JUSTICE JOHN MARSHALL HARLAN:
DEFENDER OF INDIVIDUAL RIGHTS

DISSERTATION

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By

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Since the demise of the "separate but equal" doctrine on May 17, 1954, one justice, John Marshall Harlan, the only member of the Supreme Court who opposed it at its birth, has become the center of much attention by students of constitutional law. Now that his classic remark, "the Constitution is color-blind," has replaced the "separate but equal" doctrine, it is timely to learn more about this vigorously independent jurist, who, until in recent years had been largely neglected.

It is the purpose of this paper to analyze this man who has suddenly reappeared as the precursor of so much that has emerged from Supreme Court decisions in the last half decade. More specifically, my goal is to describe, first, in general terms, his Kentucky heritage and the legal, military, and political background from which he grew before coming to the highest bench in the land, and second, and in more particular terms, the judicial role he played during his more than three decades on the Court.

The period of his service on the bench, 1877 to 1911, was one of tremendous change—social, economic, and political. To facilitate the analysis of Mr. Justice Harlan's work on the court, this study has been organized under five headings conforming to five of the more significant problems these changes in American society have presented for the
Court's consideration: first, the constitutional questions resulting from the rights guaranteed to the negro by the Civil War Amendments; second, the issues raised by the attempts of the federal government to cope with the power of big business, as reflected in the Interstate Commerce Act of 1887 and the Sherman Anti-Trust Act of 1890; third, the interesting constitutional questions concerning the rights of individuals accused of crime—including the inhabitants of the colonial areas acquired by the United States after the Spanish-American War; fourth, the issues arising from the social legislation in behalf of the industrial worker, and finally, the constitutional problems through such policies as the Income Tax law of 1895.

At this point two matters should be emphasized: first, that the biographical section on Harlan is not meant to be definitive, and second, that there has been no attempt to discuss Harlan's views on the full range of constitutional provisions, even such a major one as the commerce power.

This study is an analysis of what this writer believes to be the most striking principles of Justice Harlan's constitutional philosophy; namely, a profound respect for the dignity of the individual and a forthright defense of the government's right to protect that dignity. Displaying an intense independence of mind, Justice Harlan, through numerous dissenting opinions, became a vigorous defender of the
individual—the Negro seeking the rights which the United States Constitution guarantees, the farmer and small businessman fighting the predatory activities of the big railroads and industrial monopolies, the laborer seeking protection against his exploitation by management, the person accused of crime struggling to assert his full legal rights, both procedural and substantive, and finally, the taxpayer trying to establish a tax system more equitable in its relation to the distribution of income. In all these areas Justice Harlan supported the individual's attempts to achieve his full potential when threatened by some power greater than that of the individual concerned. He believed that it is through the maintenance of full intellectual, social, and political growth that the dignity of the individual can be preserved.

But the object of this study is not only to demonstrate the depth of Justice Harlan's faith in these principles but also to make clear his confidence in the role of government as an instrument through which they can be maintained. Therefore, what this paper hopes to show is that Justice Harlan's constitutional philosophy, as revealed in his many opinions, conceived of the United States Constitution as being based upon the fundamental tenets of the dignity and integrity of the individual and that the government must be empowered to promote and defend that principle.
This philosophy of Justice Harlan's was a defense of individualism and positive government, which at first glance may appear paradoxical because of the frequent association of individualism with the laissez-faire philosophy. What needs to be emphasized at the outset, therefore, is that individualism is used here to refer to the doctrine which assumes a supreme worth in every human being. The state serves the individual in providing and maintaining an environment for self-expression of the individual's potentialities. When it does not ignore the duties of the individual toward the rights of the minority, the philosophy of individualism is an essential element in the democratic process.

It is in this context that Justice Harlan can be described as both an individualist and a positivist, and it is this combination which makes him the personification of his time—a mixture of the nineteenth century emphasis on individualism and the twentieth century trend toward positive government. This paper will attempt to demonstrate that Justice Harlan maintained this position throughout his judicial career.
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CHAPTER I

THE MAKING OF A JUDGE

Forbears and Legacies

John Marshall Harlan's earliest American ancestor was George Harlan, a Quaker from Durham, England. When still a young man, he moved to County Down, Ireland, where he lived until coming to New Castle, Delaware, in 1687. In 1695 he was Governor of Delaware and later settled in Chester County, Pennsylvania. His grandson, George, settled in Frederick County, Virginia, where he became a member of the Presbyterian church which has since been the church of the Harlans. George's son James, at the age of 19, went to Kentucky in 1774, and his son, also named James and the father of the subject of this study, was born in 1800 at Harlan Station in what is now Boyle County.¹

Young James Harlan obtained an elementary education and then worked for five years in a mercantile house. At the end of that time he took up the study of law and in 1823, upon admission to the bar, began the practice of law in Harrodsburg, Kentucky. For six years he worked in the office of Commonwealth Attorney and in 1835 was elected Representative to Congress on the Whig ticket, serving two terms. When he had completed his second term in Congress, James

Harlan was one of the leaders of the Whig Party in Kentucky, which at that time was the dominant party in the state. In 1840 he was elected Secretary of State of Kentucky and was a delegate to the national convention which nominated William Henry Harrison for President. Eight years later, he was elected to the lower house of the Kentucky legislature and in 1851, after refusing the Whig nomination for Congress from the Ashland district, was elected Attorney-General of Kentucky.

Throughout his political career, James Harlan, like most of the Whig leaders in his state, was a staunch defender of the Union in the entire period before the Civil War and until his death in 1863. He was vehemently opposed to secession and in March, 1861, played an active role in preventing the passage by the State Legislature of a resolution which was a first step in the drive by the Southern sympathizers in Kentucky for secession. Together with such men as James Speed and John J. Crittenden, he formulated in May, 1861, a plan for the distribution of the "Lincoln guns" to the Unionists in Kentucky. An emancipator but not an

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abolitionist, he set free his slaves before the Civil War. In recognition of his contribution to the Union cause in Kentucky, as well as his legal abilities, Lincoln appointed him Federal District Attorney of Kentucky, an office he held until his death.

Thus can be seen the family background and political environment in which John Marshall Harlan was raised. Born in 1833, he was one of nine children, six sons and three daughters, of James and Eliza (Davenport) Harlan. What had he obtained from this heritage? The fact that he was named after John Marshall seems to suggest that his father at least had respect for the great jurist and possibly wished his son to choose law as a career. Certainly John must have been influenced by the fact that law and politics were of considerable importance in his environment. His Presbyterianism was another legacy. One writer has said: "In his religious convictions he was a Presbyterian of the strictest school, though broadminded and generous in his views. He was a regular church attendant, taught every week a Bible class, and was a firm believer in the rigid observance of Sunday." Further indication of these legacies of respect for the law and Presbyterianism is in an often quoted, if apocryphal, story that Harlan went to bed at night with two

books always by his side: the U. S. Constitution and the
Bible. It has been reported by R. T. Duke that he was very
fond of Justice Peckham and the latter twitted him about his
Presbyterian predilections and in turn was twitted by Harlan
about being a Democrat:

On one occasion Justice Harlan was explaining
to his brethren on the bench that he would be forced
to absent himself from Court on the following day
to attend a Presbyterian Assembly.
"You are such a good Presbyterian, Harlan,"
said Justice Peckham, "that I don't see why you are
afraid to die."
"I would not be afraid," responded Justice Har­
lan, "if I were sure that in the next world I would
not turn up at Democratic Headquarters."

Mr. Duke also goes on to point out that at another time
a Democratic friend of Harlan's gave him a rare copy of Madison's Debates—which Harlan had much desired—and also a
bottle of 25-year-old apple brandy. When he did so, he told
Harlan that he hoped they would make him a good Democrat.
To this Harlan replied, "Sir, if I thought that, I would
break the bottle—after I had emptied it."

Such anecdotes tell something of Justice Harlan's char­
acter. His devotion to Presbyterianism may partially explain
his respect for the dignity of the individual at the same
time his apparent fondness for apple brandy seems to indicate
that he was too independent to allow the church's temperance
leanings to force him into remaining a teetotaler.

Other factors in Justice Harlan's background also explain the independence of character and devotion to individual integrity which became so apparent during his judicial career. In addition to his Presbyterianism the fact of his Quaker ancestry should not be ignored. The extent to which the characteristics of this vigorously independent group played an active part in the molding of Justice Harlan is impossible to measure but it is not inconceivable that some influencing values were passed on to Justice Harlan through this ancestry.

The fact that Kentucky was frontier country in the 1830's may also explain the vigorously independent character of Harlan, so typical of frontier inhabitants. His great-uncle, Silas Harlan, was one of the early settlers in Kentucky, having come there from Virginia in 1774 with Harlan's grandfather, James. Silas, like Justice Harlan, was a big man—six feet, two inches tall. As a major, he commanded a company of scouts for General George Rogers Clark, who said of him, "He was one of the bravest and most accomplished soldiers that ever fought by my side." He was killed at the Battle of Blue Licks at the age of thirty. In honor of his memory, Harlan County bears his name.7

John Harlan's respect for the law and the Constitution, his Presbyterianism and devotion to the Union and his frontier

background are, without doubt, only a few of the legacies John Marshall Harlan received from the heritage roughly outlined here, but certainly these are among the dominant ones that will continue to be apparent as his decisions are analyzed.

Education

John Marshall Harlan was born in what is now Boyle County, Kentucky, on June 1, 1833, at Harlan Station which was founded in 1778 by his great-uncle, Silas. It is located approximately three miles southwest of Danville, the county seat. The area in which Harlan was born was largely rural. Danville is the largest city in Boyle County and in the 1830's had less than two thousand population. The county was described in 1848 as having very rich soil and as being devoted to the production of stock and hemp. The people were "generally independent in their circumstances, well educated and intelligent." Since Justice Harlan's father was elected to Congress when John was two years old and served for two terms, it can

8. Boyle County was formed in 1841 from parts of Mercer and Lincoln counties.


10. Idem.
be assumed that the economic circumstances of the Harlan family were well above the average.

After completing his elementary and secondary education, Harlan entered Centre College in Danville, from which he received his bachelor's degree in 1850. Because of the important role it played in the education of many Kentucky leaders and because it undoubtedly had an important influence on the character and attitudes of Justice Harlan, it might be appropriate to spend a moment describing this school in which Harlan spent four of his most impressionable years.

