the clear and present danger test. Such an approach is supported by precedent, as Justice Brennan seemed to recognize when he wrote, "[E]ven where there is an invasion of protected freedoms . . . the power of the state to control the conduct of children reaches beyond the scope of its authority over adults."⁷⁰

The Court, however, did not adopt that approach. Instead, Justice Brennan's opinion endorsed the concept of "variable obscenity," under which material that could not constitutionally be prohibited for adults may nonetheless be constitutionally suppressed as obscene with respect to minors.⁷¹ Such a holding was clearly not required; the statute did not use the term "obscenity,"⁷² and on the face of the statute the obscenity *vel non* of the material was not relevant to conviction. But Justice Brennan regarded the statute as branding the defined material obscene for minors, and he was therefore led to compromise the doctrine of *Roth*. As he stated the issue: "Appellant's primary attack . . . is leveled at the power of the State . . . to define the material's obscenity on the basis of its appeal to minors, and thus exclude material so defined from the area of protected expression."⁷³

Under *Roth*, the ultimate determination of the obscenity *vel non* of any particular material was to be made by the Supreme Court; but in *Ginsberg* the Court held that the determination is to be made by the state legislature—at least when obscenity with respect to minors is at issue—subject only to the requirement that the Court must find the legislature's judgment rational.⁷⁴ Moreover, according to *Roth*, obscenity was to be determined by reference to a national standard; but under *Ginsberg*, which permitted the definition of obscenity for minors to be made by the several state legislatures, variations

69. 390 U.S. 629, 634 (1968).

70. 390 U.S. at 638, citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

71. See 390 U.S. at 634-43.

72. See note 66 *supra*.

73. 390 U.S. at 635.

74. 390 U.S. at 641-43.

from state to state in the definition of obscenity for minors are encouraged. Finally, while under *Roth* the harmfulness of the obscene material was irrelevant, the *Ginsberg* Court approved the definition of obscenity for minors in terms of harm. The New York statute contained a legislative finding that the kind of material prohibited as to minors was "a basic factor in impairing the ethical and moral development of our youth."⁷⁵ In that regard the Court stated: "To sustain state power to exclude materials defined as obscenity by § 484-h requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."⁷⁶ The point to be emphasized is not that the rational-basis test thus applied in the case of minors is less rigorous than a clear and present danger test, but rather that the Court regarded harm to minors as justifying classification of material as obscene for them. Under *Roth*, the presence or absence of any prospective harm was irrelevant to obscenity; in *Ginsberg*, the possible harm to minors is the touchstone of obscenity for them.

It is possible to regard *Ginsberg v. New York* as not affecting the fundamental premises of *Roth* obscenity doctrine, and as merely taking account of the special problems associated with minors. Certainly, *Roth* and the other earlier cases did not involve statutes specifically aimed at the protection of minors, so that *Ginsberg* can be technically distinguished from those holdings. However, the reasoning of Justice Brennan's opinion in *Ginsberg* deviates sharply from the propositions even he had announced in earlier cases, and, while those propositions were not addressed to the problem of protecting minors, they were on their face categorical.

At the very least, Brennan's opinion in *Ginsberg v. New York* raises some embarrassing questions for proponents of *Roth*. If the power of the state to classify materials as obscene for minors depends upon the reasonableness of its finding that the materials in question are harmful to minors, the classification of the materials as obscene does not seem to give the state any greater power to suppress them than it would have if the concept of obscenity were discarded. Even

75. Law of April 29, 1955, ch. 548, § 2, [1955] 2 Laws of N.Y. 1988 [formerly codified in N.Y. PENAL LAW § 484-e (McKinney App. 1967)]. The legislature had also declared that such material is "a clear and present danger to the people of the state." But the Court held that, since obscenity is not protected expression, it could be "suppressed without a showing of the circumstances which lie behind the phrase 'clear and present danger' in its application to protected speech." 390 U.S. at 641, citing *Roth*.

76. 390 U.S. at 641.

in the case of protected freedoms, as the Court itself noted in *Ginsberg*, the state may interfere more readily when minors are concerned than it may in the case of adults.⁷⁷ On its face, the New York statute at stake in *Ginsberg* seems to have been premised on that view, since it did not label the materials as "obscene," but rather suppressed them because they were found to be "harmful to minors." Furthermore, insofar as the case recognizes harm to minors as a touchstone of obscenity for minors, it adds a new dimension to obscenity doctrine. However different the standard of proof of harm might be—clear and present danger or whatever—if it could be proved that some material not meeting the constitutional standards for obscenity set out in *Roth* and its progeny is nevertheless harmful to adults, might it be held to be "obscene"? And if some material may be suppressed as obscene upon a sufficient showing of harm to adults, what is accomplished by classifying that material as obscene? Such material could be suppressed even though not obscene, under the clear and present danger test or whatever variation of that test is to be applied in the case of nonobscene speech.⁷⁸ Conversely, if harm is the touchstone of obscenity, what justification is there for the suppression of materials which do satisfy the constitutional tests of *Roth* and its progeny, but cannot be shown to be harmful? Finally, insofar as *Ginsberg v. New York* holds that a legislature may adjust the definition of obscenity when children are concerned, the Court has compromised traditional obscenity doctrine by recognizing the need to weigh the interest in free speech against the legitimate interest of the state in safeguarding its youth; and if protection of youth is a substantial interest that may outweigh the interest in protection of speech, there may well be other interests which could have a similar effect. In *Roth*, the Court had treated obscenity as a distinct class of expression, excluded from constitutional protection, and not to be judged as to its suppressibility by the same standards which are applied to other classes of expression. In *Ginsberg* there was a radical change; while the case dealt with the special situation of minors, the Court in effect applied the same sort of standards that it might apply to determine the suppressibility of any other class of speech.

3. *Stanley v. Georgia*

The requiem which began with *Ginsberg* continued with *Stanley v. Georgia*. In *Stanley*, the Court's opinion rested upon

77. See note 70 *supra*.

78. See text accompanying notes 127-48 *infra*.

the assumed premise that the films in question were obscene.⁷⁹ However, notwithstanding the unqualified proposition of *Roth* that obscenity is not protected expression,⁸⁰ the Court reversed the defendant's conviction for knowing possession of obscene matter. *Roth* was distinguished from *Stanley* on its facts, and the Court insisted that "*Roth* and the cases following that decision are not impaired by today's holding."⁸¹ The Court noted that *Roth* and the other cases dealt with materials which were being disseminated or distributed; *Stanley*, on the other hand, involved "mere private possession of obscene matter."⁸² The Court acknowledged that the *Roth* declaration that obscenity is not protected was on its face unqualified, but held that it must nevertheless be read in the context of the facts in that case, and could not operate mechanically to decide a case of mere private possession. The Court stated: "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections."⁸³ According to the Court, *Roth* and the cases following it discerned an important state interest in regulating the commercial distribution of obscene material; but the facts in *Stanley*, the Court held, disclosed even more important, private interests which must be protected. *Stanley*, the Court noted,

is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. . . . If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he

79. In this case, the authorities secured a warrant to search Stanley's home for evidence of alleged bookmaking activities. In the course of their search, they came upon three rolls of movie film in a desk drawer. Using a projector and screen also found in the home, they viewed the films, and, concluding that they were obscene, seized them and commenced a prosecution for knowing possession of obscene matter in violation of Georgia law. 394 U.S. 557, 558 (1969). Although the Court might have reversed Stanley's conviction on the ground that the films had been illegally seized and should not have been admitted into evidence [see 394 U.S. at 569-72 (Justice Stewart, joined by Justices Brennan and White, concurring in the result)], the majority chose to rest its decision on the obscenity question (394 U.S. at 559). Since the defendant did not argue on appeal that the films were not in fact obscene, the Court assumed for purposes of its decision that they were. 394 U.S. at 559 n.2.

80. See text accompanying note 4 *supra*.

81. 394 U.S. at 568.

82. 394 U.S. at 561.

83. 394 U.S. at 563.

may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.⁸⁴

The opinion of the Court in the *Stanley* case was written by Justice Marshall. It was joined, however, by Justices Douglas and Harlan, each of whom has consistently and persistently rejected the *Roth* test; and it was not joined by Justices Stewart, Brennan, and White, all of whom have been consistent adherents of *Roth*.⁸⁵ In this circumstance, the pallid claim that "*Roth* and the cases following that decision are not impaired by today's holding" cannot be given much weight.⁸⁶ The fact is that the reasoning in *Stanley* is quite inconsistent with what *Roth* had been thought to have held. On its face, *Roth* made no allowance for interests which might be adverse to the interest in controlling obscenity; it held flatly that obscenity was not protected. But in *Stanley* the Court reinterpreted *Roth* merely to recognize a valid governmental interest in dealing with obscenity. While on the facts of the previous cases this interest was not outweighed by any competing interest, in *Stanley* it was outweighed by the interest in an individual's privacy and freedom to view what he pleases, even the admittedly obscene, in his own home. This balancing of competing interests is reminiscent of the approach which has typically been taken by the Court in cases involving the suppression of nonobscene publications.⁸⁷

The state argued in *Stanley* that the prohibition of private possession of obscene materials was justified because "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."⁸⁸ The Court did not say that a sufficient showing of a cause and effect relationship between obscenity and deviant behavior could not justify such a statute; it held merely that "[g]iven the present state of knowledge" the evidence of cause and effect was not sufficient.⁸⁹ In other words, the circumstances that would make the clear and present danger test applicable were not present. In *Roth*, the clear and present danger test had been dismissed as

84. 394 U.S. at 565.

85. Justices Stewart, Brennan, and White joined in a concurring opinion which declined to reach the obscenity question and argued for reversal of the conviction on search and seizure grounds. 394 U.S. at 569-72.

86. The considerations of strategy that might explain the willingness of a Justice to concur in an opinion that contains language to which he might not fully subscribe are explored, with valuable insight, in W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* ch. 3 (1964).

87. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931). For more recent cases adopting this approach, see notes 159-63 *infra*.

88. 394 U.S. at 566.

89. 394 U.S. at 567.

irrelevant to obscenity on the ground that obscenity was outside constitutional protection.⁹⁰ Again the Court distinguished *Roth* as not involving the competing interest present in *Stanley*.⁹¹ But *Stanley* left open the possibility that a showing of clear and present danger might justify suppression even of mere private possession of obscene matter. If, as *Stanley* suggested, *Roth* merely recognized a state interest in the control of obscenity, which must be balanced against other interests, perhaps we cannot say that the clear and present danger test does not apply to obscenity *because* obscenity is unprotected. Perhaps instead we must say that in view of the state interest in controlling obscenity, and absent any greater countervailing interest, meeting a lesser standard than clear and present danger would be sufficient to justify suppression; but if a sufficient countervailing interest is present, suppression of even the admittedly "obscene" would be unconstitutional without proof of clear and present danger. That, of course, is not at all what *Roth* said; but it is, in effect, what the Court now has said in *Stanley*.

