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John Marshall Harlan: The Justice and the Man

By HENRY J. ABRAHAM*

I

THE FIGURE emerging from these pages is that of a Southern gentleman of the nineteenth century—absolute confidence in the correctness of his own views, a firm belief that it is possible for human beings clearly to discern between right and wrong, and an inability to understand, once he had made this distinction in favor of the “right”, how any reasonable man could disagree with him. But if this was all there was to John Marshall Harlan—a statue marked “Soldier, scholar, jurist—God was his only Master”—his memory might better be served by salutary neglect. That, however, is not the case. For in the 46 years that separate us from the death of this eminent jurist we have seen many of his dissents become the majority opinion of the Court. We have, in many ways, grown into the picture he drew of us.

Justice Harlan is depicted by his contemporaries as anything but a negotiator or compromiser. He was viewed as a militant individualist, “in questions concerning civil rights . . . inflexible”,¹ a dissenter “to the queen’s taste.”² Harlan saw this love of personal freedom as a positive good in itself; its application to constitutional interpretation forms a vital part of his philosophy. Thus, he insisted upon the constitutional equality of minority groups—no matter what their race—the undiluted freedom of speech and of the press, the freedom of sailors to terminate their

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¹ 17 Va. L. Reg. 497 (1911).

² 51 *Cosmopolitan* 534 (1911).

employment as other citizens could, and constitutional guarantees to the peoples of America's newly-won colonies. He challenged the authority of his colleagues to select what rights will or will not be guaranteed; and, in general, he held the firm conviction that neither the national government, nor the state governments, nor individual persons, could with impunity deprive citizens of the United States of those rights guaranteed by the *whole* federal Constitution. His position on civil rights is perhaps inflexible, perhaps unmindful of the reciprocity of rights and duties that exists between a citizen and his government, and the fact that rights are not absolute but must be judged in the context in which they are exercised. Yet he recognized the dangers that are inherent in rationalizing restrictions—his age, and our age, are replete with the dire results of pandering individual liberties to the expediency of statecraft. Harlan rejected expediency; his concern lay rather with the Constitution which he revered, and with his own conception of the Union as a strong servant and protector of individual rights. There was much of the Jeffersonian Democrat in this ante-bellum slaveholder. His focus was unmistakably on the individual. In an age of rapidly growing domestic commerce, and commerce that sought for overseas empire, when *laissez-faire* enthusiasm too often read life and liberty out of the Fifth and Fourteenth Amendments in favor of an almost unassailable right to property protection, Harlan stood firm on principles laid down at an earlier time. He left his ringing dissents to become the law for future generations.

Harlan sought to retain a balance between the power of the states and the power of the national government. But his view of the scope of federal control was much more nearly akin to Chief Justice Marshall than to that of his own contemporaries. Today we have returned to his view. His dissents in favor of national taxation and federal control of interstate commerce, for example, ultimately prevailed in an amendment establishing federal income taxation, and in the complete reversal of the *Knight* doctrine.³ Although he claimed to be an adherent to a strict interpretation of the Constitution—and was that, indeed, in matters concerning civil liberties—he saw the economic life of the Nation

³ *United States v. E. C. Knight Corp.*, 156 U.S. 1 (1895).

as a primary concern of the national government. Hence, he sought to give it "the widest grant of power—consistent with the language employed and what he deemed the fundamental intent behind it".⁴

Harlan's approach to the law was free from casuistry, equivocation and quibble. His disdain for metaphysics rendered yeoman service toward discrediting the "natural law" philosophy that was espoused by many of his confreres. His abhorrence for overt "judicial legislation" called forth some of his most heated rebukes against the majority, and some of his most fervid defenses of what he viewed as the right of the legislators, rather than the judges, to make the laws of the land.

His eulogizers have pictured him as a mind "... more rugged than keen . . .",⁵ a viewer of the law "who . . . approached . . . the layman",⁶ and a constant warrior of "mind with mind . . . carried on, not with adroit fence at subtle play of reason, but with a directness and entire disregard of all narrower points of view."⁷

But perhaps it was this simple, direct approach to the law that allowed him to grasp the picture of a growing economy that could only be effectively regulated by the national government: Giant corporations doing a nationwide, some a worldwide, business that were entities of the individual states in legal fiction only; businesses upon whose prosperity the prosperity of the nation was growing more and more dependent, and with whose fortunes the general welfare was inextricably tied. Perhaps it was his avoidance of legal circumlocution that permitted him to see through the maze of split-hairs and chopped-logic to say that American democracy has no place for a half-way house between slavery and citizenship.

Perhaps his temperament was more suited for the forum than for the bench, as many of his critics noted. But it is nonetheless a temperament without which free institutions cannot survive—one characterized by militancy, strength, imagination, and the courage to stand alone.

⁴ 30 A.B.A.J. 576 (October 1944).

⁵ 23 Green Bag 654 (1911).

⁶ 8 Dictionary of American Biography 269.

⁷ Eulogy delivered by Chief Justice Edward D. White, quoted in 195 North American Review 288 (1912).

II

John Marshall Harlan was born on June 1, 1833, in Boyle County, Kentucky, the son of James Harlan, a politically influential Kentuckian.

Young Harlan grew up in that period of American history which was marked by the growing estrangement of the South and the Union. It was a time in which abolitionist feeling ran high in the North, and the South moved ever closer to secession. Kentucky, as a border state, was sharply divided. With his civic background, the young man quite naturally entered the study of law. He received his A.B. degree from Centre College, and three years later, at twenty, completed his law courses at Transylvania University. In that same year he was admitted to the Kentucky bar.

John Marshall Harlan participated actively in the bitter political struggles which racked the country on the eve of the Civil War. In 1859 he ran for Congress on the Opposition ticket against the Democrats in the Ashland District of Kentucky, but was defeated by a small margin. A Southern gentleman and slaveholder, and at heart a conservative, he was unwilling to enter into the Republican party. In the critical presidential campaign of 1860, he did not support Lincoln, the Republican candidate, but served instead as an elector on the ticket of the Constitutional Union party which was headed by Bell and Everett. The Union party platform sought the peaceful preservation of the *status quo* and was known as the "peace" ticket.