For forty years before Centre College was founded, Kentucky Presbyterians were deeply interested in education and had attempted to establish a college in that region of Kentucky. Their first efforts had led to the founding of Transylvania Seminary in Danville. Because it was unsuccessful financially, it was moved to Lexington, where it was felt there would be a greater demand for its services. The new institution had hardly got under way in the 1790's when theological and dogmatic differences resulted in a division between liberal and conservative elements within the Presbyterian group. The results of this division have been described by Dr. William C. Young in his address at his inauguration as President of Centre College in 1889:

In furtherance of the wild and universal propaganda inaugurated by the French revolutionists, its emissaries of the bloodborn atheistic young republic had penetrated even to this distant wilderness land.
Sympathy with their political views had prepared a large number of the prominent citizens of Lexington to accept their religious, or rather irreligious, sentiments and theories.11

Dr. Young pointed out how those with "irreligious" views took over the leadership of the Lexington Seminary. Hence, at its spring meeting of 1794, the Presbytery of Transylvania resolved to establish a grammar school and seminary at Pisgah, the seat of a strong Presbyterian church just nine miles from Lexington, and so the Kentucky Academy was established. In 1798 the Boards of the two schools reconciled their differences and agreed to unite; and from this merger was established Transylvania University.

Twenty years later, however, another controversy broke out over the gradual lessening of Presbyterian influence and control. For example, the Board of Trustees of twenty-one members contained only seven Presbyterians. In 1817 a Unitarian was elected president.

Thus the Presbyterians had lost control of a second college. Still determined, they established a third college "whose religious atmosphere would be what they desired, and where the young men of the church who were preparing for the work of the ministry might be educated free from contaminating

influences." Thus Centre College was founded in Danville in 1819, although it was under state control until 1824 when the Presbyterian goal of complete synodical control was achieved.\textsuperscript{13}

Not only was Harlan under the influence of conservative Presbyterianism at Centre College, but he very possibly may have been influenced by its President, John Clarke Young, who held the position twenty-seven years, from 1830 to 1857. Although very conservative in his religious views, Young was more liberal in his views regarding slavery. "On the slavery issue, he twice freed groups of his own slaves, but he opposed the radical demands of the abolitionists."\textsuperscript{14}

In 1889, when Dr. Young's son, William C. Young, was inaugurated as President of Centre College, Justice Harlan wrote to the latter, expressing his regrets that he was unable to attend the inauguration ceremonies. He also wrote:

\begin{quote}
I recall, with perfect distinctness, the period when, as a boy, I sat under the teachings of your distinguished father and his coadjutors, Professors Beatty, Scott, and Schaeffer—a corps of professors that would have done honor to the foremost university in this country.

The Institution over which they presided was, indeed, a power for good, not only in Kentucky,
\end{quote}


\textsuperscript{13} Ibid., p. 111. Quoted in Hewlett, p. 181.

but throughout the West and South. And I rejoice that it is still under such control as entitles it to claim the confidence of parents seeking to make sound scholars and worthy citizens.15

Almost four decades after graduation, Justice Harlan still felt strongly about the importance of the Presbyterian control. The Professor Beatty whom Harlan mentions was Dr. Ormond Beatty who became President of Centre College and has been described as "a quiet man, conscientious, an independent thinker, and not a mere retailer of other men's ideas." Justice Harlan may not have been a quiet man, but the remainder of the description could fit Harlan perfectly. Maybe it was this independence of mind that attracted Harlan to Professor Beatty.

What did the students study at Centre College when Harlan was a student there? President Groves of Centre has described the courses of study in the following words:

The course of study pursued in many respects actually was the equal of post-graduate work in the classics of our day....The emphasis...was on the classics of Greek and Roman literature studied in the original....By 1857 the work of the sophomore comprised much of the work of the junior and

15. General Catalogue of Centre College of Kentucky (1890) p. 49. Quoted in Hewlett, op. cit., p. 189
even the senior class of 1838, indicating some advancement in accomplishment.\textsuperscript{17}

The students were also required to attend daily prayers and attend church on Sunday, when there was also held a regular Bible lesson. Each week the students also participated in reading and declamation exercises, the upper classmen being required to deliver original orations.\textsuperscript{18} The college catalogue of 1848 also noted that students "also have an opportunity of attending a religious lecture from the President, once during each week."\textsuperscript{19} As further "protection" for the students "certain taverns, stores, houses, and shops were definitely 'off limits.' Attendance at any theatre, ball, dancing-party, or horse-race, during termtime was prohibited."\textsuperscript{20}

It is interesting to speculate on the influence this educational experience might have had on Justice Harlan. Although the students were subjected to rigid restrictions on their behavior, this does not necessarily indicate that the environment was not conducive to independence of mind. In fact, the dogged insistence by the school's administration, even to the point of creating new schools, that conservative

\textsuperscript{17} Ibid., p. 324.
\textsuperscript{18} Ibid., p. 325.
\textsuperscript{19} Ibid., p. 327.
\textsuperscript{20} Ibid., p. 329.
Presbyterianism be maintained without corrupting influences is certainly as vivid a display of independence as one can imagine. Like Professor Beatty, whom Justice Harlan admired, those who administered Centre College were assuredly not "mere retailers of other men's ideas" but rather were steadfast in their attempts to make Centre College the kind of school they thought consistent with the highest ideals of Presbyterianism.

There is also evidence of independence in President Young's action in emancipating his own slaves. This man, like Justice Harlan's father, was an emancipator although opposed to what appeared to be the extreme views of the abolitionists. There is apparent here an attitude of independence similar to that so prevalent in the South today—a steadfast refusal to be forced into overthrowing well-established patterns of behavior and social philosophy.

**Lawyer and Ante-Bellum Politics**

After graduating from Centre College, Justice Harlan went to Lexington to study law at Transylvania University. Before finishing he returned to Frankfort and continued his legal studies in the law office of his father and also with other lawyers who were his father's friends. In 1853, when twenty years of age, he was admitted to the bar.
Three years later he married Miss Malvina F. Shanklin of Evansville, Indiana. From this marriage came six children, of whom three were sons who later occupied prominent positions in their chosen fields: Dr. Richard Davenport Harlan (1859-1931), clergyman and educator; James Shanklin Harlan (1861-1927), lawyer and one time member of the Interstate Commerce Commission; and John Maynard Harlan, a prominent Chicago lawyer. Sons James and Richard were born in Evansville, Indiana, and John was born in Frankfort, Kentucky. All three were educated at Princeton, Richard graduating as valedictorian of his class.

Harlan was very highly regarded as a lawyer among his colleagues in Kentucky. Recalling Harlan's practice in this period, one writer said many years later:

As an advocate, he opened his argument in the most serious way, expressing his feeling of responsibility, his duty to his client as a controlling feature and his wish to keep the argument within the bounds of moderation. He developed his case with great skill, power and earnestness, and in his final appeal to the jury, his whole great body was in action. His face was flushed, his features set, his bearing was of tremendous earnestness and he appeared to the casual listener irresistible.

21. It is the son of John Maynard Harlan who is at present an Associate Justice of the United States Supreme Court.

For a more adequate understanding of Harlan's political views and activity before the Civil War, it might be well to look at Kentucky politics in general during this period, and Harlan's involvement therein.

Kentucky ceased to be a Democratic state after the emergence of Henry Clay. Due to the influence of Clay, Kentucky became one of the most solid Whig states in the Union. Between 1832 and 1851, the Democrats were unable to elect a single governor. From 1828 to 1856 the state failed to cast any of its electoral votes for the Democratic presidential candidates. Even in 1855 when the Whigs had gone into decline, the Democrats lost the gubernatorial election to the Know-Nothing party which the Whigs had joined. In the North the Whigs had joined the Republican party but in the South and Border State area they had nowhere to go, so they joined the American, or Know-Nothing party.

Justice Harlan's father, James Harlan, ran for re-election in 1855 for Attorney General on the Whig-American alliance. It was in this election, when Justice Harlan was only twenty-two, that he took part in politics for the first time. Because of the speeches he made during this campaign, in which he upheld many of the Know-Nothing principles, he said much which he found embarrassing in later years.

The Whig-American alliance, for example, opposed immigrants (especially the Irish who came in large numbers in the 1840's) as prejudiced against slavery and charged them with pauperism and crime. Catholics were also attacked as trying to gain political supremacy in America. Travelling throughout the state, Harlan advocated more restricted immigration and naturalization laws and also the repeal of state legislation permitting aliens to vote.  

The Whig-American alliance won every state office on the ticket. The next year, Harlan was called the "Young Giant of the American Party" by the *Louisville Daily Journal*. He made several speeches throughout the state in behalf of the Whig-American ticket of Fillmore and Donelson. In one speech he "proclaimed his belief that 'Americans should rule America' and said that in all cases he would vote for the son of the soil in preference to a foreigner."  

Whether Justice Harlan was speaking from deep conviction in these campaigns or merely saying what he thought to be politically expedient would be impossible to say. Considering his conservative Presbyterian background, it is very possible that the anti-Catholicism of the Know-Nothings struck a responsive chord.

25. Ibid., p. 20. Quoted from the *Frankfort Commonwealth*, May 21, 1856.
After the defeat of the Know-Nothings, the Kentucky Whigs were again opposing the Democrats alone. In 1858 Harlan was elected judge of the county court of Franklin County for a term of one year. This was his only judicial experience before his appointment to the United States Supreme Court in 1877. In 1859 he received the Whig nomination for Congress representing the Ashland district which his father had served from 1836 to 1840, but was defeated by the Democrat, Simms, by fifty votes.