The recognition that other interests may, under any circumstances, compete against the suppression of obscenity cuts at the very foundation of the *Roth* rule. To say that obscenity is without constitutional protection is very different from saying that the government has an interest in controlling obscenity—an interest which, however, must be balanced against other interests. To accept the latter formulation is to treat obscenity as subject to the same considerations that the Court has employed with respect to other classes of speech.⁹²

II. COMPLETING THE UNFINISHED SYMPHONY

A. *Incorporation of the First Amendment by the Fourteenth*

The general conclusion which this writer has drawn, from the attrition in the ranks of *Roth*'s adherents on the Court and even more from the recent *Ginsberg v. New York* and *Stanley v. Georgia* opinions, is that the fundamental holding of the *Roth* case—that obscenity is a discrete class of expression, excluded from the constitutional protection guaranteed to other kinds of expression and therefore to be treated differently from other kinds of expression—has already met its demise. It remains to consider what better avenue

90. 354 U.S. 476, 486-87 (1957).

91. 394 U.S. at 567.

92. See text accompanying notes 127-58 *infra*.

of constitutional approach to the obscenity problem might be open to the Court.

It is the first amendment which inhibits national interference with the freedom of expression, but it is the fourteenth amendment which inhibits interference with that freedom by the states; and there are good grounds for arguing that the degree of inhibition is not the same.⁹³

The proposition that the Bill of Rights guarantees are incorporated into the fourteenth amendment and thus applied against the states has muddled the waters of constitutional jurisprudence for three decades—ever since Justices Black and Douglas joined the Court. Each of these Justices brought with him to the Court a strong distaste for the kind of judicial obstructionism which had resulted from the Court's assumption of legislative policy functions under the undefined "due process" clauses of the fifth and fourteenth amendments, and each was convinced that to avoid obstructionism the scope of "due process" must somehow be confined. Consequently, each endorsed the proposition that the phrase "due process of law" in the fourteenth amendment was intended as a shorthand reference to the guarantees of the Bill of Rights—neither more nor less.⁹⁴

There is considerable irony in the history of the Black-Douglas "incorporation" doctrine. The doctrine originated in reaction against the Supreme Court's use of substantive due process concepts, under both the fifth and fourteenth amendments, to invalidate economic and social legislation of both the states and Congress.⁹⁵ However, unless the adherents of the doctrine contend that fifth as well as fourteenth amendment "due process" is exhausted by the list of specifics in the Bill of Rights—a contention which would make the fifth amendment due process clause meaninglessly redundant—the doctrine does nothing to prevent continued abuse in the Court's treatment of federal legislation. Moreover, since the fifth as well as the other amendments constituting the Bill of Rights is incorporated into the fourteenth, the undefined due process clause of the fifth amendment, with its potential for judicial abuse, remains applicable to the states precisely because of incorporation. But the doctrine's

93. See text accompanying notes 127-67 *infra*.

94. See *Adamson v. California*, 332 U.S. 46, 70-72 (1947) (Justice Black, joined by Justice Douglas, dissenting).

95. For examples of this use of due process, see *Ribnik v. McBride*, 277 U.S. 350 (1928); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905).

inability to provide the desired protection against obstructionist application of the undefined due process clause⁹⁶ is not the only irony. The doctrine arose as a result of concern over *substantive* due process; but its significance has been greatest in the field of *procedural* due process. During the last thirty years, one after another of the procedural guarantees contained in the second through eighth amendments has been held to be an element of fourteenth amendment due process; and the opinions in some of the cases have spoken in the language of incorporation.⁹⁷ But the substantive rights protected by the first amendment against congressional abridgment had been held protected by the fourteenth amendment against state infringement long before Black and Douglas came to the bench with their incorporation doctrine.⁹⁸ Moreover, the doctrine which has effectively ended the abuse of substantive due process—an abuse that incorporation was intended to end—has developed under both the fifth and fourteenth amendments independent of the incorporation doctrine.⁹⁹

Despite the use in some majority opinions of the language of incorporation, no majority of the Court has ever genuinely endorsed the incorporation doctrine of Justices Douglas and Black.¹⁰⁰ The most accurate characterization of the Court's actual approach is perhaps that recently tendered by the Court through Justice White—that in developing the *procedural* due process requirements of the fourteenth amendment, “the Court has looked increasingly to the Bill of Rights for guidance.”¹⁰¹ The literal incorporation doctrine, which would apply the Bill of Rights guarantees as such to the states,

96. The incorporation of the fifth amendment's due process clause is not the only reason that the incorporation theory of the fourteenth amendment fails to insure restraint. See, e.g., Justice Douglas' opinion for the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

97. See, e.g., *Klopper v. North Carolina*, 386 U.S. 213 (1967); *Griffin v. California*, 380 U.S. 609 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961).

98. *Near v. Minnesota*, 283 U.S. 697 (1931); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Fiske v. Kansas*, 274 U.S. 380 (1927); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Later cases explicitly included the freedom of religion [*Cantwell v. Connecticut*, 310 U.S. 296 (1940)] and reaffirmed the inclusion of freedom of assembly [*De Jonge v. Oregon*, 299 U.S. 353 (1937)].

99. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949); *Nebbia v. New York*, 291 U.S. 502 (1934). See also Dykstra, *Legislative Favoritism Before the Courts*, 27 IND. L.J. 38 (1951).

100. “A few members of the Court have taken the position that the intention of those who drafted the first section of the Fourteenth Amendment was simply, and exclusively, to make the provisions of the first eight Amendments applicable to state action. [Citations to Justice Black.] This view has never been accepted by this Court.” *Duncan v. Louisiana*, 391 U.S. 145, 174 (1968) (Justice Harlan, joined by Justice Stewart, dissenting).

101. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

seems ultimately destined to fade from the jurisprudence of the Supreme Court with the passing in due time of its principal advocates, Justices Black and Douglas, a casualty of the free competition in ideas which Justices Black and Douglas themselves, to their eternal credit, have so stoutly defended.¹⁰²

But even if it were conceded that the phrase "due process of

102. The distinction between the Black-Douglas literal incorporation doctrine and the different doctrine which emerges from the Court's state criminal procedure decisions since *Mapp v. Ohio*, 367 U.S. 643 (1961), is very important. The literal incorporation doctrine holds that fourteenth amendment due process means the Bill of Rights, as such. By contrast, the doctrine articulated with increasing clarity in the recent opinions holds that fourteenth amendment due process means procedures that are "fundamental . . . that is . . . necessary to an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968), and that courts, in defining these fundamental procedures, should "look . . . to the Bill of Rights for guidance." *Duncan v. Louisiana*, 391 U.S. 145, 148, 149 n.14 (1968). That doctrine may appropriately be called the "guidance" doctrine. Considering a uniform conception of American justice more important than federal diversity, it imposes those fundamental procedures which happen to be enumerated in the Bill of Rights equally upon federal and state governments: "Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." *Benton v. Maryland*, 395 U.S. 784, 795 (1969). Unlike the literal incorporation doctrine, however, the "guidance" doctrine leaves open the dual possibilities that some provisions of the Bill of Rights might not be fundamental, and thus not inhere in fourteenth amendment due process, and that some procedures not enumerated in the Bill of Rights might nevertheless be fundamental and thus required by due process. Illustrative of the latter possibility is *North Carolina v. Pearce*, 395 U.S. 711 (1969), in which a majority of the Court, over Justice Black's predictable dissent, held that while the double jeopardy provision of the Bill of Rights, as applied to the states through the fourteenth amendment's due process clause, did not preclude a heavier penalty upon conviction at a second trial, nevertheless the concept of due process itself—without reference to the Bill of Rights—could and in *Pearce*'s case did. Both the Black-Douglas literal incorporation doctrine and the different doctrine emerging from the recent cases are at odds with the due process methodology represented by *Palko v. Connecticut*, 302 U.S. 319 (1937), and still endorsed by Justice Harlan [see, e.g., *Benton v. Maryland*, 395 U.S. 784, 807-13 (1969) (dissenting opinion)]; *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342-44 (1969) (concurring opinion)].

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), Justice Douglas wrote the opinion for the Court holding unconstitutional a Wisconsin garnishment statute which permitted the taking of an employee's wages without notice and a prior hearing. No specific provision of the Bill of Rights was held violated; rather, Douglas and the Court merely stated that "this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 342. Justice Black dissented precisely because the statute offended no specific provision of the Bill of Rights. Douglas and the majority found that the case involved a fundamental requirement of fourteenth amendment due process which was not among the specifics of the Bill of Rights. Again in *North Carolina v. Pearce*, *supra*, while Douglas did find the double jeopardy clause sufficient in itself to decide the case, he added specifically, "I agree with the Court as to the reach of due process." 395 U.S. at 726. His opinion for the Court in *Sniadach* and his concurrence in *Pearce* raise the question whether Douglas himself is going "soft" on the Black-Douglas literal incorporation doctrine. Douglas, of course, could answer that he still holds to literal incorporation, but that the due process clause of the fifth amendment is incorporated into the fourteenth and that the fifth amendment clause guarantees, *inter alia*, the rights protected in *Sniadach* and *Pearce*. This reply would illustrate the irony of the literal incorporation doctrine already pointed out in the text accompanying notes 95-96 *supra*.

law" in the fourteenth amendment incorporates the procedural guarantees of the Bill of Rights and applies them against the states, it is still possible that there would be different standards for state and federal suppression of speech. Well before either Justice Black or Justice Douglas had risen to the bench, the Supreme Court had already established that the "first amendment freedoms" were secured against the states by the fourteenth amendment.¹⁰³ Those freedoms were held included, however, not as elements of the "due process" without which life, liberty, and property could not be abridged, but rather as elements of the "liberty" which the fourteenth amendment said could not be abridged except by due process.¹⁰⁴ Controversy over the Black-Douglas incorporation doctrine has obscured this essential distinction. Black and Douglas might say that a state infringement of rights of expression admittedly protected by the first amendment is a denial of "due process"; but the cases which held the first amendment freedoms protected by the fourteenth regarded such infringements as admitted violations of protected "liberty" and went on to inquire whether the admitted violations were justified because they were consistent with due process. A close look at those cases will bear this analysis out.

The first case to hold that freedom of speech is among the liberties protected by the fourteenth amendment was *Gitlow v. New York*,¹⁰⁵ in which the Supreme Court sustained a New York statute prohibiting the advocacy of criminal anarchy. The Court did not resort to the expedient of excluding this class of expression from constitutional protection—an expedient that later would be used in cases involving libel¹⁰⁶ and obscenity.¹⁰⁷ There was no denial that the statute deprived defendants of protected rights of expression; rather, the Court, giving considerable weight to the judgment of the state legislature, held that the statute was not "an arbitrary or unreasonable exercise of the police power of the State *unwarrantably* infringing the freedom of speech or press."¹⁰⁸ The Court's statement uses the familiar language of due process, which the Court was consistently using in that era, as it had in the past, in cases under the fourteenth amendment which involved admitted infringements of

103. See note 98 *supra*.

104. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

105. 268 U.S. 652 (1925).

106. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

107. *Roth v. United States*, 354 U.S. 476 (1957).

108. *Gitlow v. New York*, 268 U.S. 652, 670 (1925) (emphasis added).

other liberties than the freedom of speech.¹⁰⁹ What the majority did in *Gitlow* was not to endorse a so-called "bad tendency" test for interpretation of the first amendment,¹¹⁰ but rather to apply in the case of state regulation the traditional fourteenth amendment due process test.