Harlan moved to Louisville in 1861 where he practiced law with W. F. Bullock.⁸ As the war clouds darkened, many observers realized that there was no way to avoid conflict if the Union troops, which were then occupying the Southern forts in increasing number, were not removed. Harlan believed that war was inevitable as long as these troops remained in the South; and he contended that if war came, the border states would be sure to leave the Union. On April 12, 1861, Fort Sumter was fired upon; war had begun. On April 15, Lincoln called on Kentucky for four

⁸ It was stated in 1 National Cyclopedia of American Biography 34 that Harlan went to Louisiana to practice law with W.F. Bullock. But the mass of evidence indicates that both men were in Louisville on the eve of the Civil War and conducted their practice in that city.

regiments of troops. The legislature not being in session, Governor Magoffin defiantly replied that Kentucky would furnish no troops for the purpose of subduing her sister Southern States. The Southern Rights men were in favor of seceding from the Union immediately, but the great body of Kentuckians were opposed to such drastic action. A strong desire for a peaceful settlement of the problem remained Kentucky's hope.

Harlan subsequently abandoned the position of the Constitutional Union Party, which had joined with the Douglas faction in rejecting secession, but which refused to give military aid to the Union. When Kentucky thus refused to furnish troops, he volunteered to fight on the Northern side. He organized the 10th Kentucky Volunteer Infantry in the fall of 1861 and was commissioned a Colonel.⁹ His regiment formed part of the original division of General George H. Thomas. Harlan participated in many engagements. Once he was arrayed against a Confederate force of which Mr. Justice Lurton was then a youthful member. Harlan rose rapidly in rank and in 1863 was appointed Acting Commander of a Brigade. But he resigned his military commission in the spring of 1863 even though his name was just then before the U. S. Senate for confirmation as a Brigadier-General of the Volunteers. In his letter of resignation to General Rosecrans he said:

I deeply regret that I am compelled at this time, to return to civilian life. It was my fixed purpose to remain in the Federal army until it had effectually suppressed the existing armed rebellion, and restored the authority of the national government over every part of the nation. No ordinary consideration would have induced me to depart from this purpose. Even the private interest to which I have alluded [his father's death] would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would, to any material extent, affect the great struggle through which the country is now passing.

If, therefore, I am permitted to retire from the army, I beg the Commanding General to feel assured that it is from no want of confidence either in the justice or ultimate tri-

⁹ 23 Case and Com. 120 (1916). Harlan was also reported to have been commissioned a Captain of the Zouaves in July 1861, according to the "Proceedings of the Supreme Court at the Death of Justice Harlan," 222 U.S. XII (1912); but the writer has been unable to find collateral evidence to support the statement. It is doubtful that he ever served with these volunteer regiments.

umph of the Union cause. That cause will always have the warmest sympathy of my heart, for there are no conditions upon which I will consent to a dissolution of the Union. Nor are there any concessions, consistent with the republican form of government, which I am not prepared to make in order to maintain and perpetuate that Union.¹⁰

It has been generally felt that his resignation was directly induced by his father's death, necessitating his return to private life; but there are some who claim that he resigned to enter politics and oppose the military regime. Upon his return to civilian life Harlan received the Constitutional Union Party's unanimous nomination for the office of Attorney-General of Kentucky; he was successful in the following election. In the presidential election of 1864, Harlan took the stump in support of General George McClellan and bitterly criticized Lincoln's Administration. He opposed the Thirteenth Amendment, declaring that he would combat it on principle "if there were not a dozen slaves in Kentucky". He considered the abolition of slavery by federal action "a flagrant invasion of the right of self-government" and a violation of the promises which had been made to Kentucky slave-holders.¹¹ Harlan himself continued to hold slaves until he was forced to free them. However, in the campaign of 1868, Harlan swung completely over into the opposition camp, firmly espousing the Republican party and supporting Grant. By now he defended the war amendments as necessary to the reconstruction of the Union.

Harlan's active entrance into national affairs was marked by the part which he took in the Cincinnati Republican Convention of 1876. For the first time since 1860 there was genuine uncertainty as to who would be chosen as the Republican standard-bearer. There had been talk about a third term for Grant. However, in the spring of 1875 the Pennsylvania Republican state convention had passed a resolution against a third term in which most of the other states acquiesced. With Grant out of the way, the field was wide open. Of the potential candidates, most discussed were James G. Blaine of Maine, Roscoe Conkling of New York, Benjamin H. Bristow of Kentucky, and Oliver P. Morton of

¹⁰ *Supra* note 9.

¹¹ Coulter, *The Civil War and Readjustment in Kentucky* 279 (1926).

Indiana. In addition there were some "favorite sons," prominent among whom was Rutherford B. Hayes of Ohio.¹²

Blaine seemed to have the best chance of securing the coveted nomination. He was certain of the support of Maine and of enough votes in other states to give him a decided lead over any of the other candidates. Senator Conkling would naturally have the support of most of the delegates from his own state of New York, and was generally believed to be the candidate favored by the Administration. Senator Morton was not favorably looked upon by the reform elements of the party. He was loyally supported by Indiana; and he was so popular with the Negroes of the South that an especially called national convention of that race at Nashville, in April 1876, showed itself almost unanimous in his favor.¹³

Of all the candidates, Bristow was apparently the man best fitted to lead a campaign whose watch-words should be "Reform within the Party." As Secretary of the Treasury he had conducted relentless warfare against the Whiskey Ring, had not hesitated to secure the conviction of personal friends of the President, and had even ventured to bring about the indictment and trial of Orville E. Babcock, the President's private secretary. By his activity he had, however, gained the ill-will of the President and of the Radical official coterie, and had been "blackballed" by the New York Union League Club. On the other hand, he was regarded with favor by the reformers and was supported by a large part of the more reputable Republican press.¹⁴

The "favorite son" candidate most frequently mentioned was Hayes, who had been strongly indorsed by his home state of Ohio. He was then serving a third term as its governor. He was sound on the money question, had a good war record, was without any important enemies, but was not well known outside his own state. His chances of nomination were considered slight.