In spite of his defeat, he waged "one of the most brilliant campaigns that the state had ever witnessed."26 In his campaign, however, he again took positions which he came later to regret. One author has phrased it aptly: "He did not then realize how ruthlessly the vicissitudes of war and concomitant social revolution were to tear him away from the framework of values and beliefs he had hitherto cherished."27 For example, his religious orthodoxy resulted in attacks on the Mormons. He strove to surpass the Democrats in championing slavery. He opposed settling the slavery issue through squatter sovereignty because he considered it to be founded on the tyranny of the majority, upon "the mobocratic idea which levels destruction at all written contracts

26. Ibid., p. 21.
27. Ibid., p. 24.
by which the weak are protected against the strong, that majorities can make and not set aside constitutions at pleasure." He also considered this doctrine of squatter sovereignty as a standing threat to "individuals or minorities in the enjoyment of private property, freedom of conscience, freedom of speech, freedom of the press, and the other privileges which are the birthright of American freemen."29

Whether these observations describe Justice Harlan's honest convictions in 1859 or merely are an expression of the views he found to be politically expedient is difficult to say. If they are representative of the latter, they would tell us nothing of his true philosophy other than that he was an opportunist anxious to achieve his goals by any means. If, however, these represent his honest beliefs, they do not necessarily contradict the picture that has been drawn here of a man devoted to individual rights. That he came to defend the Negro as an individual many years later is no more the mark of an individualist than is evidenced by his pre-Civil War defense of the rights of the individual slaveholder. At this time he opposed "the tyranny of majority rule" which would take from the slaveholder what had traditionally been regarded as his property. In later years he was again opposing the tyranny of majority rule which would take from

28. Ibid., p. 22.
29. Idem.
the negro what the Constitution was to regard as his rights as a freeman.

As is the case throughout this study, one can see the conflict of principles Harlan faced in his attempt to decide what is right in any controversy. Apparently the individual right of the slave became discernible to Harlan only after a war had been fought to settle the issue. That Harlan found it necessary to change his views on many vital questions is nowhere more apparent than in his attitude toward the right of secession. One month before the attack on Fort Sumter, Harlan stated:

> It must be conceded that whenever it becomes a settled fact that the people of the seceding state are unalterably opposed to the Federal Government, they should be allowed to go in peace.30

In these years preceding the Civil War, Kentucky was divided into three political groups: (1) those on the Ohio border who would stay with the Union, (2) those on the Southern border who would secede, and (3) those in the middle who wanted the Union as it was. Immediately prior to the election of 1860, these groups were realigned into two dominant groups: (1) the Democrats and (2) the Constitutional Union Party, the latter made up of old Whigs, especially those from the third group listed above led by John Crittenden, which wished to solve the slavery problem by ignoring it.

Harlan was a member of this group. In the election of 1860 the Constitutional Union party nominated Bell and Everett. The Democrats split, those in northern Kentucky supporting the northern Democrat, Douglas, and those in southern Kentucky supporting the southern candidate, Breckinridge, who was from Kentucky. The few Republicans supported Lincoln.

Breckinridge tried to convince the Kentucky electorate that he was not in favor of disunion, but he was unsuccessful. Bell and Everett carried Kentucky, receiving 66,000 votes, as against Breckinridge's 52,800, Douglas' 25,000 and Lincoln's 1,364. Bell and Douglas were identified with the preservation of the Union whereas Breckinridge was associated with the Southern Democrats, who had threatened to secede if Lincoln were elected (although Breckinridge did everything he could to disavow this association). Lincoln was especially unpopular because he was identified with the abolition of slavery regardless of what it might do to the Union. 31 If the results of the election of 1860 are indicative of the sentiment in Kentucky toward slavery and the preservation of the Union, one might conclude that 60 per cent of the electorate favored the preservation of the Union regardless of what happened to the institution of slavery. Since Harlan belonged to this group and since Lincoln once said that he would maintain slavery or abolish it--whichever

would preserve the Union, there seems in reality to be little difference between Lincoln and Harlan on these bitterly contested issues. Harlan's refusal to support Lincoln in 1860 and 1864 can probably be explained by the fact that Lincoln had the reputation in Kentucky for wanting to abolish slavery even at the expense of the Union. If this be true, their political differences were more apparent than real--especially when Justice Harlan's career as a soldier is taken into consideration.

Soldier

During the period immediately prior to the Civil War and the early years of the war--1856 to 1863 approximately--both the people of Kentucky and Harlan were experiencing the same kind of mixed emotions. Professor E. Merton Coulter has described these feelings as they apply to Kentucky, and it is not inaccurate to say that the description fits Harlan almost perfectly. Professor Coulter pointed out that Kentucky was a border state not only geographically but also economically and sentimentally. Economically it was tied to the North, whereas sentimentally it was attracted to the South. The people of Kentucky regarded the Northern abolitionists with enmity even though the Kentuckians were sympathetic to the feelings of humanity that motivated them. Kentucky legal minds were torn between their ingrained
beliefs in states rights and their loyalty to the Union. That Harlan was suffering from this same kind of ambivalence is apparent from the reports of the attitudes he expressed during this period. For example, Professor Coulter makes the following statement:

Close observers of the times had for months past watched with anxiety the situation developing through the occupation of certain Southern forts by Union troops; and as it became more critical they saw no way to avoid war unless the troops were withdrawn. John M. Harlan declared that was inevitable as long as these troops remained in the South; and it was his belief that when war once came the border state would be sure to leave the Union.

In spite of this resentment against the presence of Union troops in Kentucky, Harlan was a Unionist himself and volunteered to fight in the Union Army. He recruited the 10th Kentucky Volunteer Infantry, a regiment which formed a part of the original division of General George H. Thomas. In command of the regiment as a Colonel, twenty-eight years of age, Harlan led them in battle against the South, and by 1863 he was acting commander of a brigade. One of the battles in which Harlan almost took part was the Battle of Mill Springs in which the Confederate General Zollicoffer invaded Kentucky and was driven back by General Thomas' division.

32. Ibid., pp. 1-18.
According to Harlan's own account of the battle, his 10th Kentucky Regiment and the 11th Ohio Regiment were involved in a futile attempt to find a reported rebel forage train, so were delayed in reaching Mill Springs until the battle had ended.\textsuperscript{34}

At the Battle of Rolling Fork, however, Harlan's regiment was directly involved in halting the expedition of General Morgan's cavalry. Harlan wrote:

\begin{quote}
I claim for my command that it saved the Rolling Fork bridge, and most probably prevented any attempt to destroy the bridge at Shepardsville, thus saving from destruction property of immense value, and preventing the utter destruction of the line of railway by which our army at Nashville is mainly supplied. And I submit whether the attack on Morgan's forces, the timely arrival of my command at Rolling Fork, did not prevent a raid upon other important points in Kentucky. It is very certain that after my command drove the rebel chief on the railroad, and very soon thereafter fled from the state, hotly pursued by other forces.\textsuperscript{35}
\end{quote}

Commenting on Harlan's role in this battle, a Brigadier General Fry wrote: "Colonel Harlan, for the energy, promptness, and success in pursuing and driving rebel forces from the railroad, is entitled to the gratitude not only of the people of Kentucky, but of the whole army of the Cumberland."\textsuperscript{36}

\textsuperscript{34} Thomas Speed, \textit{The Union Cause in Kentucky} (New York: G. P. Putman's Sons., 1907), pp. 195-199.

\textsuperscript{35} Ibid., pp. 231-2.

\textsuperscript{36} Hartz, \textit{op. cit.}, p. 26.
It is an interesting fact that throughout this struggle, Harlan never relaxed in his defense of slavery. Even in the fall of 1861 when he was traveling around the state recruiting the 10th Regiment, he promised the people that "if he saw any decision on the part of the government to turn the war into a struggle for the destruction of slavery, he would not only resign his commission but he would go over to the Confederates and take his regiment with him, and help them to fight their battles against the government."\(^37\)

Louis Hartz points out in the article cited, that Harlan's experiences in command of the 10th Kentucky Regiment doubtless had a considerable influence on his attitudes towards Catholics and the common man in general which were quite different after he got on the Supreme Court from what they were when he was fighting political battles in the 1850's for the Know-Nothing Party. For example, he spoke very highly of the Catholic men in his regiment, of whom there were a great many. Hartz writes:

Primarily it was sympathies for lower-class men that were sharpened in camp and on the battlefield. Small farmers, mechanics, workers made up the bulk of Harlan's regiment; and he insisted again and again during the reconstruction era: "when war menaced the country it was the poor and the sons of the poor who sprang to its defense." The war "was in the main fought by the poor man..."In their valor and in comradeship shared with them is doubtless discoverable

\(^37\)~ Frankfort Tri-Weekly Yeoman, July 21, 1866, Quoted in Hartz, \textit{Ibid.}, p. 25.
a segment of the roots of that compassion for com-
mon men which emerged to prominence in Harlan's
thinking immediately after the war and which pro-
foundly conditioned his judicial outlook.\textsuperscript{38}

In spite of the promise he made when attempting to re-
cruit men in 1861, he came to possess a vehement patriotism,
attacking in his dispatches "those wicked and unnatural men
who are seeking without cause to destroy the union of their
fathers."\textsuperscript{39}

After the death of his father in 1863, Harlan resigned
his commission and in his letter of resignation, he wrote:

\begin{quote}
If, therefore, I am permitted to retire from
the army, I beg the commanding general to feel as-
sured that it is from no want of confidence either
in the justice or ultimate triumph of the Union
cause. That cause will always have the warmest sym-
pathies of my heart, for there are no conditions
upon which I will consent to a dissolution of the
Union. Nor are there any conditions, consistent
with a republican form of government, which I am
not prepared to make in order to maintain and per-
petuate that Union.\textsuperscript{40}
\end{quote}

This does not mean, however, that he had come to accept
the destruction of slavery. What is especially interesting,
in the light of his defense of Negro rights while on the Su-
preme Court, is his attitude toward the Thirteenth Amendment.
In 1865 Harlan stated that he was against the Thirteenth
Amendment on principle and that "if there were not a dozen

\begin{footnotes}
\item 39. \textit{Ibid.}, p. 27.
\item 40. \textit{Union Regiments in Kentucky} p. 371. Quoted by
Hartz, \textit{Idem}.
\end{footnotes}
slaves in Kentucky, he would oppose it."\(^1\) On an earlier occasion he said that it should not be ratified for it was "a flagrant invasion of the right of self-government and the state should show that it was still master in its own household."\(^2\) He felt that the amendment would be against solemn promises made to Kentucky slaveholders; it would legalize a wrong. At what time Harlan changed his mind about the amendment is difficult to say, but that he did so long before his appointment to the Supreme Court is borne out by the fact that in the campaign of 1868, in which he supported Grant and Colfax, he is found defending the war amendments as necessary to the reconstruction of the Union.