Similarly, in *Whitney v. California*¹¹¹ and *Fiske v. Kansas*,¹¹² the Court referred to the standards of due process in order to determine the constitutionality of admitted state infringements of protected speech. In both cases protected rights were infringed, but there were factual differences between them bearing on the arbitrariness or reasonableness of the infringements. In *Whitney* the infringement was held to be consistent with due process,¹¹³ while in *Fiske* the infringement was held to violate due process.¹¹⁴ The next year, in *New York ex rel. Bryant v. Zimmerman*,¹¹⁵ the Court confronted the claim that New York had unconstitutionally deprived a person of liberty to belong to an unincorporated association. That this liberty was protected by the fourteenth amendment and that New York had taken it away was admitted; but since the Court found the deprivation of liberty to be reasonably related to a legitimate state objective, it sustained the deprivation as consistent with due process.¹¹⁶

109. See, e.g., cases cited note 95 *supra*. See also *Holden v. Hardy*, 169 U.S. 366 (1898); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Mugler v. Kansas*, 123 U.S. 623, 661-63 (1887). In cases involving economic regulations, the Court from 1890 (*Minnesota Rate Case*, 134 U.S. 418) until 1934 (*Nebbia v. New York*, 291 U.S. 502) stood ready to overrule legislative judgments on the question of reasonableness versus arbitrariness; but whatever the degree of deference to legislative judgment, the requirement of reasonableness is a due process concept. See *Adair v. United States*, 208 U.S. 161 (1908) (holding Congress to a reasonableness standard under the fifth amendment's due process clause).

110. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 909-10 (1963).

111. 274 U.S. 357 (1927).

112. 274 U.S. 380 (1927).

113. "We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association . . ." 274 U.S. at 372.

114. The Court held that the statute, as applied, was "an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." 274 U.S. at 387.

115. 278 U.S. 63 (1928).

116. 278 U.S. at 72-73:

The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power. There can be no doubt that under that power the State may prescribe and apply to associations having an oath-bound membership any reasonable regulation calculated to confine their purposes and activities within limits which are consistent with the rights of others and the public welfare. The requirement in § 53 that each association

Taken together, *Gitlow*, *Whitney*, *Fiske*, and *Zimmerman* stand for the proposition that a state *may* infringe protected liberties, but *may not* infringe them “unreasonably” or “unwarrantably.”

The approach of these early cases, protecting so-called “first amendment freedoms” from state infringement, should not be carelessly dismissed as archaic. Admittedly, it is not the approach which prevails on the face of more recent opinions. It is an approach, however, which has been obscured and then forgotten, rather than deliberately rejected. Near the close of the 1968 term, on June 9, 1969, the Supreme Court observed that *Whitney v. California* “has been thoroughly discredited by later decisions,” and held per curiam without dissent that *Whitney* is overruled.¹¹⁷ What was deliberately rejected, however, was not the due process methodology of *Whitney* and the other early cases discussed above; that aspect of *Whitney* received no mention in the 1969 case. What was rejected was *Whitney*’s conclusion that a criminal syndicalism statute was constitutionally valid despite its failure to distinguish between advocacy and incitement—a distinction which decisions subsequent to *Whitney* had determined must be made. Thus it remains true that the traditional due process approach of the early cases to problems of state infringement of first amendment freedoms has never been deliberately rejected. Nonetheless, that older approach has not been openly followed in more recent cases; and if it is to be argued that such an approach has—or should have—continued vitality, then the factors accounting for its obscuration must be explored.

The doctrine of *Gitlow*, *Whitney*, *Fiske*, and *Zimmerman* was reaffirmed in 1931 in *Near v. Minnesota*.¹¹⁸ Speaking again in traditional due process terms, the Court in *Near* explicitly stated that the fourteenth amendment restraint on state interference with protected expression is not absolute.¹¹⁹ One theme of due process doctrine prior to *Near* had been that, while a large degree of regulation infringing protected liberties to accomplish police power ends was permitted, the due process clause precluded any regulation which destroyed the

shall file with the secretary of state a sworn copy of its constitution, oath of membership, etc., with a list of members and officers . . . is not arbitrary or oppressive, but reasonable and likely to be of real effect. Of course, power to require the disclosure includes authority to prevent individual members of an association which has failed to comply from attending meetings or retaining membership with knowledge of its default. We conclude that the due process clause is not violated.

117. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

118. 283 U.S. 697, 707.

119. 283 U.S. at 707-08.

"essence" of a protected liberty.¹²⁰ After alluding to that principle, the Court in *Near* continued: "Liberty, in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty."¹²¹ Thus, when *Near* was decided, there was a clearly recognized difference between the question whether a given liberty was protected, and the due process question whether an infringement of the protected liberty violated "the essential attributes of that liberty." That period in the Court's history was the heyday of substantive due process, and it was often by answer to the latter question that the Court struck down legislation which was found to eviscerate liberties that it admitted were subject to less destructive restraints.¹²²

Within a few years after *Near*, however, due process adjudication changed; even the cases cited by the *Near* Court in framing the due process issue were explicitly overruled.¹²³ *Near*, like *Gitlow*, *Whitney*, *Fiske*, and *Zimmerman*, had applied to state infringements of protected freedoms of speech, press, and association the same due process standard that the Court had been applying to state infringements of business and economic liberties. But now it was held that when infringements upon the latter sort of liberties are in issue, due process required not reasonableness as assessed by the Court's own judgment, nor the integrity of judicially defined "essentials" of those liberties, but merely a rational basis for the legislative finding that the infringement was reasonably related to the accomplishment of some legitimate objective.¹²⁴

No person who values the fundamental freedoms of expression

120. The examples given in *Near*, 283 U.S. at 707-08, were that an owner could not be deprived of the right to a fair return, since that right is of the essence of ownership [*Northern Pac. Ry. v. North Dakota*, 236 U.S. 585, 596 (1915); *Railroad Commn. Cases*, 116 U.S. 307, 331 (1886)], and that while legislation may regulate contractual activity [*Frisbie v. United States*, 157 U.S. 161, 165 (1895)], it may not interfere with the indispensable essentials of liberty of contract [*Ribnik v. McBride*, 277 U.S. 350 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927); *Adkins v. Children's Hospital*, 261 U.S. 525, 560-61 (1923)]. See also *Hurtado v. California*, 110 U.S. 516, 532 (1884), in which the Court stated that the fourteenth amendment "must be held to guarantee . . . the very substance of individual rights to life, liberty, and property."

121. 283 U.S. at 708.

122. See, e.g., cases cited note 120 *supra*.

123. The Court in *Near* cited *Ribnik v. McBride*, 277 U.S. 350 (1928), and the precedents which that case had followed, *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). 283 U.S. at 708. *Adkins* was explicitly overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). *Tyson* and *Ribnik* were severely curtailed in *Nebbia v. New York*, 291 U.S. 502, 537 (1934), and *Ribnik* was later explicitly overruled, necessarily carrying *Tyson* with it in its demise, in *Olsen v. Nebraska*, 313 U.S. 236 (1941).

124. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

secured by the first and fourteenth amendments could countenance applying such a "minimum rationality" test to determine the legitimacy of state infringements upon those paramount liberties. Yet to continue disposing of state speech and press cases in a manner consistent with the cases from *Gitlow* to *Near* would be to raise again the specter of judicial obstructionism through the concept of substantive due process. The dilemma could have been resolved by carefully distinguishing between the appropriate use of traditional substantive due process doctrine and the obstructionist use to which that doctrine had been put in the cases of economic and social legislation.¹²⁵ But in the years after the bitter constitutional struggles of the New Deal era, there was little tolerance for any approach which even faintly resembled the repudiated obstructionist economic due process doctrine. Therefore, a different escape from the apparent dilemma had to be found. If the approach taken by the Court in *Near* could not be followed, and yet could not be flatly rejected, it had to be reinterpreted; and so it was. *Near* had inquired whether the state action which had infringed the protected liberty violated "the essential attributes of that liberty."¹²⁶ With the demise of obstructionist substantive due process, the distinction between that question and the question whether a particular liberty was protected was easily overlooked. Attention was diverted from the due process issue, as it had been framed in the earlier cases, to the question whether a given example or class of expression was protected by the constitutional guaranty of freedom of expression.

B. *Protected Liberty and Due Process*

If the content of fourteenth amendment "liberty," as it regards speech, is defined by reference to the first amendment, then whatever is excluded from the protection of the latter must also be excluded from the former. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." On its face, this prohibition is absolute; but it has never been authoritatively construed to prohibit all congressional interference with all expression under all circumstances and at all times. Certain classes of expression have been held to be excluded from the first amendment concept of protected expression; this was true for a time of libel,¹²⁷ and it was true of obscenity under *Roth*. As to other kinds

125. Such a distinction is articulated in the text accompanying notes 195-200 *infra*.

126. 283 U.S. 697, 708 (1931).

127. *Beauharnais v. Illinois*, 343 U.S. 250 (1952); see Kalven, *The New York Times*

of expression, the classic formulation of the protection afforded by the first amendment is based upon Justice Holmes' statement in *Schenck v. United States*:¹²⁸ "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."¹²⁹ In subsequent opinions, Justices Holmes and Brandeis argued that the proximity must be great and that the substantive evils feared must be substantial.¹³⁰ Later opinions have suggested that the constitutional protection varies with the substantiality of the substantive evils feared, with the proximity of their relationship to the expression, or with both.¹³¹

Justice Holmes' statement in *Schenck* is typical of the eloquent imprecision characteristic of his opinions. He does not make clear whether the clear and present danger doctrine is an exception to the provision that there shall be "no law . . . abridging the freedom of speech," or whether it is a limitation upon the concept of "freedom of speech." He does not indicate whether, when Congress outlaws sufficiently dangerous speech, it is abridging—but constitutionally—the "freedom of speech," or whether, instead, there is no abridgement because such dangerous speech is outside the constitutional concept of "speech."¹³² The distinction is highly significant for first amendment doctrine respecting congressional power. As if this imprecision were not enough, Holmes and Brandeis confounded things further in subsequent cases. *Schenck* involved only the first

Case: *A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 217-18. But see *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

128. 249 U.S. 47 (1919).

129. 249 U.S. at 52. Justices Douglas and Black would eliminate even the clear and present danger exception to the first amendment. *Brandenburg v. Ohio*, 395 U.S. 444, 449-57 (1969) (concurring opinions).

130. *Whitney v. California*, 274 U.S. 357, 373, 377 (1927) (concurring opinion); *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (dissenting opinion).

131. *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951).