The Republican convention met at Cincinnati. The meeting place was regarded as especially favorable to Bristow, for the delegates were more enthusiastic for him than they were for Hayes, and the city was also easily accessible to Kentuckians. Harlan nominated Bristow.

¹² Hayworth, *The Disputed Presidential Election of 1876*, 11 (1906).

¹³ *Id.* at 13.

¹⁴ *Id.* at 14.

On the first four ballots the total number of votes cast varied from 754 to 755. Blaine received from 285-292, with 378 constituting the necessary majority. Bristow's highest count, on the other hand, was only 126. The strenuous support given to Blaine had now thoroughly convinced the supporters of the other candidates that he was the real enemy. Many of the party leaders, knowing that a bolt would take place should he be the nominee, began to cast about for some candidate in whose favor a combination could be made. The reformers had convinced Conkling's followers that he could not be nominated; the same applied to Morton and Hartrauft, a favorite son from Pennsylvania. This left Bristow and Hayes as the only possible anti-Blaine nominees.

On the fifth ballot a decided shift toward Hayes became evident; his vote increased from 68 to 104. On the sixth ballot, however, a Blaine stampede began. He received 308 votes, and thus came within 70 votes of the nomination. On the same ballot Hayes gained only 9 to bring his total to 113; Morton received 85; Bristow 111; Conkling 81; and Hartrauft 50.¹⁵

The seventh ballot seemed to be decisive: at first, Blaine's total increased rapidly, and it was apparent that if he continued to gain at the same rate he would be nominated. When Indiana was called, the chairman of the delegation withdrew the name of Morton, and cast 25 votes for Hayes and 5 for Bristow. The crucial moment in the roll call came when Kentucky was reached. Since it had become evident that Bristow could not be nominated, Kentucky withdrew his name. Then, moved by the knowledge of Blaine's hostility to Bristow, the Kentucky delegation, at Harlan's behest, voted unanimously for Hayes. They were followed by most of the remaining delegates who had opposed Blaine, with the result that Hayes received 384 votes and the nomination.¹⁶

As the future President, Hayes sought to reward Harlan for his convention efforts by offering him the Attorney-Generalship, a position Harlan desired. This, however, was considered to be inexpedient by Hayes' advisors due to Harlan's controversial role as a member of the much discussed Louisiana Commission of 1876; this commission had investigated the dispute arising out of the famous election of that year. Instead, Harlan was offered a diplomatic post, which he declined.

¹⁵ *Id.* at 24.

¹⁶ *Ibid.*

But on October 16, 1877, Hayes appointed John Marshall Harlan to the Supreme Court to fill the vacancy caused by the resignation of Mr. Justice David Davis some time earlier—an appointment that was at the time regarded as a payment for political service rendered.

III

The years during which Justice Harlan served on the Supreme Court represent one of the most important periods in the history of the United States. The era of reconstruction following the close of the Civil War had passed; this country had embarked upon an unparalleled era of prosperity and industrial development.

The enormous extension of the railway system, resulting in over 300 times as much track in 1890 as in 1877, and the organization of immense corporations, formed by the consolidation of rival companies, aroused the entire country and the Congress to the perils of monopoly. The first step toward the federal regulation of the railroads was consequently taken by the passage of the Interstate Commerce Act of 1887. This period of time also witnessed the initial attempts toward regulation and suppression of trusts and monopolies by the passage of the Sherman Anti-Trust Law of 1890. Justice Harlan's decisions, insisting upon a construction that would carry out the apparent intent of Congress, gave rise to some of his most famous opinions.

Interstate Commerce Power

The first important case construing the Act of 1887 was *Texas and Pacific Railroad Co. v. Interstate Commerce Commission*.¹⁷ Here the question was whether under the Interstate Commerce Act the railroad company could legally charge a cheaper rate for shipments of goods from foreign ports through the territory of the United States than it did between two equally distant places within the United States. The Interstate Commerce Commission held that there had been an unlawful discrimination. The Supreme Court reversed the finding of the Commission and held that it had exceeded the powers given it by Congress. Justice Harlan dissented, contending that the decision by the Court

¹⁷ 162 U.S. 197, 239 (1896).

legitimized partiality to foreign shippers as opposed to those at home. He also felt that the ICC gave the only proper interpretation of the Act of Congress, either as to its meaning or as to the intent of the legislators.

In *ICC v. Alabama Midland Railroad Company*,¹⁸ the Supreme Court decided that in attempting to fix rates the commission had exceeded the powers granted to it by Congress. Again, Justice Harlan disagreed with the majority-decision because it evidently deprived the ICC of its ability to prevent discrimination in rates:

Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. . . . It [the Commission] is denied many of the powers which, in my judgment, were intended to be conferred upon it.

As a direct result of the decisions in the above cases, in which the Court decided that the Commission did not have the regulatory power which it thought it possessed and sought to exercise, Congress amended the ICC Act so as to give it the powers contended for by Justice Harlan in his dissents.

Sherman Anti-Trust Law Cases

Just as the Interstate Commerce Act of 1887 was nullified and emasculated by judicial interpretation, so was—in due course—the Sherman Anti-Trust Act of 1890. The first important case construing the Sherman Act was that of *U. S. v. E. C. Knight Co.*,¹⁹ in which the U. S. Attorney General charged that the American Sugar Refining Company had, by contracts with four other defendants, gained control of 98 per cent of the manufacture of all refined sugar in the United States, and so tended to raise prices and restrict trade. The Court, however, in an eight to one decision, Justice Harlan being the lone dissenter, held that the statute did not denounce a monopoly in the manufacture of a necessity of life, such as sugar, but only a monopoly in interstate and international trade or commerce. The majority further con-

¹⁸ 168 U.S. 144, 176 (1897).