**Post-War Politics**

Soon after his release from the army in 1863, Harlan was elected Attorney-General of Kentucky as a representative of the Union Party. In this campaign he opposed both the secessionists and the abolitionists. He spoke out against the Emancipation Proclamation as being unconstitutional. He continued this middle-of-the-road position a year later when he supported the candidacy of McClellan rather than that of Lincoln. In 1865, when he was asked by Colonel John Combs to run for Congress as the Conservative Union candidate, Harlan refused. In his letter to Combs, he stated that he

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\(^1\) *Cincinnati Gazette*, August 2, 1865.

\(^2\) *Cincinnati Gazette*, July 7, 1865.
believed the Thirteenth Amendment would "destroy the peace and security of the white man in Kentucky," and he pleaded for a "thorough union of all citizens who...are opposed to the admission of the Negro to the ballot-box or to the enjoyment of political privileges."\(^\text{43}\)

Although we know Harlan changed his opinion relative to Negro rights very radically, in his arguments at this time can be seen his opposition to a principle he would never accept—that of unlimited majority rule. In this letter to Colonel Combs, Harlan wrote that the amendment was "a direct interference, by a portion of the states with the local concerns of other states, and...at war with the genius and spirit of our republican institutions....If three-fourths of the states and two-thirds of each branch of Congress can...abolish slavery in Kentucky, the same power can establish slavery in Ohio."\(^\text{44}\)

Immediately after the war Kentucky politics was characterized by a struggle between Conservatives and Radicals. The former group was composed of old Democrats, the returning Confederate soldiers, those who had stayed at home without fighting, plus many who had fought on the Union side but were opposed to the military regime and such ideas as Negro

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\(^{43}\) Lexington Observer and Reporter, June 1, 1865. Quoted in Hartz op. cit., p. 29.

\(^{44}\) Ibid., Hartz p. 30.
suffrage and freedom. The Radicals were made up of those who favored, with varying degrees of support, the Republican policies in Washington. As the hostility between the Radical Republicans in Congress and President Johnson increased, the Kentucky Conservatives began to split as those who had fought with the Union armies became more ardent supporters of Johnson. The Radicals in Kentucky were finding it increasingly more difficult to support the Radical Republicans in Congress. As a result, the Conservative Unionists joined with the Kentucky Radicals as the latter gradually adopted a more conservative program. At the same time the Democrats began to emerge as a powerful force as bitterness toward Union activity plus the influx of Northern carpetbaggers increased. Soon the state was divided politically between the Radicals who were ardent supporters of President Johnson and the Democrats who were opposed to all elements in Washington. In the shifting that took place during the years following the war, Harlan left the Conservative Unionists and joined the Radicals. Coulter describes this shift:

As the gulf between Democrats and Radicals widened, the Conservatives in the middle were almost forced to take sides if they were to be at all effective. The Democrats made several overtures to get the Conservatives to join them in opposition to the Radicals. Finally in 1868, the Conservatives began to disintegrate with the bulk of the Conservative leaders going over to the Democrats. A few, with John M. Harlan, James Speed,
W. H. Wadsworth and C. F. Burnham as the most notable, joined the Radicals. 45

In the election for Governor in 1868, the Democrat, Stevenson, defeated the Radical candidate, Baker, by the decisive margin of 155,000 to 26,000 votes. These results are especially indicative of the resurrection of the Democrats in Kentucky politics when one understands that there was little in common between the Radicals in Kentucky and the Radicals in Congress. In fact at a party caucus in 1866, the Kentucky Radicals "endorsed Johnson's policies, condemned Negro suffrage, asked for the restoration of the writ of habeas corpus, demanded the removal of federal troops, and called for the removal of the Freedmen's Bureau from the state." 46

Almost overnight the Southern-oriented Democrats had control of the state. According to the Cincinnati Gazette of February 2, 1866: "It is a singular fact that scarce six months after the surrender of Lee's army, the legislature of Kentucky is in the hands of as fierce a set of rebels as ever thirsted for the life of the Union or ever rushed upon the bayonets of the Union Army." A year later the Cincinnati Commercial declared:

The election of congressmen is over, and as might have been expected, loyal Kentucky has gone

46. Cincinnati Gazette, Jan. 19, 1866.
overwhelmingly for the Rebels. Today as effectually in the hands of the Rebels as if they had every town and city garrisoned with their troops, with a Rebel governor, Rebel congressmen, Rebel State House and Senate, Rebel judges, Rebel mayors, Rebel municipal officers, Rebel policemen and constables, what is to become of the poor blacks and loyal white men God only knows. 47

Such was the position of power held by the Kentucky Democrats when the election of 1871 for governor took place. The Radicals who had suffered many defeats at the hands of the Democrats looked for someone in their camp who could not be accused of extremism. Such a man was Harlan. According to Professor Coulter, "The real beginning of an intelligent opposition to the Democrats was made in 1871 in the gubernatorial campaign of that year; and it was at this time that it can truly be said that the Republican Party in Kentucky was born. Radicalism was withering and dying for the surroundings were unfavorable." 48 At the Radical Party Convention in Frankfort, Harlan was reluctantly persuaded to accept the unanimous nomination for the governorship. He had never been identified with the extreme Radicalism but had actually been a power in the Conservative group. "He immediately commended himself to the reasoning portion of the old Radicals, and commanded the respect of intelligent Democrats. He began a strong campaign with a forward-


looking platform." Although Harlan was defeated, he helped to establish the Republican Party in Kentucky. His defeat was by a much smaller margin than that experienced by Baker three years previously. The Democratic candidate, Preston Leslie, received 126,455 and Harlan received 89,299.50

This campaign is of particular importance in this study because Harlan was forced to readjust much of his earlier thinking on the Civil War Amendments and other problems presented by the war. As the Conservative Union party in Kentucky disintegrated, Harlan was no longer able to maintain a plague-on-both-your-houses attitude. His whole political background and devotion to the Union made joining the Democrats impossible; therefore, in 1868 he became a Republican.

Quite naturally, in his campaign for Governor of Kentucky in 1871, the opposition took advantage of his past statements and hurled them at him at every opportunity. On one occasion when his opponent, Governor Leslie, pointed out how Harlan had changed in his views on the Thirteenth Amendment, Harlan replied, "I have acquiesed in the irreversible results of the recent war; I recognize my errors in some respects. It can be said of no man that he has changed no

49. Ibid., p. 434.
opinion with the last ten years in the presence of the stirring events of that period. Let it rather be said of me that I am right rather than consistent."\textsuperscript{51}

Among the issues for which Harlan fought in this campaign were acquiescence in the Civil War Amendments and complete amnesty for all those who had taken part in the rebellion.\textsuperscript{52} He also favored measures which could increase immigration to Kentucky, a departure from his views in the 1850's. He opposed vehemently the Ku Klux Klan, denouncing the organization as enemies of all law and order, which, if left unchecked, would lead to anarchy.\textsuperscript{53} He also emphasized the fact that the leaders and candidates of the Kentucky Democrats in 1871 were the same group who favored the destruction of the Union.\textsuperscript{54}

One issue upon which he devoted much emphasis was equal rights for Negroes in courts of law. In a speech which sounded much like one of his dissenting opinions years later, he said:

\textit{...the lawless...may go to the house of the colored man at the hour of midnight, when he is asleep and his family around him, entitled under the fundamental law of the land and by all the laws of humanity...}\textsuperscript{51}

\textsuperscript{51} Cincinnati Daily Gazette, May 25, 1871.
\textsuperscript{52} Ibid., Aug. 4, 1871.
\textsuperscript{53} Ibid., Aug. 5, 1871.
\textsuperscript{54} Idem.
On the question of slavery Harlan came out wholeheartedly against it. Said he, "There is no man on this continent...that rejoices more than I do at the extinction of slavery on this continent and that the sun of American liberty shines upon no slave."56 In spite of this change of heart, however, Harlan, at this time, was still not ready to defend social equality for the Negro. Although it was not an issue in Kentucky at this time, he felt segregation in the public schools was just and proper. All he was advocating was equality before the law.57 Any attempt to reconcile, with finality, this view with his vigorous dissents, especially in the Civil Rights cases, is impossible. Professor Louis Hartz poses the problem very aptly when he writes:

The difference measures the extent to which Harlan's convictions with respect to Negro equality

55. Ibid., May 25, 1871.
56. Idem.
were cemented by subsequent years of struggle in their behalf and deep reflection; or the extent to which judicial office emancipated him from practical considerations of political appeal limiting the full expression of his views.58

Harlan did, however, speak in favor of the Civil Rights Bill of 1871 (Ku Klux Klan Act): "Had the Federal government, after conferring freedom on the slaves, left them to the tender mercies of those who were unwilling to protect them in life, liberty and property, it would have deserved the contempt of freemen the world over."59

Harlan's defense of Federal protection of civil rights is indicative not only of the gradual shift in favor of the Civil War Amendments but also of a more sympathetic attitude toward centralization of government. As an example of this further departure from a states rights position (which, of course, as a Union supporter he never held to an extreme degree), he made the following statement:

[The Democratic Party] says that "the preservation of liberty is possible only through the states." Fellow citizens, I don't know what the party means by that. Why, when you turn to the constitution, you find there written...under those amendments which constitute...the bill of rights of the people...rights guaranteed to the people of the United States over and above the right of any state to modify or change. Without these amendments you are left to the mercy of a temporary majority in any state of this union.60

58. Hartz, op. cit., p. 35.
In this statement can be seen the forerunner of another group of Harlan dissents—those dealing with the "nationalization of the bill of rights," because here he is taking the position he was to take alone years later—that the bill of rights cannot be modified or changed by the "temporary majority in any state of this Union."