132. Under either of these views, the clear and present danger test or its variations would arguably apply as fully to the fourteenth amendment as to the first. If "speech" in the first amendment is defined to exclude speech which presents a clear and present danger, it is that restricted concept of speech which is contained in the "liberty" protected by the fourteenth amendment. On the other hand, if "speech" is a broad term, including dangerous speech, but legislation abridging it is permissible as an exception to the "no law" prohibition of the first amendment, it is arguable that what is included in fourteenth amendment "liberty" is not "freedom of speech" but rather the first amendment right to have "no law" passed "abridging the freedom of speech." Under the latter view, the exceptions to the "no law" prohibition of the first amendment would be integral to fourteenth amendment liberty regarding speech.

amendment, but *Gitlow* was decided on fourteenth amendment due process grounds.¹³³ Yet in *Gitlow*, Holmes dissented, joined by Brandeis, urging application of the clear and present danger test.¹³⁴ The inference arises that this test, initially fashioned under the first amendment—which contains no due process clause—was now being urged as the applicable criterion of due process of law. The validity of that inference is confirmed by Justice Brandeis' concurring opinion in *Whitney*, in which Justice Holmes joined. The majority in *Whitney* deferred to the legislature on the due process question of the reasonableness of the infringement of speech there involved. Brandeis construed that deferral as an abrogation to the state legislature of the decision whether a clear and present danger was presented,¹³⁵ and he contended that this decision should be reserved to the Supreme Court. To support his contention, Brandeis was obliged to make an analogy to the aberrational line of obstructionist cases¹³⁶ in which the Court had departed from older due process doctrine¹³⁷ and had decided the due process question on its own assessment of the reasonableness of economic legislation, in derogation of the legislators' judgment.¹³⁸

Even before last term, when *Whitney* was expressly overruled,¹³⁹ there was, as the Court stated in 1951, "little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale."¹⁴⁰ Regrettably, however, the subsequent opinions have done no better than Justices Holmes and Brandeis themselves in clarifying the significance of the clear and present danger test. If

133. See text accompanying notes 105-10 *supra*.

134. 268 U.S. 652, 672-73 (1925).

135. 274 U.S. 357, 374 (concurring opinion):

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the legislature of California determined that question in the affirmative.

136. *E.g.*, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905); *Minnesota Rate Case*, 134 U.S. 418 (1890); cases cited by Brandeis, 274 U.S. at 374 n.1.

137. See *Hurtado v. California*, 110 U.S. 516 (1884); *Munn v. Illinois*, 94 U.S. 113 (1877); text accompanying notes 202-05 *infra*.

138. 274 U.S. 357, 374 (1927) (concurring opinion):

Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

139. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); text accompanying note 117 *supra*.

140. *Dennis v. United States*, 341 U.S. 494, 507 (1951).

that test is offered, as in *Gitlow* and *Whitney*, as the standard of fourteenth amendment due process, how does it apply to the first amendment, which permits no due process infringement but flatly provides that no law may abridge the freedom of speech? If the test provides an exception to the "no law" prohibition, it may exclude certain utterances from protection under either the first or the fourteenth amendment;¹⁴¹ but then it contains grave implications for our security from federal suppression,¹⁴² and leaves undefined the factors which might justify, as consistent with due process, state infringements of protected freedoms. If it defines a boundary between protected and unprotected expression, it clearly applies to both amendments;¹⁴³ but again, it leaves undefined the circumstances under which states may infringe the protected freedoms in accordance with due process.

Because the clear and present danger test originated under the first amendment, and because it, or variations of it, have been regularly applied to federal as well as to state legislation,¹⁴⁴ the test cannot be regarded as a test of due process. The first amendment on its face imposes a higher standard of protection than does the due process clause, and it is to that higher standard that the clear and present danger test provides an exception. Thus, while we may agree with Holmes and Brandeis that infringements of liberty should be restrained, and, while we may agree as well that the majorities in *Gitlow* and *Whitney* provided too little restraint,¹⁴⁵ the contention that clear and present danger is a due process test cannot be accepted. Clear and present danger excludes some speech and writing from constitutional protection, but state infringements consistent with due process are contemplated by the fourteenth amendment even as to protected expression.

The question remains, however, whether the clear and present danger test is an exception to the first amendment's "no law" prohibition or an exclusion of certain types of expression from the definition of freedom of speech and press. If it is viewed as an exception to the "no law" prohibition, it invites a proliferation of exceptions, and ultimately leads to what Justice Frankfurter hailed as the "weighing of competing interests."¹⁴⁶ There is considerable force in Justice

141. See note 132 *supra*.

142. See text accompanying notes 146-47 *infra*.

143. See note 132 *supra*.

144. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

145. For a discussion of the due process standard, see text accompanying notes 196-219 *infra*.

146. *Dennis v. United States*, 341 U.S. 494, 519, 525 (1951) (concurring opinion).

Black's protest that such an approach "waters down the First Amendment so that it amounts to little more than an admonition to Congress."¹⁴⁷ Moreover, it is a naked amendment of the constitutional language, which on its face is unequivocal and without exception: "no law."

On the other hand, "the freedom of speech . . . [and] the press" is language on its face imprecise the meaning of which must be defined by history and judicial construction. If the clear and present danger doctrine is viewed as a partial definition of those freedoms, judges are not left wholly at large to balance competing interests. According to that view,

The command of the first amendment is "absolute" in the sense that "no law" which "abridges" "the freedom of speech" is constitutionally valid. . . . [I]t insists on focusing the inquiry upon the definition of "abridge," "the freedom of speech," and if necessary "law," rather than on a general de novo balancing of interests in each case. And the text [sic] gives weight to the constitutional decision made in adopting the first amendment by emphasizing that the entire question of reconciling social values and objectives is not reopened. This approach of "defining" rather than "balancing" narrows and structures the issue for the courts, bringing it more readily within the bounds of judicial procedures. It is true that the process of "defining" requires a weighing of various considerations, but this is not the same as open-ended "balancing."

. . . [A]s already noted, the process does not result in every communication being given unqualified immunity from restriction or regulation under the first amendment. The characterization as "absolute" does serve the purpose, however, of emphasizing the positive features of the constitutional guarantee and limiting the area of restraint.¹⁴⁸

Viewing the clear and present danger test, therefore, as defining the freedoms of speech and the press not only is more consistent with the language of the first amendment, but also provides greater assurance of protection from governmental suppression than does the balancing approach of Justice Frankfurter.

If the clear and present danger test defines the freedom of expression protected by the first amendment, and the same freedom is protected by the fourteenth, then speech sufficiently dangerous to be excluded from the first amendment protection is excluded from the protection of the fourteenth amendment as well. This is true of any definition of the first amendment freedoms and explains why, when the Court in *Roth* defined those freedoms to exclude

147. *Dennis v. United States*, 341 U.S. 494, 580 (1951) (dissenting opinion).

148. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914-15 (1963).

obscurity, it could dispose of *Alberts v. California*¹⁴⁹ in the same opinion and on the same grounds. However, the process of "defining" the terms of the first amendment does not exhaust the issues under the fourteenth. This definitional process determines the boundaries of the liberty protected by the fourteenth amendment, but that amendment still contemplates state infringements of the protected liberty so long as they are consistent with due process.

Careful attention to the language of the Constitution may try the patience of some who prefer recourse to dogmatic generalities; but if a written constitution is to have genuine meaning, the language of the document must be relevant in constitutional adjudication. We are not bound to the unascertainable "intent of the framers";¹⁵⁰ moreover, "it is a *constitution* we are expounding,"¹⁵¹ that is, it is "a constituent act [which has] called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."¹⁵² But whatever construction we might put upon it, we are not free to disregard the language of the document.¹⁵³ Faithfulness to the language dictates neither "conservative" nor "liberal" interpretation,¹⁵⁴ but it does provide the only basis to legitimate whatever ultimate decision is made.

Life, property, and corporal liberty are protected by the fourteenth amendment. That protection does not mean, however, that states are precluded from executing felons, fining or imprisoning criminals, or appropriating private property for public use; it means only that the states cannot take such actions "without due process of law." The protected liberty to engage in a lawful business may also be regulated or taken away, so long as the requirement of due process is satisfied.¹⁵⁵ By force of the same constitutional language, the liberty of expression which is protected by the fourteenth amendment may also be infringed, so long as the standard of due process is met.

149. 354 U.S. 476 (1957).

150. See Engdahl, Book Review, 21 J. LEGAL ED. 119 (1968).

151. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

152. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

153. Neither in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), nor in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), was the language of the Constitution subverted. On the contrary, the Court resorted to the explicit language of the document—regardless of the original intention of the framers—to legitimate its holdings.

154. For instance, the celebrated recent decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which applied the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1964), to bar all racial discrimination in the sale or rental of property, is faithful to the language of the thirteenth amendment.

155. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Several of the free speech cases decided since *Near v. Minnesota*¹⁵⁶ have been disposed of on what are essentially procedural due process grounds.¹⁵⁷ But a number of others have been determined by essentially the same method that the Court employed freely until the New Deal era under the aegis of substantive due process. The process of weighing competing interests against the constitutional interest in safeguarding protected rights, so as to accommodate the necessities of security, peace, and order and preservation of other rights without defeating the essential purposes of any constitutionally protected right, is of the essence of historic substantive due process.¹⁵⁸ This is the process which has been used by the Court, or several of its members, to deal with numerous cases: those concerning the conflict between demands for impartial justice and the freedoms of speech and press,¹⁵⁹ those concerning the effect upon rights of expression of laws ensuring public order,¹⁶⁰ those concerning the effect of laws suppressing suppressible expression as inhibitions upon unsuppressible expression,¹⁶¹ and those concerning laws so broadly written or left so much to discretion in their enforcement that they threaten greater infringement of protected rights than is necessary to secure the competing interest.¹⁶² Nevertheless, since the revolt against the obstructionist use of substantive due process in the social and economic spheres, the Court has invariably failed to recognize that the balancing method which it has used in these cases is the method of substantive due process.¹⁶³ Instead, it has treated its inquiry as

156. 283 U.S. 697 (1931). See notes 118-24 *supra* and accompanying text.

157. *E.g.*, *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Winters v. New York*, 333 U.S. 507 (1948).

158. See notes 211-12 *infra* and accompanying text.

159. *E.g.*, *Wood v. Georgia*, 370 U.S. 375 (1962); *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950) (separate opinion of Justice Frankfurter); *Craig v. Harney*, 331 U.S. 367 (1947).

160. *E.g.*, *Feiner v. New York*, 340 U.S. 315 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *cf.* *Street v. New York*, 394 U.S. 576 (1969). See also, *e.g.*, *Kovacs v. Cooper*, 336 U.S. 77 (1949) (concerning the inhibitive effect of laws regulating the use of amplification devices).

161. *E.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959).

162. *E.g.*, *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

163. Occasionally, however, the opinions contain an exceptionally candid indication that the method used today for first and fourteenth amendment cases is essentially the method of substantive due process. Justice Fortas, for example, recently stated: "The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation is reasonable, due account being taken of the paramountcy of First Amendment values." *Street v. New York*, 394 U.S. 576, 616 (1969) (dissenting opinion). Occasionally, also, the Court frankly applies simi-

unrelated to the due process clause, and therefore just as appropriate to the first amendment as to the fourteenth. Recognition that these grounds for decision are in the tradition of substantive due process will put an end to the "balancing away" of first amendment rights.¹⁶⁴ It will ensure that the first amendment will serve its purpose as a guarantee that no federal law will abridge the freedoms of speech and the press, subject to definition of those terms; and consideration of substantive due process will be appropriate only as to state infringements of the liberty so defined.