¹⁹ 156 U.S. 1, 12 (1895).

tended that the acquisition by the sugar company of its competitors did not constitute a combination to restrain or monopolize interstate commerce, because it related solely to the *manufacture* of refined sugar in one city and state only, although the product afterward entered into interstate commerce. In the opinion of the Court, "Commerce succeeds to manufacture, and is not a part of it."

Justice Harlan vigorously dissented from these views upon the ground that the Act of 1890 did not strike simply at the manufacture of articles which are recognized subjects of commerce, but at combinations that unduly restrain, because they monopolize the buying and selling of articles which are to go into interstate commerce. He contended that the case fell within the purview of the Act because the sugar controlled by the monopoly, even though manufactured in one state, *entered into interstate commerce* and that to the federal government alone belonged the power of regulating the interstate relations of corporations engaged in interstate commerce. He insisted that the states were powerless to control the interstate operations of giant corporations, and unless the federal government did so there would be a "twilight zone" wherein no power of regulation could be exercised. He expressed his views on the scope of the federal government's power in regard to interstate commerce as follows:

While the states retain, because they have never surrendered, full control of their completely internal traffic, it was not intended by the framers of the Constitution that any part of interstate commerce should be excluded from the control of Congress.²⁰

The Sugar Trust opinion for the time being vitiated, in very large degree, the federal control of trusts and monopolies. The only successful prosecutions conducted by the government in the next few years were those directed against railroad rate combinations and labor unions. Since a railroad was in itself a business directly engaged in interstate commerce, the issue in such cases was not federal control of production but the regulation on commerce itself and the dictum in *U. S. v. E. C. Knight Co.* did not apply. Thus in two divided opinions, Justice Harlan voting with the

²⁰ *Id.* at 42.

majority in both cases, given in *U. S. v. Trans-Missouri Freight Association*,²¹ and *U. S. v. Joint Traffic Association*,²² the Court held that an "association" formed by several western railroads to fix rates was monopolistic in character and hence violated the Sherman Act.

In a unanimous opinion in *Addyston Pipe and Steel Co. v. United States*,²³ the Court took at least one short step toward recognition of the intimate relationship between commerce and production. Here it held that a combination entered into by several pipe manufacturers, which divided the pipe market along regional geographic lines, and which fixed the prices of pipe through collusive bidding by members of the combine, had a *direct effect* upon interstate commerce and was therefore illegal under the Sherman Act.

The next important case was that of the *Northern Securities Company v. United States*,²⁴ in which Justice Harlan delivered the opinion of the Court. As the voice of the majority, he asserted the principles which he had developed in his dissent in the *Knight* case. It represented a decision which did much to "revitalize" the Sherman Anti-Trust Act.

The suit at issue was against the Hill-Morgan railroad combine, which had arranged to put a stop to competition in the northern and northwestern sections of the U. S. by controlling under one head practically all of the railroads in that part of the country. The question to be determined by the Court was whether such a combination amounted to a restraint of trade forbidden by the Act of 1890, and whether the U. S. had the power to command these corporations to refrain from their proposed combination.

The Court, speaking through Mr. Justice Harlan, decided in favor of the government. Part of the opinion follows very closely the ideas set down by Chief Justice Marshall in *Gibbons v. Ogden*.²⁵ Justice Harlan wrote:

Congress may protect the freedom of interstate commerce by any means that are appropriate and that are

²¹ 166 U.S. 290 (1897).

²² 171 U.S. 505 (1898).

²³ 175 U.S. 211 (1899).

²⁴ 193 U.S. 197 (1904).

²⁵ 22 U.S. (9 Wheat.) 1 (1824).

lawful, and not prohibited by the Constitution . . . no state corporation can stand in the way of the enforcement of the national will, legally expressed.

The only other cases of importance on this subject in which Justice Harlan dissented, and with which he practically closed his career on the bench, were *U. S. v. American Tobacco Co.*,²⁶ and the *Standard Oil Co. v. U. S.*²⁷ In these cases the Court, while upholding the Anti-Trust Act in sweeping fashion and decreeing the dissolution of these two powerful trusts, injected the so-called "rule of reason" into the construction of the Act. The Court held that the statute only denounced a monopoly where it was "unreasonable" and there was an "undue" restraint of trade. Although Justice Harlan concurred in the decisions in these cases, he dissented sharply from the Court's reading of the word "unreasonable" into the Act of 1890. He insisted that to do so amounted to judicial legislation, and that it read into the Anti-Trust Act words not put there by Congress.

The State Police Power

Late in life, drawing on the experience of thirty-four years on the highest bench, Mr. Justice Harlan summed up the principles of the state police power which he said were "not open to question":

. . . [The police power is] the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the *public morals, the public safety and the public health*, as well as to *promote the public convenience and the common good*; and that it is with the State to devise the means to be employed to such ends, taking care that the means devised do not go beyond the necessities of the case, have some real or substantial *relation to the objects to be accomplished*, and are *not inconsistent with* its own constitution or the Constitution of the United States. . . .²⁸ (Emphasis supplied)

But what is included in the public health, safety, morals, convenience and common good? Harlan expressed his approval of many state statutes in a variety of fields including alcoholic beverages, compulsory vaccination, the use of the flag of the

²⁶ 221 U.S. 106 (1911).

²⁷ 221 U.S. 1 (1911).

²⁸ *House v. Mayes*, 219 U.S. 270, 282 (1911).

United States, running of freight trains on Sunday, monopoly in the insurance business, zoning, charter of a fertilizer manufacturing company and the manufacture of oleomargarine.

Strongly opposed to "judicial legislation",²⁹ Harlan maintained it was for the Legislature, not the Court, to determine the need for legislation in any area. Upholding a Pennsylvania statute prohibiting the manufacture of oleomargarine he wrote:

If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive . . . their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.³⁰

In legislative areas which may belong to the national government, but where Congress has not acted, he held that the state legislatures may exercise their police power. Moreover, in the area of liquor prohibition, he felt that only the states could exercise effective control.