Other issues of this campaign upon which Harlan took positions to be repeated on the Court later are those dealing with monopoly and taxation. He attacked the monopoly of the Louisville and Nashville Railroad and the refusal of the state legislature to grant other charters, especially one to the Cincinnati and Southern Railroad. In a speech similar to his decisions in the Anti-trust and I.C.C. cases, Harlan attacked "railroad monopolies absorbing the capital of the state and controlling its politics." On the issue of taxation, he took a position similar to his dissent in the Pollock case by defending the income tax over the Democratic position favoring a direct tax on property. On another taxation question involving the financing of public schools by taxes levied on families according to the number of children enrolled in the school, Harlan opposed this means as inconsistent with the principle of levying taxes on the ability to pay. According to Harlan, this measure meant that "a poor

man blessed in the number of his children but unprovided with this world's goods, is taxed, while the rich, who are able to educate their children in private schools, are exempt from taxation to meet this deficit. The poor man with six children...is assessed six times more than a man with one child, worth a hundred thousand dollars...and a bachelor...exempt altogether." 62

Although Harlan fought an aggressive campaign, the Democratic control of Kentucky was virtually complete, and he was defeated by over 30,000 votes. Nevertheless, Harlan received almost 90,000 votes as compared to 35,000 votes received by the Republican gubernatorial candidate in 1868.

That Harlan was an able candidate was recognized by both sides. After the election was over the Louisville Ledger, a Democratic newspaper, made the following tribute to Harlan:

We have not striven at all from the love of it, but because he put himself in our way. In fact, we could not help it, "he stood so fair." We have none but the kindliest of feelings for him personally, and have, too, a just appreciation of his merits as a man, and his abilities. There is no question but that his nomination by the radicals was the wisest thing they could have done. His energy and ability, to say nothing of other qualities that might be mentioned, in conducting the campaign, were such as the party could not have commanded elsewhere. With a less able and less plausible standard bearer the radical vote would have been little else than the federal officeholders and negroes. 63

63. Cincinnati Daily Gazette, August 10, 1871.
The Democratic *Louisville Courier-Journal* also recognized Harlan as a man of ability who made a good race for governor.64

"In 1872 Harlan's name was prominently mentioned as a vice-presidential possibility on the Grant ticket."65 In 1875 he was again the Republican candidate for governor, but was defeated a second time. That the Democrats maintained a tight hold on state politics for some time is made apparent by the fact that "the first time the Republicans carried the state for a president or governor was in 1896, when McKinley received its electoral vote and William O. Bradley was elected governor."66

The last political campaign in which Harlan played a major role was on the national rather than the state level. A law partner of his, Benjamin H. Bristow, served as President Grant's third Secretary of the Treasury and in that position waged a vigorous campaign against the forces of corruption which had become entrenched in the Treasury Department. This had resulted in his becoming in the popular mind a symbol of reform. "As chief of the ring-smashers, he had

64. Ibid., August 11, 1871.


ridden the wave of reform into the front rank of presidential possibilities." Harlan became very active in Bristow's behalf and one account of Harlan's role is somewhat less than flattering:

Harlan, Bristow's brilliant law partner, was casting a covetous eye toward the Supreme Bench. Bending before the strongest political winds, he had changed from a slaveholding Whig to a Grant Republican, and now, hoping to play a major role in the making of a president, had joined the reform ranks. He dominated the Republican organization in Kentucky. But, since Kentucky was overwhelmingly Democratic, he exerted only limited influence in national party circles.

That Harlan expected to get to the Supreme Court as a result of anything he might do at the Republican convention in 1876 is highly debatable. Certainly there seems little doubt that he was in substantial agreement with Bristow's desire to bring reform out of Grant's disastrous administration. Bristow was a vigorous advocate of resumption of specie payments, warfare on the revenus thieves, free trade, and a moderate policy toward the South. As far as this writer knows, none of these views were unacceptable to Harlan, before or after the announced candidacy of Bristow. Also, the fact that Bristow was a law partner of Harlan's as well as a native of Kentucky makes Harlan's support a natural

67. Bruce Thompson, "The Bristow Presidential Boom of 1876," The Mississippi Valley Historical Review, XXXII, No. 1, (June, 1845), 3.
68. Ibid., p. 7.
alliance rather than one motivated by opportunism as implied by Thompson, who goes on to admit that the men around Bristow were highly regarded. Henry Adams called them "all the virtue left in the Republican Party." 69 Wrote Thompson, "[These men] planned to break the pernicious influence of the cabal surrounding Grant and to elevate the reform and conservative elements to the dominant positions within the administration." 70

The Republican National Convention opened in Cincinnati, June 24, 1876, with James G. Blaine the leading contender and Benjamin Bristow his most important rival. "Of all the regular candidates, Bristow was the only one wholly acceptable to Carl Schurz and his coterie of Liberal Republicans." 71

Harlan, as leader of the delegation from Kentucky, Bristow's home state, presented Bristow's name before the convention. He summarized in glowing terms the candidate's record as a soldier, Republican, and public servant. When the convention settled down to a fight among Blaine, Bristow, and Rutherford B. Hayes, with Blaine in the lead, the Blaine forces tried to persuade Bristow to take second place on the ticket in exchange for his support of Blaine but

Bristow refused. When the Michigan delegation, containing Bristow votes, swung over to Hayes on the fifth ballot, Bristow's chances for the nomination died. With Bristow out of the running, Hayes remained the only man available around whom the anti-Blaine forces could assemble. On the sixth ballot Blaine's vote had risen to 308 with 378 necessary for the nomination. Alabama, Arkansas, Georgia, and Illinois increased their votes for Blaine on the seventh ballot. After hurried consultations, the anti-Blaine delegates decided to stage a grand rally for Hayes. Indiana, which had been supporting Morton, its favorite son, withdrew Morton's name and cast twenty-five votes for Hayes and five for Bristow. Thus the tide began to turn. A few minutes later, Harlan arose and withdrew Bristow's name and switched Kentucky's twenty-four votes to Hayes. "As Harlan himself modestly phrased it, 'The fate of Blaine was doomed.' The final vote stood: Hayes, 384, Blaine, 351; and Bristow, 21." 72

Had Harlan betrayed Bristow by switching when he did? It is difficult to say. Even Thompson, who seems suspicious of Harlan's motives, admits that "When the Michigan delegation, containing eleven Bristow men, swung over to Hayes on the fifth ballot, the secretary's chances, already slim, completely vanished." 73 At the same time, however, Thompson

72. Ibid., pp. 27-8.
73. Ibid., p. 27.
records in a footnote the fact that Harlan admitted an indiscretion:

Harlan later confessed to W. Q. Gresham that he had made a "deal" with the Hayes men. Hayes carried out his part of the bargain by placing Harlan on the Supreme Court in 1877. Bristow, piqued over failure to receive the justiceship for himself, and feeling that Harlan had betrayed him, never spoke to Harlan after the latter's appointment.74

What the nature of the "deal" was this writer has been unable to discover. One writer has stated that after his election, Hayes wished to appoint a Kentucky lawyer to his cabinet as Attorney General and offered the position to Harlan "who, however, did not see his way clear to accept."75 There seems some doubt that Harlan was actually offered the Attorney-Generalship. According to Professor Robert E. Cushman, Hayes was grateful for Harlan's support but "the cross currents of party politics made Harlan's appointment to the Attorney-Generalship in Hayes' cabinet politically inexpedient, although Hayes at first intended to offer Harlan this post and he would have been glad to accept it."76 This analysis of the situation is also borne out by other sources.

William H. Smith, the editor of the Cincinnati Chronicle.

74. Ibid., p. 28.


76. Cushman, loc. cit.
reported that in a conversation with Hayes, the latter "had
selected John M. Harlan for Attorney-General but this was
abandoned at Morton's request. He never knew why Morton
objected to Harlan." 77 That Harlan wanted to be Attorney-
General is proved by his diary in which he states that Bri­
tow had said that he participated in the campaign for the
Presidential nomination in 1876 chiefly in order to be in a
position the better to see that his friends were cared for
under the new Administration, "and to secure for me the po­
sition of Attorney-General. From frequent interviews he
[Bristow] knew that I had an ambition to be Attorney-General,
and that I would not accept any other nomination in the cabi­
et." 78

Therefore, it seems unlikely that Harlan betrayed Bri­tow in order to obtain a seat on the Supreme Court. In fact,
in 1872, and again in 1873, Harlan had urged President Grant
to appoint Bristow to the Supreme Court. 79 Therefore, the
hostility which developed between Harlan and Bristow seems
to be due to Bristow's refusal to support actively Harlan's
desire for the Attorney-Generalship rather than to Harlan's
sacrifice of Bristow in order to get on the Supreme Court.

77. Charles R. Williams, ed., Diary and Letters of
Rutherford B. Hayes (Columbus: Ohio State Archaeological
and Historical Society, 1924), III, 427.

78. David Farrelly, "John M. Harlan's One-Day Diary.
August 21, 1877," The Filson Club History Quarterly, XXIV
(1950), 163.

79. Ibid., p. 159
Writing in his diary a year after the Republican convention which nominated Hayes, Harlan is still resentful over Bristow's failure to push for Harlan's appointment as Attorney-General. 80

Regardless of what kind of "deal" Harlan may or may not have made with the Hayes forces, Hayes used Harlan's services almost immediately after assuming the presidency. There was a dispute between political foes in Louisiana. The Louisiana Conservatives refused to submit to the decision of the returning board which had given the electoral votes of Louisiana to Hayes in his disputed election against Tilden. They also opposed the state government which had been set up by the Radicals under Governor Packard. The White League rose in arms and held the state for the Conservative administration of Governor Nicholls. During the first three months of 1877, both governments continued nominally to exist, each claiming to be the legal government of Louisiana. Hayes appointed Harlan to serve on a commission which had no power but which was directed to hear both sides of the dispute and make recommendations to Hayes. The Republicans in Louisiana wished to keep federal troops in the state in order to secure themselves in power.