Therefore, the crucial task with respect to state regulation is the determination of the standard of substantive due process as it applies to the freedom of expression. We may agree with Brandeis and Holmes that the standard applied by the majorities in *Gitlow* and *Whitney* was too lax; indeed, as Brandeis noted,¹⁶⁵ a higher due process standard was being applied in the same period to infringements of economic rights. But the appropriate corrective of the vices of *Gitlow* and *Whitney* was not the view tendered by Brandeis and Holmes.¹⁶⁶

Recently, we have witnessed a clumsy but definite admission of due process considerations in a case involving state infringement of asserted freedom of expression. In *Ginsberg v. New York*, the Court held that a state could define literature as obscene for minors, "at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful."¹⁶⁷ The opinion is clumsy because it attempts to be consistent with *Roth* and regards the material rationally found harmful as therefore obscene and consequently, according to *Roth*, outside the scope of constitutional protection. But the test of rationality for the state legislature's finding is distinctly a due process test, reminiscent of the holdings in *Gitlow* and *Whitney*.

On the premise that comparison of the language of the first and

lar substantive standards in conscious due process adjudication, thereby rendering false any pretense that substantive due process is an archaic or disreputable conception. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 14 (1965), in which the Court observed: "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction."

164. See, e.g., *Scales v. United States*, 367 U.S. 203, 261 (1961) (Justice Black, dissenting); *Konigsberg v. State Bar of California*, 366 U.S. 36, 61 (1961) (Justice Black, dissenting).

165. See note 138 *supra*.

166. For an analysis of the appropriate due process standard for state infringements of the freedom of expression, see text accompanying notes 186-254 *infra*.

167. 390 U.S. 629, 639 (1968). See notes 68-77 *supra* and accompanying text.

fourteenth amendments precludes treating the standards for state and federal regulation of obscenity as identical, we may now proceed to inquire what standards might govern each.

C. *The Appropriate Scope of Federal Obscenity Control*

We have already noted the uncertainty in the application of the clear and present danger test and discussed the alternative implications for freedom of expression generally.¹⁶⁸ For purposes of federal control of obscenity, however, it is not necessary to choose between the alternative views. If the clear and present danger test is a qualification of the phrase "no law," leading to Justice Frankfurter's approach of balancing competing interests, an interest of the federal government must be found to place on the scale; and if the test is viewed as defining the freedoms of speech and of the press, it permits suppression only when the impending evil is, in Justice Holmes' words, one "that Congress has a right to prevent."¹⁶⁹ It is difficult to conceive of any evil which even the most patently offensive, prurient, and worthless material might in good faith be said to cause—that is an evil which the federal government is constitutionally empowered to prevent.

In the obscenity cases decided since *Roth*, no Justice has attempted to explain the constitutional right of Congress to prevent whatever evils might be thought to be caused by obscenity; since obscenity was held to be per se outside protected expression, it could be suppressed without any such explanation. But if obscenity is now to be viewed in the same manner as other speech, it is difficult to discern a federal interest that could justify suppression by the national government. Even Justice Harlan, who from the first has rejected the *Roth* test and urged a minimum role for federal censorship, has never explained what constitutional basis exists for federal suppression even of hard-core pornography.¹⁷⁰

It is by now a familiar and orthodox doctrine that Congress may use its enumerated powers as means to accomplish extraneous ends,¹⁷¹ just as it may use extraneous measures as means to accom-

168. See text accompanying notes 137-48 *supra*.

169. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

170. See text accompanying notes 25-26 *supra*.

171. See, e.g., *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Champion v. Ames*, 188 U.S. 321 (1903). In fact, Congress may have extraneous unespoused objectives in mind when it enacts legislation "necessary and proper" to the accomplishment of some espoused constitutional end. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

plish ends specifically entrusted to it by the Constitution.¹⁷² Congress may, for example, use its postal or commerce power to support regulations designed to protect morals.¹⁷³ But when such regulations abridge the freedom of expression, they threaten collision with the first amendment; and such a collision can be avoided only if the expression presents a sufficient risk of a consequence that Congress has a right to prevent. Now, can we say that, because Congress may use its postal or commerce power as a means to regulate morals, it has a general right to regulate morals? Congress may outlaw the interstate transportation of women for immoral purposes,¹⁷⁴ thus exercising its commerce power to control prostitution; has Congress, then, a general power to control prostitution, so that federal law could punish a strictly local prostitute admitted to have no connection with or effect upon interstate commerce? Congress may use enumerated power *A* to advance extraneous objective *B*; does this mean, not merely that Congress has power to advance *B* by means of *A*, but rather that Congress has the general power to advance *B*, so that the necessary and proper clause empowers Congress to employ other extraneous means to accomplish more effectively the extraneous objective *B*? Such a "bootstrap" view of federal power has never been sustained, except by implication in one case,¹⁷⁵ and in that case, it was sustained through failure in analysis of the precedents rather than by deliberate decision.¹⁷⁶ Such a view

172. U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Moreover, it is for Congress to choose the means, provided only that it have a rational basis for its choice. *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

173. *E.g.*, *Champion v. Ames*, 188 U.S. 321 (1903).

174. *Hoke v. United States*, 227 U.S. 308 (1913). *See also* *Caminetti v. United States*, 242 U.S. 470 (1917).

175. *United States v. Sullivan*, 332 U.S. 689 (1948); *cf.* *United States v. Guest*, 383 U.S. 745, 774-86 (1966) (separate opinion of Justice Brennan, joined by Chief Justice Warren and Justice Douglas). If § 5 of the fourteenth amendment were viewed as empowering Congress to provide against only state action, the objective, however, being to secure the enjoyment of equal rights, then federal legislation against *private* interference with such enjoyment could not be sustained except by the "bootstrap" reasoning. Brennan, to avoid that impasse, reasoned that the fourteenth amendment "secured" the rights generally, although it specifically proscribed only state interference with them. Under this reasoning, federal legislation outlawing private interference with the enjoyment of the secured rights was not a means of better accomplishing the extraneous end which the amendment itself was only a partial means of accomplishing, but rather was a means of accomplishing the end specifically "secured" by the amendment's first section itself.

176. In *Sullivan*, the Court held that the Federal Food, Drug, and Cosmetic Act [21 U.S.C. §§ 301-92 (1946)] could be constitutionally applied to an act of misbranding drugs which had once crossed state lines even though a subsequent intrastate transaction had intervened, and even though there was no suggestion that the local misconduct had any effect upon interstate commerce. 332 U.S. at 697-98. For au-

would, of course, render the federal government virtually omniscient, obliterating all the extant boundaries between state and federal power.

The same illogic necessary to sustain such bootstrap omniscience would be necessary to sustain federal obscenity legislation under even the broadest interpretation of the clear and present danger test. Like the language of the necessary and proper clause, the evil "that Congress has a right to prevent"¹⁷⁷ must contemplate, not extraneous objectives at which Congress may aim the exercise of its constitutional powers, but objectives constitutionally entrusted to the care of the federal government. It follows that, even if it were proved that the publication or distribution of obscenity would immediately and incontestably result in illicit behavior or would reduce every citizen to a dissolute, lecherous, Oedipal wretch, federal obscenity controls could not be sustained; for these are not evils that Congress has a right to prevent.

There is, however, a limited role for federal law regarding obscenity, which may be constitutionally supported. Congress should have power to prohibit mailing or interstate shipment of materials to any person who objects to such materials.¹⁷⁸ This power, which

thority the Court cited *McDermott v. Wisconsin*, 228 U.S. 115 (1913), a case that is clearly distinguishable. In *McDermott*, the federal law prohibited the interstate shipment of syrup not bearing certain labelling, and contained a provision permitting the government to enforce that regulation by inspection of the product after delivery. The Court held that the enforcement provision was constitutional under the necessary and proper clause, and that a state law interfering with that means of enforcement had been pre-empted. The inspection provision was a means to the end of regulating commerce, and the fact that the commercial regulation was itself a means to the extraneous end of consumer protection was irrelevant. In *Sullivan*, however, the Court's holding was completely different. There an act of misbranding *after* shipment in interstate commerce was held to be reachable by the federal act, not because the reach of the act was necessary and proper to prevent the misbranding of goods in interstate commerce, but because it was necessary in order to accomplish the extraneous objective at which the regulation of interstate commerce was aimed—namely, consumer protection.

Congress quickly took advantage of *Sullivan*'s unprecedented holding, and amended the Food, Drug, and Cosmetic Act in order to make unambiguous its intention to reach as far as the Court had held that it could. Act of June 24, 1948, 62 Stat. 582. See Engdahl, *Consolidation by Compact: A Remedy for Preemption of State Food and Drug Laws*, 14 J. Pub. L. 276, 292 n.90 (1965).

The reach of the federal law sustained in *Sullivan* could arguably have been sustained on the ground that intrastate transactions in drugs have an effect on interstate commerce. But that was not the ground articulated in *Sullivan*; in its endorsement of the "bootstrap" theory of federal power, *Sullivan* is clearly anomalous.

177. See text accompanying note 129 *supra*.

178. A federal statute authorizes the Postmaster General, upon request by an addressee who has received advertisements offering for sale materials that the addressee "in his sole discretion believes to be erotically arousing or sexually provocative," to issue an order forbidding further mailings of such advertisements to that addressee. 39 U.S.C. § 4009 (Supp. IV, 1965-1968). A recent case upheld the consti-

should not be limited to obscene materials but should apply equally to all materials,¹⁷⁹ might be justified on either of two grounds. The better ground, in this writer's judgment, is the argument that the freedoms of speech and press, by definition, do not encompass any right to impose expression upon an unwilling audience.¹⁸⁰ Thus, federal regulations which do not categorically exclude obscene materials from interstate commerce or the mails, but prohibit only their mailing or shipment to unwilling recipients, would in no way infringe the freedoms of speech and press.

There is, however, another arguable ground for the same conclusion. There is clearly emerging a broad constitutional right of privacy, of particular vigor when it protects a person in his own home.¹⁸¹ Since this right is included in fourteenth amendment "liberty," the fifth section of that amendment empowers Congress to buttress the right "by appropriate legislation." If the authority of Congress under this enforcement section is read—as several members of the Court in 1966 seemed prepared to read it¹⁸²—broadly enough to empower Congress to reach private as well as state action interfering with fourteenth amendment liberty, Congress could act to protect rights of privacy by outlawing unsolicited mailings or other presentations of obscenity to a person in his home or other private place. Such legislation would stand, not as a regulation of the mails or of commerce, but as a means to achieve an end that Congress is constitutionally empowered to achieve: the protection of privacy.

tutionality of that statute. *Rowan v. U.S. Post Office Dept.*, 300 F. Supp. 1036 (C.D. Cal. 1969). The Court in that case held that § 4009 violated neither the fifth amendment's due process clause nor the first amendment's guarantees of free speech and free press. It also found that the section was not void for vagueness, and that it did not constitute an unlawful delegation of power. The case has been appealed to the Supreme Court, and is docketed for argument during the present term. 38 U.S.L.W. 3097 (July 28, 1969) (No. 399).