As if to underline these views, expressed in the dissent in which Justice Harlan joined in *Leisy v. Hardin*,³¹ Congress passed the Wilson Act in 1891, which provided that imports of alcoholic beverages were subject to the laws of the state enacted in the exercise of its police powers in the same manner as they applied to domestic liquors.³²

Upholding an Ohio statute requiring passenger stops of interstate railroad trains,³³ Harlan quoted his previous opinion in *Hennington v. Georgia*:

. . . the legislative enactments of the States, passed under their admitted police powers . . . are to be respected in the courts of the Union until *they are superseded and displaced by some act of Congress* passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress . . .³⁴
(Emphasis supplied)

²⁹ See the discussion in Abraham, "John Marshall Harlan: A Justice Neglected," 41 Va. L. Rev. 876 (1955).

³⁰ *Powell v. Pennsylvania*, 127 U.S. 678, 686 (1888).

³¹ 135 U.S. 100, 125 (1890).

³² Dowling and Edwards, *American Constitutional Law* 408 (1954).

³³ *Lake Shore & Mich. So. R'y v. Ohio*, 173 U.S. 285, 291 (1899).

³⁴ *Hennington v. Georgia*, 163 U.S. 299, 317 (1896).

Thus it is apparent that in this period of American industrial and territorial expansion, the Court and Harlan emphasized the position of state police power. So much importance did Harlan attach to the police power that he believed, with the Court, that states could not bargain away the police power to mushrooming enterprises eager to secure valuable franchises and concessions—fertilizer companies, lotteries, beer and liquor companies, gas utilities, railroad companies and the like.³⁵ Further the Court warned these companies that the constitutional provision against the impairment of their contracts would not bar the exercise at some future date of the state police power.³⁶

One of Harlan's first concerns was with the actual effect of the legislation before him as well as with the intent of the legislature. If, as in the so-called Minnesota meat inspection statute, the effect of the legislation was to prohibit the importation of fresh meat into the state, that statute was held repugnant to the Commerce clause.³⁷ And in throwing-out a similar Virginia law he wrote:

[A state] may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.³⁸

Although Harlan supported the positive use of the state police power he nonetheless held to a broad, national interpretation of the powers of the federal government. Where state statutes excluded products of other states or discriminated against out-of-state corporations he held them to be unconstitutional as repugnant to the commerce clause. For example, a Louisiana quarantine statute upheld by the Court, forbade the "interstate shipment" of cattle between Texas and Louisiana because of anthrax in Texas. To Harlan this was an unjustifiable burden on all shipment of cattle and an improper burden on interstate commerce.³⁹

³⁵ *Douglas v. Kentucky*, 168 U.S. 488 (1897) (opinion by Harlan); *Stone v. Mississippi*, 101 U.S. (11 Otto) 814 (1879).

³⁶ *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

³⁷ *Minnesota v. Barber*, 136 U.S. 313 (1890).

³⁸ *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891).

³⁹ *Smith v. St. Louis & S.W. R'y Co.*, 181 U.S. 248, 259 (1901).

He considered the exaction of wharfage duties by a municipality a "burden on the constitutional privilege of entering the port of any city,"⁴⁰ and the Tennessee tax on the out-of-state business of an out-of-state corporation with a warehouse in Tennessee "a clever device . . . to sustain its government by taxation upon interstate commerce."⁴¹ But when the Court held unconstitutional an attempt by Texas to collect a one per cent tax on gross receipts from interstate railroad lines he said the tax was valid as an occupation tax upon business within the State of Texas.⁴²

Nevertheless, Mr. Justice Harlan was not willing to say that at all times the commerce power should transcend the state police power. According to his rule of thumb, police power should prevail over commerce if the statute in question affected commerce "only incidentally, to some extent or for a limited time or in a limited degree". In his dissenting opinion supporting an Iowa prohibition on the sale and import of intoxicating liquor he wrote:

The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society, than their power in respect to trade and commerce having no possible connection with those subjects.⁴³

In all of the cases on this subject Mr. Justice Harlan, whether agreeing or dissenting, stood resolutely for the freedom of commerce and the rights of citizens of other states. He seemed to feel that the commerce clause and Article I, Section 10, were two of the chief compromises of the Constitution, striking as they did at the vexatious statutes which the colonies had enacted to discourage the importation of articles competing with their own products. While he upheld inspection laws and other similar enactments when they appeared to have been enacted in good faith, and for the purpose of promoting commerce, he was quick to express his disapproval of such as appeared to have been enacted for the ulterior purpose of discriminating against commerce from other states.

⁴⁰ *Transportation Co. v. Parkesburg*, 107 U.S. 691, 707, 710 (1882).

⁴¹ *Ficklen v. Shelby County Taxing District*, 145 U.S. 1, 24, 28 (1892).

⁴² *Galveston, Harrisburg & San Antonio R'y. Co. v. Texas*, 210 U.S. 217, 228 (1908).

⁴³ *Bowman v. Chicago & Northwestern R'y Co.*, 125 U.S. 465, 524 (1888).

Harlan brought the same respect for substance to his consideration of that other, equally thorny, conflict between the state police power and the rights guaranteed under the Thirteenth and Fourteenth Amendments. Up until the Civil War the all-important defense of property rights was rooted in the contract clause of the Constitution dealing with the impairment of contracts. After the passage of the Fourteenth Amendment, "deprivation of property without due process" and alleged "denial of equal protection" found their way into *certiorari* petitions filed before the Court on behalf of commercial and industrial interests.