On March 28, 1877, President Hayes appointed the commission which in addition to Harlan included General Joseph

80. Ibid., p. 164.
Hawley of Connecticut, Judge Charles B. Lawrence of Illinois, ex-Governor J. C. Brown of Tennessee, and Wayne MacVeagh of Pennsylvania. The commission arrived in New Orleans on April 5, and immediately started to work. Eventually they worked toward the "consolidation of the two rival legislatures so that the rival claims to the governorship and other offices could be effected by the civil authority of the state." The commission succeeded in bringing about the consolidation of the legislatures, largely because it was obvious to all concerned that the Nicholls administration was the overwhelmingly more popular government. "By the 21st of April the Packard legislature had practically ceased to exist." The commission also advised Hayes that it would be unwise to maintain the federal troops at the state house, and on April 20, 1877, Hayes sent a letter to Secretary of War McCrary for the "removal of said troops at an early date, from their present position to such regular barracks in the vicinity as may be selected for their occupation."


82. Cushman, loc. cit.

83. Hayworth, op. cit., p. 300.

The success of the commission was due very largely to the fact that the situation was so overwhelmingly on the side of the Nicholls regime that it would have caused a furor if they had tried to maintain the Packard government in power. The property owners had even refused to pay any taxes to the Radical administration but were turning them over to the Democratic organization. To say, as Clark does, that "Mr. Harlan's sense of honor must have helped greatly in maintaining the integrity of the commission" seems to imply that the commission had a real choice in the matter. Considering the situation which the commission found in Louisiana, it would have been sheer corruption for it to have decided in favor of Packard's very unpopular regime.

Appointment to the Supreme Court

On October 17, 1877, President Hayes submitted the name of John Marshall Harlan to the Senate for appointment to fill the vacancy left by Justice Davis on the Supreme Court. The appointment was not confirmed for forty-one days—until November 29, 1877. Considerable opposition arose from various quarters. On the one side he was criticized by the Southern Conservatives because he did not seem to have what they considered proper regard toward states rights. On the opposite side of the political spectrum Harlan was opposed by the Northern Radical Republicans on the grounds that he

85. Clark, op. cit., p. 11.
had not supported Lincoln and also he had spoken out against the War Amendments.

Because of the many positions Harlan had taken on the issues of the day, he was charged with opposing at one time or another most of the things that the majority of the Senate favored. If one wishes, he could find statements by Harlan, made between 1855 and 1877, which opposed states rights or favored them. This chapter has pointed out the many sides to controversial questions that Harlan had championed. The grounds for opposition to Harlan on both sides, therefore, can be understood.

When he had opposed the Thirteenth Amendment, he had done so not only on the basis that it was a violation of the property rights of the slaveholders, but also that it interfered with the rights of the states to determine the treatment of the newly freed Negroes. In his role on the Louisiana Commission he had taken the side of the southern Governor Nicholls against Packard, the choice of the Radicals. These actions can be given as possible reasons for opposition from the Radical Republicans. It is possible that the southerners opposed him merely because he was a Republican, or because as early as 1868 he had spoken in favor of the War Amendments as "necessary to the reconstruction of the Union."
Therefore, the most likely reason for the opposition to Harlan's appointment was his refusal to support wholeheartedly either the Southern Democrats or the Radical Republicans in the years following the Civil War. Other reasons that seem logical are that he was only forty-four years of age in 1877 and his only public office experience had been four years as Attorney-General and one as judge in his native Kentucky.

One writer takes the position that none of the foregoing were the real reasons, however, for the Senate's delay. He emphasizes the fact that Harlan was not the only would-be candidate for the vacancy. Two Senators, Timothy Howe of Wisconsin and Isaac Christiany of Michigan, were frequently mentioned for the appointment. Harlan's law partner, Benjamin Bristow, was also urged upon Hayes. Possibly here is the clue for Bristow's hostility to Harlan referred to above. Ewing states that "when strong opposition developed against Bristow's potential candidacy, the president dropped him and sent the name of Harlan to the Senate." This statement is interesting in the light of the "deal" that Harlan is alleged to have made with the Hayes forces. If Ewing's statement is correct, it implies that Hayes would have appointed

88. Ibid., pp. 23-24.
Bristow if there had not been so much opposition to him. If so, then whatever deal Harlan may have made, it does not seem to have involved an appointment to the Supreme Court because apparently Harlan was not Hayes' first choice but at least his second, after Bristow.

According to Professor Charles Fairman, the fact that Bristow had presidential ambitions was recognized by President Hayes, who expressed fear of them. In the *Diary and Letters of Rutherford B. Hayes* there is a letter to President Hayes from the editor of the *Cincinnati Chronicle*, William Smith, in which the latter made the following evaluation of Harlan:

> Is Harlan the man? I think so. His age, vigor--mental and physical--his agreeable manner and personal magnetism are strongly for him. I think him a very much better man every way than Bristow, and if a Southern man is to be taken, he is the man.  

This was written only two weeks before Hayes submitted Harlan's name to the Senate.

Justice Harlan's career on the Supreme Court was marked not only by its length but more importantly by the vigor of his dissenting opinions which in several cases have later

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been adopted by the majority of the court. In his thirty-four years on the Court, Harlan delivered the majority opinion in 703 cases and dissented in 316. As a dissenter, Harlan was very often alone. As will be demonstrated in the analysis of these cases, Harlan was often vigorous and impassioned in his dissent, and his role as a judicial dissenter was one which reflected deep convictions on the rights of all individuals. One writer has emphasized this aspect of Harlan:

In all his dissenting opinions, Justice Harlan took the side of the plain people and the defense of American liberties, and there was never a time when partisanship seemed to sway him, nor ever a word or slightest hint that he had been influenced by any other sway than his love of the people and his profound respect for the law.

Even though allowances should be made for the usual exaggerations so characteristic of obituaries, the evaluation seems to be an accurate one. As his character, intellect, and temperament emerge from his opinions analyzed here, the


following evaluation of Justice Harlan may not be far from accurate:

...there was no respect in which he was more distinguished than in his intellectual vivacity, alertness, and independence. He was an individualist in theory and in practice. Again and again he stood alone in the expression of his opinion on important cases. Justice Harlan's temperament was very far from that which is commonly regarded as distinctly judicial. To the consideration of great cases he brought a well-trained intellect, but also very warm feeling and very profound convictions. 94

Before leaving this discussion of Harlan to review his work on the Supreme Court Bench, it might be appropriate to present a picture of this man. One of the most vivid accounts is the following:

...stalwart form, a splendid face, massive brow, a strong and firm countenance, yet gentle and tender. He was big of frame and big of mind, above all, big of heart. He was six feet two and weighed 240 pounds, in the prime of life and vigor, of imposing and magnificent presence and most serious earnestness. 95

Such is the man with whom this study is concerned. Although Justice Harlan may appear in this analysis to be inconsistent at times, on the bench as well as off, there is a thread that runs through his decisions which is discernible. It is characterized by a concern for the dignity of the individual in our society—the Negro struggling to achieve the

95. Willis, op. cit., p. 37.
rights the constitution guarantees; the accused trying to defend himself with that great shield, the bill of rights; the farmer, small businessman, and consumer trying to protect themselves against the predatory activities of the industrial and railroad monopolists; the inhabitant of the United States possessions in the Caribbean and the Pacific striving to possess the rights and privileges of mainland Americans, and the worker struggling for the economic security made possible through social legislation. These are the people who found in Justice Harlan a champion and it is the purpose of this thesis to demonstrate through an analysis of his opinions how Justice Harlan well deserves the title: "Dissenter for the Individual."
CHAPTER II

MR. JUSTICE HARLAN AND THE NEGRO

Aftermath of Reconstruction

Although the problems of Reconstruction were many and varied, there are two of particular importance which resulted in constitutional interpretation: (1) the question of whether the Congress or the President would determine the program of Reconstruction and (2) the extent to which the Civil War Amendments and the Civil Rights Acts would serve to protect the civil rights of the newly freed Negroes.

The problems raised by the struggle between Congress and the President were either resolved or sidestepped by the Supreme Court prior to Justice Harlan's appointment in 1877.\(^1\)

The second group of constitutional questions, however, were very much argued before Harlan's court and they will be dealt with in this chapter. Basically they are concerned with the attempts of the Radical Republicans to guarantee that the Negroes would not be returned to a status similar to that which they experienced before the war. The instruments used to achieve this end were a series of Civil Rights Acts and the Thirteenth, Fourteenth, and Fifteenth Amendments.

After the Civil War had come to a close, the southern states immediately enacted a group of laws known as "Black

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1. Cummings v Missouri, 4 Wall. 277 (1867); Ex parte Garland, 4 Wall. 333 (1867); Mississippi v Johnson, 4 Wall. 475 (1867); Georgia v Stanton, 6 Wall. 50 (1868); Ex parte McCord, 6 Wall. 318 (1868) and 7 Wall. 506 (1869); and Texas v White, 7 Wall. 700 (1869).
Codes" to restrict the activities and opportunities of the newly freed Negroes. In order to defeat these laws, Congress passed between 1866 and 1875 the Civil Rights Acts, most of which were based on the Civil War Amendments. Known as Enforcement Acts because they were passed under the enforcement provisions of these amendments, these laws struck at the heart of the attempts by the South to keep the Negroes in a subordinate position.

There has been a great deal of controversy over the intentions of the framers of the Civil War Amendments. Considering that the Amendments were drafted by the same group in Congress who wrote the Civil Rights Acts, Justice Harlan felt that one need merely to read the Acts to see what were the intentions of these men when they added these three amendments to our constitution. To Harlan it was beyond dispute that these measures were drafted with the following purposes in mind: to guarantee beyond any question that the Negroes would not be placed in a condition of servitude, that they would be citizens of the United States with all the legal and political rights and privileges which had been traditionally enjoyed by the white man, and that they would not be hindered in their desire to exercise their political power through the suffrage. Through the enforcement provisions of these amendments, Congress passed the Civil Rights Acts to make it illegal to deprive the freedmen of any of these rights. That Justice Harlan disagreed with the interpretation of the
Supreme Court on the amendments, and thus as to the intentions of their framers, is demonstrated in the analysis of the cases which follow.