Another limited role for federal law—but one containing great potential for abuse—is in the regulation of the broadcasting industry. Not only is the viewer or listener in a position that makes him vulnerable to unsolicited offense, but the broadcasting industry enjoys a governmentally conferred status comparable to monopoly, and thus broadcasting is unlike ordinary speech. As the Court recently stated: "... differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

179. The rationale which would legitimate the exercise of such power should apply regardless of the type of materials to which the recipient objects. Thus third class bulk mail—commonly referred to as "junk mail"—should be subject to the same congressional restraint as obscene materials.

180. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 86-89 (1949).

181. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

182. *United States v. Guest*, 383 U.S. 745, 762 (Justice Clark, joined by Justices Black and Fortas, concurring), 777-80 (Justice Brennan, joined by Chief Justice Warren and Justice Douglas, concurring) (1966).

The latter argument, however, depends entirely upon acceptance of the proposition that congressional power under section 5 of the fourteenth amendment extends to the proscription of nonstate invasions of liberty. Desirable as such a power might be, it is not clear that the amendment confers it. Three of those Justices who in 1966 opined that it does—Justices Brennan and Douglas and Chief Justice Warren—did so by an argument to the logic of which this writer must demur;¹⁸³ and only two of them now remain on the Court. Three other Justices—Clark, Black, and Fortas—offered no supporting argument, but merely proclaimed their conclusion;¹⁸⁴ and only one of them now remains on the Court. The opinion of the Court specifically reserved the question for future disposition.¹⁸⁵ Consequently, this writer prefers to rest the power to prevent the unsolicited mailing or interstate shipment of materials to any person to whom they are objectionable upon definition of the freedoms of speech and the press, rather than upon section 5 of the fourteenth amendment.

D. *The Appropriate Scope of State Obscenity Control*

Since the liberty secured by the fourteenth amendment, so far as it relates to speech and the press, is to be defined by reference to the first amendment,¹⁸⁶ the clear and present danger test which applies in the case of federal suppression is applicable also in the case of state suppression. However, while that test in this writer's judgment leaves no room for general federal obscenity laws,¹⁸⁷ the same test does leave open the possibility of state controls. Although the possible effects of obscenity are consequences Congress has no constitutional right to prevent, the tradition of state police powers is broad enough that the states do have the right to prevent at least certain of the consequences which obscene materials might be shown to cause. Thus, for example, if the states are admitted to have power to prevent acts of criminal sexuality, and if certain materials can be

183. See *United States v. Guest*, 383 U.S. 745, 777-80 (1966); note 175 *supra*.

184. "[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." 383 U.S. at 762 (Justice Clark, joined by Justices Black and Fortas, concurring).

185. 383 U.S. at 755 (1966). However, Justice Stewart, who wrote the Court's opinion in *Guest*, observed in a later concurring opinion that only Justice Harlan dissented from *Guest*'s "square holding" that the right to travel involved in *Guest* was assertable against private action. *Shapiro v. New York*, 394 U.S. 618, 642-43 & n.3 (1969) (Justice Stewart, concurring).

186. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

187. See text accompanying notes 171-76 *supra*.

shown to create a clear and present danger of such acts being perpetrated, state suppression of those materials would be constitutional.

Application of the clear and present danger test, however, only partially completes the task of delineating the power of the states over expression. As pointed out above,¹⁸⁸ the language of the fourteenth amendment contemplates some scope for state regulation even of expression which is protected. Indeed, the limits on infringements of protected expression are more important to obscenity control than is the definition of what is and is not protected, for until the scientific evidence becomes considerably more conclusive,¹⁸⁹ proof of a clear and present danger inherent in obscenity would seem to be foreclosed.

The standard which the due process clause imposes for state action outside the judicial arena has been the subject of litigation since the first decade after passage of the fourteenth amendment.¹⁹⁰ Most of the cases have involved state regulations of business and economic affairs. As is well known, the due process standard which today is enforced against state economic regulations is rooted in the holding of *Nebbia v. New York* that "the guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."¹⁹¹ In accord with the approach of *Nebbia*, it has been held that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."¹⁹² It is clear that the particular regulation chosen by the legislature need not be the best possible means of dealing with a particular problem: "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."¹⁹³ Not only has the due process test for state economic regulations become one of the mere rationality of the legislation's

188. See text accompanying notes 150-55 *supra*.

189. See *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968). The Commission on Obscenity and Pornography, created by Act of Oct. 3, 1967, 81 Stat. 253, and scheduled to report to the President and Congress by July 30, 1970, was charged, among other duties, with studying the effects of obscenity and its relationship to antisocial behavior.

190. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877).

191. 291 U.S. 502, 525 (1934).

192. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

193. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). See also Note, *Michigan Statute Requiring Motorcyclists To Wear Protective Helmets Held Unconstitutional*, 67 MICH. L. REV. 360 (1968).

relationship to a legitimate end; the Court has gone so far in deferring to the legislature's finding of a rational relationship that in one recent case Justice Harlan was obliged to concur separately "on the ground that this state measure [apparently on Harlan's independent determination] bears a rational relation to a constitutionally permissible objective."¹⁹⁴ The due process standard thus enforced against state economic regulations is comparable to the standard which the Court enforces in the case of congressional legislation under the necessary and proper clause, especially with respect to interstate commerce. In such cases, the Court has left the question whether a particular activity affects commerce, so as to be regulable under the necessary and proper clause, to decision by Congress, reserving to itself the power of further examination only to determine whether or not there is a rational basis for the congressional finding.¹⁹⁵

However, the restraints placed upon the states by the fourteenth amendment may change with variations in subject matter. This fact is well established with respect to the equal protection clause. The Court has deemed that economic regulation is permissible under that clause if a legislative classification "has relation to the purpose for which it is made. . . ."¹⁹⁶ The Court stated in 1961: "[a] statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it. . . ."¹⁹⁷ In only one modern case of economic regulation has the Supreme Court found a statutory classification so remote from the purpose of the act as to offend the equal protection clause.¹⁹⁸ Racial classifications, however, fare differently under that clause. A statutory discrimination based on race "will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy."¹⁹⁹ The special treatment accorded racial classifications under the equal protection clause is justified by the fact that equality of treatment of the races was the overriding objective of the fourteenth amendment. But with regard to classifications affecting highly valued rights other than racial equality, the Supreme Court has been considerably more ready to find violations of the equal protection clause than it has

194. *Ferguson v. Skrupa*, 372 U.S. 726, 733 (1963) (concurring opinion), citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

195. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

196. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949).

197. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

198. *Morey v. Doud*, 354 U.S. 457 (1957).

199. *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

with regard to economic regulations.²⁰⁰ Whether or not the freedom of speech is regarded as occupying a "preferred position" in our jurisprudence, it is certainly true that our system and traditions place an extremely high value upon this freedom; and it would seem that, when the fourteenth amendment is applied to matters beyond the racial problems with which it immediately dealt, the due process clause, like the equal protection clause, must take account of the different values to be placed upon the several liberties which might be at stake.

The original doctrine of substantive due process is receptive to distinctions in the degree of protection afforded to liberties of different values. While it was foreshadowed in earlier cases decided under the fifth amendment,²⁰¹ the doctrine of substantive due process did not flower until after enactment of the fourteenth amendment. At first, in *Munn v. Illinois*,²⁰² a case of economic regulation, infringements of property rights were justified under the due process clause by a holding that "[w]hen . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good"²⁰³ The Court then held that regulation of charges for the use of such property was not a violation of the due process clause so long as the legislature considered that regulation reasonable.

But a different standard was soon proclaimed for more highly valued rights. In *Hurtado v. California*,²⁰⁴ decided in 1884, the Court distinguished the American due process clause from comparable guarantees which had long been established in England:

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder . . . and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land The

200. See, e.g., *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Shapiro v. Thompson*, 394 U.S. 458 (1969); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Baxtrom v. Herold*, 383 U.S. 107 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also *Shapiro v. Thompson*, *supra*, at 655 (Justice Harlan, dissenting).

201. See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857).

202. 94 U.S. 113 (1877).

203. 94 U.S. at 126.

204. 110 U.S. 516 (1884).

actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments They were limitations upon all the powers of government, legislative as well as executive and judicial.

. . . Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application . . . they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

. . . .
 . . . [I]t is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. . . . The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.²⁰⁵

While this general language, indicating that the *Court* must determine arbitrariness or reasonableness, makes no distinction among the several rights and liberties thus protected, the case involved the process by which a man could be deprived of his life, a most highly valued right; and the *Munn* case, which had been decided only seven years before and which had allowed the legislature to decide the reasonableness of economic regulations, was not specifically impugned.

Very soon thereafter, however, the Court began to usurp the legislative function it had declined in *Munn* with respect to economic regulations. From 1890 onward,²⁰⁶ the Court invalidated scores of measures of social and economic regulation on grounds that they infringed property rights and economic liberties in a manner the Court thought unreasonable, and hence violative of substantive due process. Curiously, during this same period, while the economic cases were decided inconsistently with *Munn* and the Court took to itself the question of the reasonableness of economic regulations, the Court reneged on *Hurtado* in cases involving personal rights. Thus, in *Gitlow* and *Whitney* the Court virtually abdicated its role as assessor of the reasonableness of infringements of rights of expres-

205. 110 U.S. at 531-32, 535-36.

206. Minnesota Rate Case, 134 U.S. 418 (1890).

sion and deferred to the judgment of the legislators on that matter.²⁰⁷ The reason for this curious inversion of the original doctrine is not obscure: the majority of Justices during that era placed a high value on economic rights, and felt more concern over their infringement than over the suppression of dissidents' speech.

Since 1934,²⁰⁸ substantive due process with regard to economic rights has returned to the original doctrine propounded in *Munn*, leaving the reasonableness of economic regulations to be determined by the legislature.²⁰⁹ In overreaction against the obstructionist abuses of economic substantive due process, however, the baby has been thrown out with the bath. Rather than recognize the receptivity of the historic conception of substantive due process to differences in the value of the rights it protects, the Court has declined to confess that it continues to deal with infringements of rights of expression in traditional substantive due process terms. Thus, while declining to identify its deliberations as assessments of substantive due process, it has applied them indiscriminately to federal as well as state cases—under the first as well as the fourteenth amendment. Thus, not only is it feasible to deal with state control of expression in historic substantive due process terms, without the compulsion to apply the “minimum rationality” test of the economic cases; but the Court has consistently been employing just such an analysis,²¹⁰ although without admitting the characterization and therefore without confining its essentially due process judgments to cases of state regulation.

Historic substantive due process doctrine requires a sufficient relationship between a regulation and a legitimate state objective; in the absence of that relationship the regulation is arbitrary and thus impermissible.²¹¹ The doctrine also entrusts to the Court the protection of “the very substance of individual rights to life, liberty, and property,”²¹² to prevent violations of “the essential attributes of that liberty,”²¹³ while at the same time recognizing that these liberties are not absolute and must be subject to some regulation to accommodate competing legitimate state interests.²¹⁴ Thus, application of a sub-

207. See text accompanying notes 108-13 *supra*.

208. *Nebbia v. New York*, 291 U.S. 502 (1934).

209. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

210. See notes 159-62 *supra*.

211. *Nebbia v. New York*, 291 U.S. 502, 502-25 (1934).

212. *Hurtado v. California*, 110 U.S. 516, 532 (1884).

213. *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

214. *Frisbie v. United States*, 157 U.S. 160, 165-66 (1895); *Munn v. Illinois*, 94 U.S. 113 (1877).

stantive due process test unavoidably involves the exercise of judgment. There is no solace here for those who insist that the guarantees against state infringements of liberty are "absolutes." But, as commentators have demonstrated, even the absolutists indulge in balancing when they determine what is the right that is "absolutely" protected and what does and does not constitute an infringement.²¹⁵ As one commentator has stated: "[a]ll judges balance competing interests in deciding constitutional questions—even those who most vigorously deny their willingness to do so."²¹⁶ Resort to absolutes gives a sense of immutability and transcendency to constitutional adjudication, but it is a false sense.²¹⁷ The function of law is not to eliminate judgment, but, by structuring the questions for decision, to confine it within narrow bounds. Thus, one apologist for the absolutist approach to first amendment liberties has answered its critics by pointing out that "[t]his approach of 'defining' rather than 'balancing' narrows and structures the issue for the Court, bringing it more readily within the bounds of judicial procedures."²¹⁸ We have endorsed that approach to the first amendment, but found that it cannot apply equally to the fourteenth amendment because of the latter's due process clause.²¹⁹ However, we can accomplish the same objective of narrowing and structuring the issue for the Court

215. See, e.g., P. KAUFER, *CIVIL LIBERTIES AND THE CONSTITUTION* 114-17 (1962).

216. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 79-80 (1960).

217. "[T]o remove candor from one's description of the decisional process is to strike at the heart of the rule of law. . . . [A]bsolutists risk the independence of the judiciary by denying their basic judicial responsibility, which is to exercise judgment." Karst, *supra* note 216, at 80.

218. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914-15 (1963) (quoted in context in text accompanying note 137 *supra*).

219. Justice Douglas himself, joined by Justice Black, has indicated the possible consequences for state obscenity legislation if the fourteenth amendment restrictions on the state are viewed as distinct from the restrictions which the first amendment places on Congress. Dissenting in *Ginsberg*, Douglas wrote, "If we were in the field of substantive due process and seeking to measure the propriety of state law by the standards of the Fourteenth Amendment, I suppose there would be no difficulty under our decisions in sustaining this act." 390 U.S. 629, 650 (1968). Indeed, Douglas sees no reason, if what he calls "substantive due process" is to be the test, why legislatures should be limited to protecting only children: "If rationality is the measure of the validity of this law, then I can see how modern Anthony Comstocks could make out a case for 'protecting' many groups in our society, not merely children." 390 U.S. at 655. Concurring in *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 703-04 (1968), Douglas, again joined by Justice Black, stated: "If we assume *arguendo* that the censorship of obscene publications, whether for children or for adults, is in the area of substantive due process, the States have a very wide range indeed for determining what kind of movie, novel, poem, or article is harmful." But Douglas and Black have too narrow a view of the scope of substantive due process. Under a substantive due process standard, there is still a great deal of restraint on state obscenity control. See text accompanying notes 220-54 *infra*.

by a careful assemblage of the considerations appropriate under the due process clause. The exercise of judgment upon each of the factors in the context of particular cases and issues is a task for judges, not professors; but to aid in defining the factors to narrow and structure the questions for judgment is a task not only for judges, but for professors and all students of our constitutional system.

It bears repeating that the question before us concerns the requirements of fourteenth amendment substantive due process—a separate question from that addressed by the clear and present danger test. That test defines the liberty protected; we are here concerned with the standards for state infringement of liberty admitted to be protected. However, some of the factors involved in the clear and present danger test are factors which also are relevant here. Recognition of differences in the values we attach to property rights and various liberties requires that we recognize the elements of the due process test as variables, so that the test operates as a framework for structuring judgment and not as a wooden “hornbook” rule. It seems to this writer that four factors must be considered in judging the validity of state infringements of liberty under a substantive due process test: the legitimacy of the state’s interest, or the constitutional permissibility of the end to which the regulation is claimed to be related; the substantiality of the legitimate state interest; the means-to-end relationship between a particular piece of legislation and the legitimate state interest; and the effect of countervailing interests. These factors will now be examined more closely insofar as they bear directly on the state’s control of obscenity.

1. *The Legitimacy of the State Interest*

Before reaching the question whether particular legislation is sufficiently related to an objective, it must be determined whether the objective itself is within the constitutional power of a state. Certainly a state has power to prevent acts of violence, including sexual violence and sexual assaults upon unwilling persons, young or old. Perhaps the states must also be admitted the power to insure the mental health and proper social adjustment of their youth, even though these spongy concepts are highly relative. But the enforcement of traditional or contemporary moral standards of sexual behavior among consenting adults is a matter which has already been put in some question²²⁰ and on which continuing developments can

220. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Kingsley Intl. Pictures Corp. v. Board of Regents*, 360 U.S. 684 (1959).

be anticipated. Moreover, the legitimacy of a state's interest in what transpires in the privacy of one's own home has been put in serious question.²²¹ Thus, statutes designed to protect the citizenry from violence that could result from the spread of obscenity and those designed to protect the youth of a state from the corruption of obscenity have as their goal a legitimate state interest; and unless those statutes are impermissible under one of the other three factors, they may constitutionally interfere with free expression. But the state may not enact legislation which has as an objective the protection of adults from themselves.

The above limitations on the power of states to regulate are easily applied to the regulation of speech and of published materials. But when nonverbal expression, such as various forms of action and of dramatic communication, is at issue, the legitimacy of the state interest in regulation is much more difficult to appraise. Earlier in our history, it was held that the requirement of due process imposed no restraints on indirect or consequential infringements of property or liberty.²²² Today, however, expression by means of nonverbal action deserves and receives constitutional protection, but not every action is protected merely because it is labelled expressive. The Court has held that regulation of action, however expressive,

is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²²³

For purposes of federal regulation that test may be formulated in terms of a definition of the freedoms protected by the first amendment, but the same considerations would be pertinent in judging state regulations by the standard of due process. Indeed, although the language quoted above is taken from a case involving a federal regulation prohibiting the destruction of draft cards, the Court in another recent case applied a similar test to a local regulation.²²⁴

221. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

222. "[The fifth amendment due process] provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871).

223. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

224. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

That case was concerned with a school regulation prohibiting a form of expression which presented the possibility of disruption of school decorum, but which, unlike the draft card destruction, did not interfere with any other state interest. In applying an interest balancing test, the Court held that the state's interest in school decorum was insufficient to justify the regulation.²²⁵ Thus, the legitimacy of the state's interest in preventing the forbidden action may be admitted, but the substantiality of that interest must be determined and weighed against its effect on the freedom of expression.

The same approach seems appropriate for dealing with live dramatic expression. Some modern theatrical productions involve kinds of behavior which states have traditionally had the power to punish; but the legitimate state interest in regulating behavior should not be sufficient in itself to justify prosecution of performers in such productions. Rather, the substantiality of the state's interest must be weighed along with the other factors involved in questions of freedom of expression.

It has already been noted that the right of privacy is gaining increasing constitutional stature.²²⁶ State legislation whose purpose is the protection rather than invasion of one's privacy would seem to have a legitimate objective. Protection of citizens from being subjected unwillingly or unwittingly to offensive expression seems to be a legitimate state interest. Pursuant to this interest, a state might, for example, prohibit distribution of unsolicited obscenity by mail²²⁷ or any other means.²²⁸

Such legislation, however, is to be distinguished from that which would suppress expression that some persons might consider offensive. Nevertheless, there has been some case support for the proposition that expression can be restrained solely because it is offensive. In *Manual Enterprises, Inc. v. Day*,²²⁹ the Court construed the Federal Comstock Act²³⁰ as requiring for conviction thereunder

225. 393 U.S. at 507-14.

226. See note 181 *supra*.

227. Even though the postal system is a federal instrumentality, such legislation by the states should be valid unless deliberately pre-empted. For a discussion of the doctrine of pre-emption, see Engdahl, *Consolidation by Compact: A Remedy for Pre-emption of State Food and Drug Laws*, 14 J. PUB. L. 276, 279-305 (1965). If there were fears of unintended pre-emption, however, federal legislation could assuage the fear by specifically authorizing state legislation. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

228. Cf. *Kovacs v. Cooper*, 336 U.S. 77 (1949).

229. 370 U.S. 478 (1962).

230. 18 U.S.C. § 1461 (1964). The Act prohibits the mailing of obscene matter and establishes criminal penalties for violation of its provisions.

not only that the materials appeal to prurient interests, but also that they be "deemed so offensive on their face as to affront current community standards of decency."²³¹ The statute, the Court held, "has always been taken as aimed at obnoxiously debasing portrayals of sex."²³² *Manual Enterprises* has been interpreted by adherents of the *Roth* rationale as establishing "patent offensiveness" not only as an additional statutory requirement under the Comstock Act, but as an additional constitutional requirement for a finding of obscenity. Thus, in *Memoirs v. Massachusetts*, the second coalescing element which Justice Brennan included in the definition of obscenity was that "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."²³³ In no other area of speech is the mere offensiveness of an expression any justification for its suppression. Certainly, persons should be protected from the plight of having offensive utterances thrust upon them when they have no opportunity for escape;²³⁴ and there should be a limited restraint on speech which is so offensive as to provoke breaches of the peace.²³⁵ But expression may not be restrained solely on the ground that some people regard it as unpatriotic or sacrilegious and thus as extremely offensive.²³⁶ Similarly, if obscenity is not to be treated as a distinct class of speech categorically excluded from constitutional protection, it seems difficult to justify its suppression merely because it is very offensive to some, to many, or even to almost all "decent" people.²³⁷ Of course, the patent offensiveness test under *Roth* and

231. 370 U.S. at 484.

232. 370 U.S. at 483.

233. 383 U.S. 413, 418 (1966).

234. See *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Public Util. Commn. v. Pollak*, 343 U.S. 451 (1952).

235. *Feiner v. New York*, 340 U.S. 315 (1951). Some cases have treated such speech as outside the category of protected expression. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

236. *Street v. New York*, 394 U.S. 576, 592 (1969); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). See also *Cantwell v. Connecticut*, 310 U.S. 296, 309-11 (1940).