In *Smyth v. Ames*, the celebrated Nebraska rate case, Mr. Justice Harlan found that the rates fixed by the Nebraska statute were so low that the railroad companies had suffered an actual loss in the years 1891-93. The law kept the railroads from receiving reasonable and just compensation thereby depriving them of property without due process of law and of the equal protection of the laws.⁴⁴

Upholding an Alabama regulation of combination and monopoly in the fire insurance business he found that a provision where policyholders were entitled to recover 25 per cent above the amount of the policy did not deprive the companies, members of a rate association, of property without due process.⁴⁵ He said that the Farm Drainage Act of Illinois was a proper exercise of the police power, that the railroad had to replace at its own expense a bridge as part of a swamp drainage scheme of public improvement, and that the cost of replacement could not be construed as a deprivation of property without due process.⁴⁶ He concurred in Justice Peckham's opinion that zoning laws do not deny a property owner equal protection of the laws when they establish commercial and residential classifications of the city.⁴⁷ In another dissent joined by Mr. Justice White and Mr. Justice Day, and supported, separately, by Mr. Justice Holmes, he held that the New York regulation of maximum hours of work in bakeries did not violate freedom of contract guaranteed by the Fourteenth Amendment, and that the decision of the Court

⁴⁴ *Smyth v. Ames*, 169 U.S. 466 (1898).

⁴⁵ *German Alliance Insurance Co. v. Hale*, 219 U.S. 307 (1911).

⁴⁶ *Chicago, Burlington & Quincy R'y Co. v. Illinois ex rel. Drainage Commissioners*, 200 U.S. 561 (1906).

⁴⁷ *Welch v. Swasey*, 214 U.S. 91 (1909).

“would seriously cripple the inherent power of the States to care for the lives, health and well-being of their citizens.”⁴⁸

While Harlan’s most vigorous and fervent opinions were written in defense of civil rights and civil liberties, his concept of the scope of the state police power and the federal-state relationship is a further contribution to the evolution of constitutional law.

Taxing

Justice Harlan’s views on the taxing power of a state were interestingly manifested in the case of *Ficklen v. Shelby County Taxing District*.⁴⁹ Shelby County, Tennessee, imposed a license fee and a tax on the profits of a representative of an out-of-state concern. The Court upheld the county tax and fee even though Ficklen’s profits were derived from interstate business. Harlan in dissenting argued that since Ficklen’s business was purely interstate, the county could not tax or impose a fee on the profits of the said business.

The problem of what constitutes direct taxation faced the Court in the case of *Pollock v. Farmers’ Loan and Trust Company*.⁵⁰ A majority of the Court decided that a law that levied taxes on income from real estate and from personal property constituted *direct* taxation, and thereby held the recently enacted Federal Income Tax Act unconstitutional. Harlan in dissenting, argued—and it was one of his most vehement, most publicized dissents—that “a tax on *income* derived from real property ought not to be, and until now has never been, regarded by any court as a direct tax on such property within the meaning of the Constitution.” Harlan correctly warned that the effect of the Court’s decision would be to make a constitutional amendment necessary for the imposition of an income tax.

Racial Segregation

All of Harlan’s spirit and concern for the Constitution pour forth with renewed vigor in his most famous dissents, dealing with human rights in those cases in which the Supreme Court “by a subtle and ingenious verbal criticism sacrificed the substance and the spirit of the recent amendments of the Constitution. . . .”⁵¹

⁴⁸ *Lochner v. New York*, 198 U.S. 45, 65, 73 (1905).

⁴⁹ 145 U.S. 1, 24 (1892).

⁵⁰ 157 U.S. 429; 158 U.S. 601, 638, 665 (1895).

⁵¹ *Civil Rights Cases*, 109 U.S. 3, 26 (1883).

Mr. Justice Harlan's opposition to racial segregation first came to attention in *Plessy v. Ferguson*.⁵² As the only dissenter in this case and, paradoxically, the lone Southerner then on the bench, he brought into question the general purpose of the Thirteenth and Fourteenth Amendments:

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race. . . . Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude".⁵³

One of Justice Harlan's statements in *Plessy v. Ferguson* has come to be an especially famous one, its doctrine achieving its most recent attention through the 1954 public school segregation cases, almost 60 years later:

Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.⁵⁴

Justice Harlan expressed deep concern for racial minorities, especially for the Negro, but also for the Chinese,⁵⁵ and American Indian.⁵⁶ Harlan's dissents in *Berea College v. Kentucky*,⁵⁷ the *Civil Rights Cases*,⁵⁸ *Giles v. Harris*,⁵⁹ and two railroad "Jim Crow" cases, covered additional aspects of the problem. Of these, Harlan considered his dissent in the *Civil Rights Cases*⁶⁰ as his most notable. Here, the majority of the Court held that Congress had no power under the Fourteenth Amendment to protect the Negro against discrimination practiced by individuals. Harlan

⁵² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁵³ *Id.* at 554, 555.

⁵⁴ *Id.* at 559.

⁵⁵ *Baldwin v. Franks*, 120 U.S. 678, 694 (1887); and *Chew Heong v. United States*, 112 U.S. 536 (1884).

⁵⁶ *Elk v. Wilkins*, 112 U.S. 94, 110 (1884).

⁵⁷ 211 U.S. 45, 58 (1908).

⁵⁸ 109 U.S. 3, 26 (1883).

⁵⁹ 189 U.S. 475, 493 (1903).

⁶⁰ 109 U.S. 3, 26 (1883).

believed, however, that precisely such protection was the intent of the framers of the amendment.

Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude.⁶¹

In the two "Jim Crow" cases dealing with both interstate commerce and segregation of races, Harlan was clearly opposed to the seemingly contradictory doctrine rendered by the Court's majority. He failed to see how the Court, after refusing a few years before to *uphold* a Louisiana statute *forbidding* the separation of races on carriers within the state,⁶² could uphold Kentucky and Mississippi statutes *requiring* separation,⁶³ on the basis that the first case involved interference with interstate commerce while the last two did not!

Later cases on racial segregation demonstrated clearly, in one way or another, the basic ideas that were present in all of Harlan's dissents regarding civil rights. He felt that the Thirteenth Amendment meant much more than mere exemption from actual slavery; to him it represented far more than simply preventing one person from owning another as property. He contended that the people, in adding the Thirteenth Amendment, could not have intended simply to destroy the institution of slavery, then remit those who had been set free to the states which had held them in bondage, and then *also* expect those states to protect them in the rights which necessarily grew out of the freedom that those very states evidently did not desire them to have. Harlan held, consequently, that the adoption of the Thirteenth and Fourteenth Amendments necessarily gave freedom which involved affirmative immunity from, and protection against, all discrimination because of race, in respect of such civil rights as belong to free men of other races.