The cases in which these rights were involved fall into two separate categories: (1) those concerning validity of the Civil Rights Acts, and (2) those concerning development of the "separate but equal" doctrine. In the last few years, a virtual revolution has been taking place in regard to the latter and it is to Justice Harlan's credit that the revolution has been fought to establish and maintain the position that he took as a lone dissenter. It is in this area especially that the prescience of Justice Harlan is most apparent. As far as the validity of the Civil Rights Acts is concerned, Justice Harlan took a view in opposition to discrimination far ahead of the Court not only of his time but of the Court sitting today. An analysis of both groups of cases clearly reveals the unique position on these matters held by Justice Harlan.

The purpose of this chapter is not to show that this position of Justice Harlan has been accepted by recent Supreme Court decisions— that point has been made by several writers. The purpose is rather to show how tenaciously Harlan held to his belief that the Negro was to be treated not only as a free man but as one with equal rights under the law and thus to be protected actively and directly by Federal law from
those who would prohibit the Negro from enjoying all the rights that Harlan felt the Civil War Amendments guaranteed to him.

The language used by Justice Harlan leaves no doubt as to the depth of his convictions on this matter. He was not merely defending amendments reluctantly because of the idea that "good or bad, the law must be upheld." He believed these amendments represented the means by which the dignity of the individual—in this case the Negro—would be protected and maintained by the federal government.

Civil Rights Acts: Congress vs the Supreme Court

In the cases which came before the Supreme Court during the period of Justice Harlan's tenure, several resulted in majority opinions holding specific sections of the civil rights legislation unconstitutional. Shortly before Harlan's appointment to the Court, the Supreme Court had declared an 1870 Civil Rights law unconstitutional. The most direct presentation of the constitutionality of these laws to come before the Court after his appointment were the Civil Rights Cases. An extended description of the opinions of

2. [US v Harris, 106 US 629 (1883); Civil Rights Cases, 109 US 3 (1883); Baldwin v Franke, 120 US 678 (1887); James v Bowman, 190 US 127 (1903); and Hodges v US, 203 US 1 (1906).](#)
3. [US v Reese, 92 US 214 (1876).](#)
4. [109 US 3 (1883).](#)
the Court on these cases and Harlan's dissent provide a vivid picture of the basic differences between Harlan and the Court regarding this very controversial question of minority rights.

Five cases dealt with the constitutionality of the first and second sections of the Civil Rights Act passed March 1, 1875. The first section of this act stated:

All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land, or water, theatres, and other places of public amusement; subject to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.  

The second section placed penalties on any person who violated this law by denying the aforementioned accommodations to any person for reason of race or previous condition of servitude.

Of the five cases brought before the Court in 1884, two were concerned with the denial of hotel accommodations to Negroes and two others dealt with the denial of theatre accommodations to Negroes. The fifth was a case in which a Negro woman was denied a ladies' car accommodation on the railroad.

The Court handled these cases together, and with only Harlan dissenting, declared these sections unconstitutional.

5. 18 Stat. 335.
as not authorized under the 13th or 14th Amendments.

According to the reasoning of the Court, the legislation the Fourteenth Amendment authorized Congress to pass for its enforcement was not direct legislation, making violations of this amendment illegal, but was merely corrective legislation, such as may be necessary to counteract or redress the effects of any state law which violated that amendment. Thus the Court held that Congress could not constitutionally pass legislation which would make criminal any action that violated the Fourteenth Amendment. Rather the Federal Government must wait until a state governmental institution had passed or enforced laws contrary to the Fourteenth Amendment. Once this occurred, then Congress could pass legislation to correct this situation in order to offset the effects of the state action and provide the victim of such action a remedy for redress.

Another important point is that the Fourteenth Amendment is prohibitory upon the states only and the cases concerned the actions of private individuals outside state authority, and thus outside the provisions of the Fourteenth Amendment. Speaking for the majority, Justice Bradley said:

The wrongful act of an individual, unsupported by State authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if
not sanctioned in some way by the State, or not
done under State authority, his rights remain in
full force, and may presumably be vindicated by
resort to the laws of the State for redress. 6

As far as the Thirteenth Amendment was concerned, the
majority of the Court held that it related only to slavery
and involuntary servitude and such matters were not involved
in these cases. Even though Congress may pass legislation
directly extending to the subject of the incidents of slav­
ery, the denial of equal accommodations in inns, etc., im­
posed no badge of slavery or involuntary servitude on the
parties involved here. Said the Court:

It would be running the slavery argument into
the ground to make it apply to every act of discrim­
ination which a person may see fit to make as to the
guests he will entertain, or as to the people he will
take into his coach or cab or car, or admit to his
concert or theatre, or deal with in other matters of
intercourse or business. 7

The dissenting opinion by Harlan was considered by
Roscoe Conkling to be the "noblest opinion in history, great
in legal learning and understanding of our system of govern­
ment and our people and their history and great in statesman­
ship." 8

7. Ibid., p. 24-5.
   This is also the view of Louis Boudin, Government by Judici­
Because all of Justice Harlan's subsequent opinions dealing with Negro rights incorporate views expressed in this dis­sent, an extensive analysis of it seems appropriate, thus making unnecessary as complete an analysis of the remaining cases in this group.

At the outset Harlan attacked Bradley's interpretation of the Civil War Amendments as a departure from the true intent of the Congress which passed them. Said Harlan, "I cannot resist the conclusion that the substance and spirit of the recent amendments of the constitution have been sac­rificed by a subtle and ingenious verbal criticism....The Court has departed from the familiar rule requiring, in the interpretation of the constitutional provisions, that full effect be given to the intent with which they were adopted." To Harlan, that intent was clear: to prevent the South (or any area) from relegating the Negro to the status of second­class citizen.

Next Harlan used the Court's upholding of the Fugitive Slave Act of 1793 in Frigg v Pennsylvania (16 Peters 539) as an analogy to point out that

10. Ibid., p. 28.
The Court in the Prigg case was defending the right of the master to have his slave returned to him under the rendition clause. Harlan felt that the Court should no more place a shadowy interpretation upon the Fourteenth Amendment than upon Article IV. Whereas the Fugitive Slave Law was upheld under Article IV and thus the rights of masters were protected, by the same token the Civil Rights Laws should be upheld under the Fourteenth Amendment and thus the rights of the newly freed Negroes should be protected, because the Fourteenth Amendment was designed to safeguard the rights of Negroes just as much as Article IV was designed to protect the masters of Negro slaves.

Harlan also used the Court's decision in the Prigg case to show that Congress had the same authority to protect Negro rights by primary (and not merely corrective) legislation as it did to protect the rights of masters through primary legislation. Quoting the Court, Harlan said, "It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties, and the rights which it intended to secure, upon State legislation, and not upon that of the Union." In other words, Congress passed the amendments and the laws to enforce them in order to protect

11. Article IV, Section 2.
Negroes, and it would be unthinkable that it intended this objective to be fulfilled by state law instead of through Federal legislation. To Harlan the same reasoning which upheld the Federal protection of the rights of masters could be used to uphold the rights of their former slaves. Harlan also cited Ableman v Booth\textsuperscript{13} wherein the Court upheld the Fugitive Slave Law of 1850 on the grounds of the implied power of Congress to enforce the master's rights. This statute according to Harlan placed at the disposal of the master seeking to recover his slave, substantially the whole power of the nation. It invested commissioners, appointed under the act, with power to summon the posse comitatus for the enforcement of all its provisions, and commanded all good citizens to assist in its prompt and efficient execution whenever their services were required as part of the posse comitatus. It is sufficient to say that Congress omitted nothing from it which the utmost ingenuity could suggest as essential to the successful enforcement of the master's claim to recover his fugitive slave.\textsuperscript{14}

That the Federal government should have the power and the desire to protect so fervently the rights of the master and be so lacking in power to protect the rights of the Negroes was, to Harlan, the epitome of irony.

Justice Harlan also devoted considerable attention to the intent of Congress in the passage of the Thirteenth Amendment. To him it was not merely an amendment to free

\textsuperscript{13} 21 Howard 506.

\textsuperscript{14} 109 U.S. 30.
the slaves from physical bondage, but was a grant of power to Congress

to uproot the institution of slavery whenever it existed in the land, and to establish universal freedom...and to place the authority of Congress in the premises beyond the possibility of a doubt. Therefore power to enforce the Thirteenth Amendment, by appropriate legislation, was expressly granted.15

He particularly defended the right of Congress not only to eliminate slavery but all the "burdens and disabilities which constitute badges of slavery and servitude." The issue between Harlan and the Court was that to the latter discriminations such as those forbidden by the Civil Rights Act of 1875 had no relation to slavery, therefore should not have been considered "incidents and badges of servitude." Harlan, on the other hand, regarded such discriminations as a badge of servitude because slavery

was the moving or principal cause of the adoption of that amendment, and since that institution [slavery] rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect to such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people from the deprivation, because of race, of any civil rights granted to other freemen in the same State; and such legislation may be of a direct

15. Ibid., p. 34.
and primary character, operating upon States, their officers and agents, and also upon, at least, such individuals and corporations as exercise public functions and wield power and authority under the State. 16

It is in the final sentence that one can find the key to Harlan's thinking on discrimination. Congress has the power not only to prohibit discrimination on the basis of race by state law and state agencies, but also against any acts of racial discrimination by individuals and corporations exercising public functions and wielding power and authority under the State. In this respect he described the legal rights of Negroes in respect to the accommodations, privileges and facilities of public conveyances, inns, and places of public amusement. First he discussed Negro rights relative to public conveyances on land and water, citing cases and decisions in which the public character of railroads and common carriers was emphasized. Paraphrasing the opinion in Cleatt v. Supervisors 17 Harlan stated that railroads are public highways and even though owned by private corporations, were established by the authority of the state, and thus the operators of these railroads had a responsibility to serve the public without discrimination. Said Harlan:

Such being the relations these corporations hold to the public, it would seem that the right of a colored person to use an improved public highway, upon