237. The offensiveness of obscenity, however, has been frequently decried. For example, Mr. Richard H. Kuh of New York City, addressing the Third Circuit Judicial Conference in September 1966 quoted D.H. Lawrence's reference to pornography as "the attempt to insult sex" and make it "[u]gly and cheap . . . degraded . . . trivial and cheap and nasty." He then opined: "I think the ban on pandering which markets an item, not for its beauty, not for its historical value, not for its classical interest, but just for its cheapness and nastiness, is something that our society can properly support." 42 F.R.D. 504, 513 (1968). A majority of the Supreme Court today would probably approve prosecutions for such pandering even without the *Roth* test, as Chief Justice Warren did in his concurring opinion in *Roth*, 354 U.S. 476, 495-96 (1957). But to suppress the material itself, as distinguished from the act of pandering that material, because it degrades and insults sex—as Kuh has urged at length in his

its progeny is a criterion for excluding certain expression from constitutional protection; but with the demise of *Roth* it seems impossible to justify recognition of a legitimate state interest in protecting the citizens' sensibilities with regard to sexual expression, just as such an interest cannot be justified when religious or political expression is at issue.²³⁸

2. *The Substantiality of the Legitimate State Interest*

Early in the development of the clear and present danger test, Justices Holmes and Brandeis qualified the original formulation from *Schenck v. United States*²³⁹ by urging that to justify suppression of speech, the evil consequence feared to ensue from that speech should be serious or substantial.²⁴⁰ The substantiality of the legitimate interest sought to be protected should also be a factor in determining the constitutionality, under the due process clause, of state suppression of obscenity. The state may have a more substantial interest in protecting children from the possible consequences of obscenity than it has in so protecting adults. Similarly, the state may have a more substantial interest in preventing sexual "perver-

book *Foolish Fig-Leaves? Pornography in—and Out of—Court* (1967)—would be as unconstitutional as to suppress sacrilege or verbal aspersions of the flag.

238. Another aspect of *Roth* is equally unsound. In the course of his argument in the Court's opinion in *Roth*, Justice Brennan stated:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees.

354 U.S. 476, 484 (1957). It was in this context that Brennan found that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484. Thus, *Roth* may be read to mean that obscenity is unprotected since it is not a part of any dialogue concerning political and social questions. In the first place, that conclusion is simply untrue. Obscenity may at times fulfill the same role with respect to unorthodox conceptions of social relations and morality that satire fulfills with respect to other kinds of social criticism. In fact, it may even heighten the impact of social criticism through the eloquence of shock. But aside from this fact, to confine liberty of expression in the way that Brennan's proposition does, would exclude from protection a large variety of innocuous, but pointless, communication. A great deal of expression has as its purpose mere entertainment, and the suppression of such expression would not be tolerated despite any attempts to justify the suppression on the ground that only the "interchange of ideas for the bringing about of political and social changes" is protected. Indeed, the Supreme Court has held that various publications which contained "nothing of any possible value to society" were nonetheless protected: "The line between the informing and the entertaining is too elusive for the protection of that basic right." *Winters v. New York*, 333 U.S. 507, 510 (1948). Expression concerning sex should be afforded the same degree of freedom under the first and fourteenth amendments as is expression concerning any other subject, because "the rights of free speech and a free press are not confined to any field of human interest." *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

239. 249 U.S. 47 (1919).

240. *Whitney v. California*, 274 U.S. 357, 373, 377 (1927).

sion" than it has in denying entertainment to those deemed to be already "perverted." Substantially, however, cannot be considered in isolation. It varies in relation to the weight accorded countervailing interests,²⁴¹ and in turn affects the degree of relationship which should be required between the liberty-infringing means and the legitimate end sought to be attained.

3. *The Means-to-End Relationship Between a Particular Piece of Legislation and the Legitimate State Interest*

In *Dennis v. United States*,²⁴² Chief Justice Vinson and the three Justices who joined in his opinion²⁴³ endorsed Judge Learned Hand's reformulation of the clear and present danger test under the first amendment: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."²⁴⁴ Opinions may differ on the question whether that reformulation is too great a compromise of the protection which the first amendment affords against federal suppression. But as an element of the due process test that governs state suppression of obscenity, such a formula makes possible an accommodation between those who fear the dire consequences of obscenity and those who note the inconclusiveness of the scientific evidence as to its harmfulness. Judge Hand's statement suggests that if the evil feared is very great, a lesser showing of its probability should be sufficient for suppression than if the evil feared is small. Applied in the case of obscenity, this approach would mean that a relatively insubstantial state interest could justify suppression only if the damage to that interest is highly probable to follow from the publication or circulation of obscenity. On the other hand, if the potential evil were much greater—that is, if the state's interest in preventing the evil were very substantial—the obscenity would be suppressible on a lesser showing of probability that it would cause the evil. In the field of economic regulation, the very substantial state interest in controlling economic forces justifies infringements of property rights and freedom of contract on a showing of minimum rationality in the relationship of regulatory means to the end. While there is no necessity to apply that same lax standard to other areas, as the Court did in *Ginsberg v. New York*,²⁴⁵ the greater sub-

241. See text accompanying notes 247-54 *infra*.

242. 341 U.S. 494 (1951).

243. These were Justices Reed, Burton, and Minton.

244. 341 U.S. 494, 510 (1951), quoting from the opinion below, 183 F.2d 201, 212 (2d Cir. 1950).

245. 390 U.S. 629, 641-43 (1968); see text accompanying notes 65-77 *supra*.

stantiality of the state interest at stake in protecting its children would justify upholding the suppression of the distribution of obscene materials to minors on a lesser showing of the probability of a cause and effect relationship than should be required in the case of distribution to adults.

The over-sufficiency of the means for the accomplishment of the end must also be considered with respect to the relationship of suppressive legislation to the asserted state interest. Even the most substantial state interest should not justify legislation which aids in the protection of that interest, but does far more than is necessary to protect it. The overbroad statute, in obscenity cases as elsewhere, is violative of the due process clause.²⁴⁶

4. *The Effect of Countervailing Interests*

The clearest and most immediate relationship between an utterance and an evil that a state has a substantial and legitimate interest in preventing would not justify punishment of the speaker without a fair trial. Similarly, other countervailing interests might outweigh an interest which would be served by suppression.²⁴⁷ *Stanley v. Georgia*, for example, recognized that the right of a person to read or observe what he pleases in the privacy of his own home is an interest in competition with a state's interest in the control of obscenity.²⁴⁸ The right of parents to control the upbringing of their children is also a substantial interest, which may compete with state interests that might be served by obscenity control. However, the interest in parental authority might not be given such weight as to prevent prosecution of a parent who deliberately "depraves" his child with pornography, assuming a substantial state interest in preventing such "depravity," any more than it prevents prosecution of a parent who seduces or otherwise physically abuses his child.²⁴⁹

The greatest interest to be weighed against any state interest claimed to justify state suppression of expression, however, is the interest of a free people in the freedom of speech itself. This is the

246. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). The problem of vagueness presents a different issue. See, e.g., *Winters v. New York*, 333 U.S. 507 (1948). A law may establish a sufficiently ascertained standard of guilt, and thus avoid the procedural due process vice of vagueness, and yet be so broad in its reach that it inhibits actions which, on consideration appropriate under substantive due process, may not be so inhibited.

247. See, e.g., *Wood v. Georgia*, 370 U.S. 375 (1962).

248. 394 U.S. 557 (1969). See text accompanying notes 79-92 *supra*. However, the Court in *Stanley* did not regard that privacy interest as absolutely controlling or as controlling in all circumstances. See text accompanying notes 88-91 *supra*.

249. Cf. *Carpenter v. Commonwealth*, 186 Va. 851, 44 S.E.2d 419 (1947).

point that was emphasized by the Court in *Hurtado* and *Near*: the Court must protect "the very substance"²⁵⁰ of this liberty and must repel any invasion of its "essential attributes."²⁵¹ We are thus referred to the history and purpose of the constitutional guaranty, most eloquently stated by Justice Brandeis²⁵² and in our own day by Justice Douglas.²⁵³ Furthermore, even measures which otherwise would be permissible will violate substantive due process if, while suppressing the constitutionally suppressible, they also intimidate unsuppressible expression.²⁵⁴

III. CONCLUSION

Since the cases seem to indicate that the regime of *Roth* has ended, it is important to determine what approach will arise to replace it. This Article has, through an analysis of existing constitutional law, suggested a possible approach. According to that approach, obscene expression should be treated no differently from nonobscene expression, and the only important matter for examination is the application of familiar constitutional standards to the particular dangers posed by obscenity.

Since the legitimate federal interest in regulating obscenity is extremely limited, the primary concern of this Article has been an examination of the bases of permissible state regulation. The proposed framework for decision on state legislation is not a new structure, but is the familiar substantive due process standard, detailed with new precision. That framework will not by itself decide any state obscenity case. It is only a skeleton to which flesh must be added gradually by judicial decision. The legitimacy of certain state interests, their substantiality, the means-to-end relationship between particular legislation and legitimate interests, and the effects of countervailing interests must be determined on a case-by-case basis. Each of these determinations will call for the exercise of judgment, with its inevitable subjective component; none involves absolutes. Moreover, it may be admitted that the factors treated here as distinct coalesce in reality. But this suggested framework for deliberation, while keeping faith with the language of the Constitution, does serve the purpose of narrowing and structuring the issues for decision by the Court.

250. *Hurtado v. California*, 110 U.S. 516, 532 (1884).

251. *Near v. Minnesota*, 283 U.S. 697, 708 (1931).

252. *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (concurring opinion).

253. See text accompanying notes 11-16 *supra*.

254. See, e.g., *Freedman v. Maryland*, 380 U.S. 51 (1965); *Smith v. California*, 361 U.S. 147 (1959). See also note 158 *supra*.

If decisions are made within that framework, any degree of strictures upon state control of obscenity could ultimately be imposed, and different degrees of restraint could be imposed for various situations. Thus, some types of legislation might be permissible if they can be shown to have any rational connection to a legitimate state objective, while other types of legislation might require a cogent demonstration of a demonstrable risk to an urgent state interest. If I were in a position to judge, I would be inclined to give as much weight as Justice Douglas does²⁵⁵ to the interest of society in free expression; but I would permit restraints designed to protect rights of privacy, and I would accept regulation for the insulation of children from obscenity, although my test for accepting such regulation would not be quite so lax as the minimum rationality test endorsed in *Ginsberg v. New York*.²⁵⁶ Being a professor, and not a judge, however, I am content to suggest the factors to be weighed for decision, and to leave the judgment to those who have been assigned that task.

The effect of employing the suggested framework for decision, therefore, would not be to dictate the end product of constitutional doctrine regarding state regulation of obscenity. But employing this structure of the relevant factors would help to eliminate the ad hoc and episodic, the knee-jerk and "gut reaction" elements of obscenity law frequently decried under the regime of *Roth*. Moreover, since it provides for the treatment of obscenity as expression protected as much as, but no more than, any other class of speech, it would relieve the Supreme Court of the politically sensitive task of deciding case by case the obscenity *vel non* of all types of sordid publications. Thus, it would not preclude the development of uniform constitutional standards but would put the Court in its rightful position of formulating such general standards rather than passing on particular publications one by one.

The controversy surrounding the Court today is furious enough without the public reaction to what laymen can understand only as the Justices' own moral evaluation of salacious publications. We should hope that public hostility will never deter the Justices of the Supreme Court from fulfilling their constitutional duty, as their oath and conscience demand. But the existence of public reaction to constitutional doctrine heightens the importance of developing constitutional law in such a way that, in appearance as well as in substance, the principles and rules of law developed are generally applicable and are, so far as possible, objective or neutral.

255. See text accompanying notes 11-16 *supra*.

256. 390 U.S. 629, 641-43 (1968). See text accompanying notes 65-77 *supra*.