Harlan thus refused to deny to Congress the legislative au-

⁶¹ *Id.* at 48.

⁶² *Hall v. DeCuir*, 95 U.S. (5 Otto) 485 (1878).

⁶³ *Chesapeake & Ohio Ry. v. Kentucky*, 179 U.S. 388 (1900); *Louisville, N.O. & T. Ry. v. Mississippi*, 133 U.S. 587 (1890).

thority to define and regulate the entire body of civil rights which citizens are supposed to possess and enjoy. In his judgment, he was simply advocating the existence of free men in our society, based on his belief in the role of the Constitution as the people's instrument for the attainment of the basic rights which were intended for them by the authors of that document.

Civil Liberties

While Harlan's statements from *Plessy v. Ferguson* have come to general notice recently in connection with racial questions, his expressions on other aspects of civil liberties also deserve attention.

Some of the most critical questions presented to the Court just before and during Justice Harlan's occupancy of the high bench appeared to center on the meaning of the Fourteenth Amendment. Did the Amendment confer on the federal government the power to enforce upon the states restrictions similar to those in the first eight amendments, which relate only to the federal government's power? It was a clearly joined issue: One side saw the amendment as only conferring the power on the federal government to prevent state actions when the privileges or immunities "owe their existence to the federal government, its National character, its Constitution, or its laws".⁶⁴ The opposing view, championed by Justice Harlan, was that the privileges and immunities concerned "embrace at least those expressly recognized by the Constitution . . . and placed beyond the power of Congress to take away or impair."⁶⁵

Justice Harlan came to the Court after a pattern of decision on these questions had already been set. In the *Slaughter House Cases*,⁶⁶ decided in 1873—four years prior to his appointment to the bench—the Court had rejected the claim that power was conferred on the federal government through the Fourteenth Amendment to review the actions of states in the broad areas of personal and property rights outlined in the first eight amendments. It said that the effect of such a doctrine would be:

⁶⁴ Justice Miller in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

⁶⁵ *Maxwell v. Dow*, 176 U.S. 581, 606 (1900).

⁶⁶ 83 U.S. (16 Wall.) 36 (1873).

. . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress . . .⁶⁷

Justice Harlan spoke forcibly on his position that the Supreme Court could not select the types of rights which it believed the Fourteenth Amendment was to protect. He stood for including all the rights enumerated as guaranteed in the first eight amendments. *All these rights, therefore, would be in the orbit of federal protection against encroachment by the states.* Among these rights is that requiring indictment by a grand jury.

In the words of Justice Harlan in his dissenting opinion in *Hurtado v. People of California*:

My brethern concede that there are principles of liberty and justice, lying at the foundation of our civil and political institutions, which no State can violate consistently with that due process of law required by the 14th Amendment in proceeding involving life, liberty or property. Some of these principles are enumerated in the opinion of the court. But, for reasons which do not impress my mind as satisfactory, they exclude from that enumeration the exemption from prosecution, by information, for a public offense involving life.⁶⁸

A similar question occurred in *Maxwell v. Dow*.⁶⁹ In this dissent, Justice Harlan inveighed against the idea that the Court could select those areas of rights in which federal protection would be afforded and those areas in which state protection would be the only available recourse. He said that all the rights of the Bills of Rights:

are equally protected by the Constitution. No judicial tribunal has authority to say that some of them may be abridged by the States while others may not be abridged. . . . If some of the guarantees of life, liberty and property which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have in the judgment

⁶⁷ *Id.* at 77, 78.

⁶⁸ 110 U.S. 516, 546 (1884).

⁶⁹ 176 U.S. 581 (1900).

of some ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. . . .⁷⁰

Another important civil right is that concerned with immunity against self-incrimination. In *Twining v. New Jersey*, Justice Harlan would not concede that this privilege was not granted federal protection against state violation by virtue of the Fourteenth Amendment.⁷¹

A question of freedom of the press arose in another case, *Patterson v. Colorado*.⁷² This involved the question of publication of material critical of a court during the process of a trial. Justice Harlan delivered a powerful rebuke to his colleagues who had held that while "previous restraints" cannot be practiced upon the press, subsequent punishment may be justified:

. . . As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that when the Fourteenth Amendment prohibited the States from impairing or abridging the privileges of citizens of the United States it necessarily prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press. . . .⁷³

Except for the health issue involved, it would appear somewhat out of keeping with Justice Harlan's usual role that he wrote the majority opinion which upheld the right of a state to impose a compulsory vaccination law. But in *Jacobson v. Massachusetts*,⁷⁴ he wrote that such a requirement was admissible and would be in violation of constitutional guarantees only if it was "beyond all question, a plain, palpable invasion of rights secured by the fundamental law. . . ."

IV

"Solitude is the fate of great men." With these words Windelband opened the chapter on Immanuel Kant in his *History of Modern Philosophy*. Justice Harlan was basically a solitary man. Even if he was not an object of malice among his colleagues he

⁷⁰ Id. at 616, 617.

⁷¹ 211 U.S. 78, 114 (1908).

⁷² 205 U.S. 454 (1907).

⁷³ Id. at 464.

⁷⁴ 197 U.S. 11, 31 (1905).

was nonetheless a superb individualist and remained steadfastly independent in his thinking and judgment. Thus he, as well as Holmes, has been called the "Great Dissenter."⁷⁵ His two most celebrated dissenting opinions—judgments that were destined to become the majority opinion of the U. S. Supreme Court many decades later—were delivered by himself alone, joined by no one else.⁷⁶

Harlan was a man of sincerity and, in common with most sincere men, he did not easily compromise. Moreover, he was remarkably consistent in his attitudes and thus predictable. As an uncompromising man, he was often militant in his opinion, even at the risk of standing alone. Indeed, he seemed to be unafraid of such solitude, and rather might have enjoyed it, for his individual life was a spiritually full and rich one: ". . . each night he sank into slumber, with one hand upon the Bible and the other upon the Constitution!"⁷⁷

Above all, he was truly a moral person. Three moral qualities were attributed to him by Chief Justice White: a sense of supreme importance attached to the duty of justice; his noble purpose to do justice; and his reverence for the faith in the Constitution.⁷⁸ Out of these qualities sprang his humanitarianism "to see to it that the weak were not overmastered by the strong."⁷⁹ Out of them flowed his liberal nationalist creed. He was one of those few men on the highest bench who represented the integration of high moral principles into his duty. In a sense he was an embodiment of the lofty cause for which the Supreme Court stands.

Thus his philosophy was merely the expression of the above qualities of his personality. We may classify his philosophy into two categories: namely, his basic attitude toward the law itself, and his constitutional doctrine.

Justice Harlan regarded the law as something more than a *mere instrument of expediency*. He was first of all reluctant to invalidate a law unless it was "plainly and palpably" in conflict

⁷⁵ See Abraham, "John Marshall Harlan: A Justice Neglected," 41 Va. L. Rev. 871 (1955).

⁷⁶ *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896); *United States v. E. C. Knight Co.*, 156 U.S. 1, 18 (1895).

⁷⁷ As quoted in Abraham, *supra* note 75 at 875.

⁷⁸ Proceeding on the death of Mr. Justice Harlan, 222 U.S. XXVI (1912).

⁷⁹ *Ibid.*

with the Constitution.⁸⁰ He took a firm position against "judicial legislation." On the bench, he was a moral person called upon to uphold the ideals of the Constitution. Off the bench, however, he was a realist who knew the pragmatic significance of the actions of the Court. He was, when off the bench, a shrewd practical man with many diverse interests. His opinions often reflected this aspect of his personality. Yet, basically, his chief concern was the law, as set forth in the Constitution and legislative enactments. But when it comes to just what it is that makes the law, his view was unique and clear: It is the "internal sense," the "intent" of the law and not its letter that counts:

"It is not the words of the law but the internal sense of it that makes the law: the letter of the law is the body; the sense and reason of the law is the soul."⁸¹

[F]ull effect [should] be given to the intent with which . . . [the constitutional provisions] were adopted.⁸²

If, since John Marshall, the practice of judges is to look into the legislative intent for a guide to the sound construction of a law, then Justice Harlan lifted this practice to the level of a philosophical principle. Thus, it was not because of his captivity by the letter of the law, but, on the contrary, because of his respect for its "internal sense" and "reason," that he tried to "carry-over" the entire first eight amendments of the Constitution to the due process clause of the Fourteenth Amendment. He knew and understood the "intent" of the post-war amendments, and tried to be true to it. It may be said, therefore, that he, above all others, had a kind of religious reverence for the Constitution as the fundamental instrument of the ideals for which American democracy stands. A fervent Marshall disciple, he keenly sensed the vital role of the Court as the ultimate guardian of the Constitution.

Harlan was a militant justice, yet he was by no means extreme in his judgment. Throughout his service on the bench he tried to be true to the intent and purpose of the Founding Fathers as he interpreted them in his best conscience. Thus, whenever possible, he upheld the state legislatures in matters of social and eco-

⁸⁰ *Lochner v. New York*, 198 U.S. 45, 68 (1905).

⁸¹ *Civil Rights Cases*, 109 U.S. 3, 26 (1883).

⁸² *Ibid.*

conomic welfare. But in the matter of interstate commerce he was consistently nationalistic. He was concerned with the preservation of the constitutional institution, and it was his far-reaching insight that prompted him to deny the state police power in the field of interstate commerce under modern economic conditions. In the field of civil rights he also favored federal actions, for he regarded the States as too inefficient and at times too reluctant to give full effect to the "intent" of laws pertaining to civil rights. Hence, he read not the letter of the "equal protection of the laws" clause, but its "internal sense", when he declared:

The thin disguise of "equal" accommodations . . . will not mislead any one, nor atone for the wrong this day done.⁸³

Thus, instead of getting captivated by the letter of law, he argued, in the words of Professor Clark, that "when by a logical and grammatical construction a law could be made to correct the evils intended to be remedied by it, . . . this should be done."⁸⁴ In the matter of civil rights, he was further invigorated by his moral principle of humanitarianism. In this he was far ahead of his colleagues and consequently felt constrained to play the role of sole dissenter in the famous *Plessy v. Ferguson* case.⁸⁵ And it was precisely for this moral quality of his personality, his insistence on respecting the intent and purpose of a law as he saw it, that his colleagues could not join with him in many cases. Yet it was this very quality that makes him a great justice four and a half decades after his death.

In general he did not take any extreme position with respect to the relative powers of federal and state government. If he was basically nationalistic, he was equally concerned with the reserved powers of the states. Whenever possible, he favored the state police power and took an affirmative attitude toward state legislation; yet he was emphatic with regard to national supremacy. His view on this matter was, again, essentially that of Justice John Marshall, as expressed in *McCulloch v. Maryland*.⁸⁶ The main difference between him and Marshall would be that the latter played the role of a constitutional pioneer, while Harlan struggled

⁸³ *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896).

⁸⁴ Clark, *The Constitutional Doctrine of Mr. Justice Marshall Harlan* 15 (1915).

⁸⁵ 163 U.S. 537 (1896).

⁸⁶ 17 U.S. (4 Wheat.) 316 (1819).

to maintain the torch of Marshall's philosophy in a period of "a very damp season."⁸⁷

Looking back to his achievements one cannot fail to sense the great debt which the generations after him, as well as the generations yet to come, owe this solitary dissenter. To the extent that his philosophy contains the touch of immortality, he will come to be remembered and cherished by his people as long as American democracy survives.

⁸⁷ Corwin, *Constitutional Revolution*, Ltd. 89 (1941).

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