16. Ibid., p. 36.
17. 16 Wallace 678.
the terms accorded to freemen of other races, is as fundamental...as are any of the rights which my brethren concede to be so far fundamental as to be deemed the essence of civil freedom. "Personal liberty consists," says Blackstone, "in the power of locomotion, of changing situation, or removing one's person to whatever places one's own inclination may direct without restraint, unless by due course of "law." But of what value is this right of locomotion if it may be clogged by such burdens as Congress intended by the act of 1875 to remove? They are burdens which lay at the very foundation of the institution of slavery as it once existed. They are not to be sustained, except upon the assumption that there is in this land of universal liberty, a class which may still be discrimi­nated against, even in respect of the rights of a character so necessary and supreme, that, deprived of their enjoyment in common with others, a freeman is not only branded as one inferior and infected, but, in the competitions of life, is robbed of some of the most essential means of existence, and all this solely because they belong to a particular race which the nation has liberated. The Thirteenth Amendment alone obliterated the race line so far as all rights fundamental in a state of freedom are concerned.18

In the case of discrimination by innkeepers, Harlan took the position that such discrimination could be constitutionally prohibited by Congress because of the quasi-public character of inns. He quoted judicial sources to establish the definition of inns as more than mere private boarding houses.19 Said Harlan:


19. For example, according to Justice Story: "To consti­tute one an innkeeper, within the legal force of that term, he must keep a house of entertainment or lodging for all travellers or wayfarers who might choose to accept the same, being of good character or conduct." Quoted from Story on Bailments, Sections 475-6.
These authorities are sufficient to show that a keeper of an inn is in the exercise of a quasi-public employment. The law gives him special privileges and he is charged with certain duties and responsibilities to the public. The public nature of his employment forbids him from discriminating against any person asking admission as a guest on account of the race or the color of that person.20

In the matter of public amusements, Harlan pointed out that such places were established and maintained under license of the law which comes from the public, including members of the colored race. "A license from the public to establish a place of public amusement imports, in law, equality of right, at such places, among all the members of that public."21 Harlan then justified this position on the principle expounded in Munn v Illinois22 that property becomes "clothed with a public interest" when it is used in a public manner and affects the community at large. Harlan quoted the following statement of the Munn opinion as analogous to the cases at hand:

*When, therefore, one devotes his property to a use in which the public has 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, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.*23

20. Ibid., p. 41.
21. Ibid., p. 42.
22. 94 U.S. 113.
23. Ibid., p. 126.
After stating the foregoing arguments to justify the Civil Rights Acts as constitutional under the Thirteenth Amendment, Harlan next presented arguments to show the acts were also constitutional under the Fourteenth Amendment. He pointed out that between the passage of the Thirteenth and Fourteenth Amendments, several States passed laws to keep the Negro almost in a state of servitude. It was felt by the framers of the Fourteenth Amendment, according to Harlan, that regardless of what rights the Negroes had under the National constitution,

they could not become citizens, except by the consent of each State; consequently, their civil rights, as citizens of the State depended entirely upon State legislation. To meet this new peril to the black race, that the purposes of the nation might not be doubted or defeated and by way of further enlargement of the power of Congress, the Fourteenth Amendment was proposed for adoption.24

Here Harlan directed his attack on the majority opinion of the Court to the effect that Congress cannot act directly to protect the rights, privileges and immunities of the Fourteenth Amendment in advance of hostile legislation or proceedings of the States. To the Court, the Fourteenth Amendment merely acted to prohibit state action but did not give Congress positive power for direct legislation. To support this conclusion, the Court used the analogy of the constitutional prohibition of the state to impair the obligation of contracts. The Congress had no more power to pass

24. 109 U.S. 44.
direct legislation enforcing the Fourteenth Amendment than
it had to enforce the obligation of contract clause. Har­
lan declared this analogy to be unsound because the con­
tract clause contains no provision for enforcement except
through the courts. The Fourteenth Amendment, on the other
hand, does contain a provision for its enforcement. Whereas
the contract clause is nothing more than a prohibition upon
a state, the Fourteenth Amendment, Harlan pointed out, "pre­
sented the first instance in our history of the investiture
of Congress with affirmative power, by legislation, to en­
force an express prohibition upon the States....The power
given is, in terms, by Congressional legislation to enforce
the provisions of the amendment."25

Harlan also brought up the problem of trying to deter­
mine what constitutes "privileges and immunities" of the
Fourteenth Amendment. Whatever else they involve, Harlan
felt that they contain at least

exemption from race discrimination in respect of any
civil right belonging to citizens of the white race
...unless the recent amendments be splendid baubles,
thrown out to delude those who deserved fair and
generous treatment at the hand of the nation. Citi­
zension in this country necessarily imports at least

25. Ibid., pp. 45-6.
equality of civil rights among citizens of every race in the same state.

Harlan made a distinction between the rights that a state may give its citizens (such as suffrage) and the rights that the national government may provide. The State may pass the necessary legislation to enforce the rights that it grants its citizens; therefore, asked Harlan, why can't national government enforce the rights that it provides? He quoted US v Reese where the Court said:

...rights and immunities created by and dependent upon the Constitution of the United States can be protected by Congress. The form and manner of protection may be such as Congress, in the legitimate exercise of its discretion shall provide. These may be varied to meet the necessities of the particular right to be protected.

Harlan pointed out that what measures were appropriate to protect these rights—whether through corrective legislation or direct—should be determined by the legislative

26. Ibid., p. 48. Harlan quoted from Ex Parte Virginia (100 US 334), Strauder v W. Va. (100 US 306), and Neal v Delaware (103 US 386) to support this view. From Ex Parte Virginia: "One great purpose of these amendments was to raise the colored race from that condition of servitude and inferiority in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." Although not made explicit, Harlan is again refusing to distinguish between civil, legal, or political rights and the rights to equal accommodations in inns, places of amusement, etc.

27. 92 US 214.

branch and not the judicial. To grant such discretion to the judiciary would be "sheer usurpation of the functions of a coordinate department, which, if often repeated, and permanently acquiesed in, would work a radical change in our system of government."^9

Reverting back to the Court's interpretation that the Fourteenth Amendment gives the national government merely the right to prohibit state acts of discrimination, Harlan emphasized the ironic situation in which this view decreases the power of Congress from what it was before the amendments were passed. Again he cited the Court's upholding of the fugitive slave laws and stated that the national government should be able to "do for human liberty and the fundamental rights of American citizenship, what it did...for the protection of slavery and the rights of the masters of fugitive slaves."^0

Harlan concluded his dissenting opinion by denying that the Civil Rights Acts of 1866 and 1875 interfered with the social rights of the white people. These acts were concerned with legal rights only. In fact, Harlan made it clear that he was opposed to legislation which tried to enforce social

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29. Ibid., p. 51.
30. Ibid., p. 52.
relationships. These Civil Rights Laws, however, were not concerned with social rights. Said Harlan:

The right, for instance, of a colored citizen to use the accommodations of a public highway, upon the same terms as are permitted to white citizens, is no more a social right than his right...to use the public street of a city...turnpike road...or his right to sit in a public building with others, of whatever race, for the purpose of hearing the political questions of the day discussed.\(^{31}\)

Harlan's faith in the Civil War Amendments is well stated in his closing paragraph in which he stated that if these amendments were enforced according to the intent of their framers, there could not be in our nation "any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant."\(^{32}\) The authority of these constitutional amendments is paramount and their meaning clear and to them "everyone must bow, whatever may have been or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to

\(^{31}\) Ibid., p. 62.

\(^{32}\) Idem.
Another case which demonstrates the conflict between Harlan and the Court over the interpretation of the Civil Rights Acts and their relation to the Civil War Amendments is that of Hodges v. U.S. In this case Hodges and others were indicted in the United States District Court of Eastern Arkansas for the crime of "having knowingly, willfully and unlawfully conspired to oppress, threaten, and intimidate" eight Negro citizens in the free exercise of their right to dispose of "their labor and services by contract without discrimination against them because of their race or color, and without illegal interference or by violent means." The Negroes had obtained jobs in a lumber manufacturing plant and while they were so engaged, Hodges and others, armed with deadly weapons, threatened and intimidated

33. Idem. The force of Harlan's dissent in these cases makes the following observation interesting and pertinent: "His opinions are strong, well written and leave very little doubt as to what he meant....When he dissented he never hesitated to criticize the opinion of the Court. There was a touch of indignation in the language he used, and almost an inability to understand how his colleagues could have differed from him, could be seen in each sentence. He had an absolute confidence in the correctness of his own opinion and with his great power of judgment and vigor of expression made a wonderfully strong presentation of his view of any case....In questions concerning civil rights he was inflexible....He was a fearless judge--absolutely independent and determined to do the right as he saw it." R.T.W. Duke, Jr., "John Marshall Harlan," Virginia Law Review, November, 1911 pp. 503-4.

34. 203 US. 3, (1906).

35. Quoted from Harlan's Dissent, 203 US. 20.
the Negroes in order to compel them by violence to quit their jobs and abandon the plant for no other reasons than that they were Negroes. The lower federal court found Hodges and the others guilty of violating five sections of the Civil Rights Acts which provided, in essence, that all persons had the same rights to make contracts regardless of race and which made illegal conspiracies to injure or oppress persons in the free exercise of the rights secured by the United States Constitution or its laws.

The opinion of the majority of the Supreme Court followed the pattern of most cases of this type. The convictions were reversed on the ground that these Civil Rights Acts could not be upheld under the Fourteenth Amendment because they gave Congress power to make illegal, acts of private persons. Justice Brewer, speaking for the Court, said:

That the Fourteenth and Fifteenth Amendments do not justify the legislation is beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. 36

The Court held the acts were not within the scope of the Thirteenth Amendment because that Amendment applies only to a status of slavery or involuntary servitude and the actions of Hodges and the others were not relevant to that amendment. Again the Court upheld the section which made

it a crime to prevent the free exercise of any right guaranteed by the Court or laws of the U. S., but as usual stated that it was not applicable in this case because the right to an occupation is not a right secured by the Constitution of the United States and thus not one of the rights which that section was designed to protect. To imply that the actions of Hodges and others were illegal because the victims were Negroes was to suppose that the Thirteenth Amendment was applied to Negroes only, and such was not the case. Said Brewer:

While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation....It reaches every race and every individual thereof. Slavery or involuntary servitude of the Chinese, or the Italian, or the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African.37

In his dissenting opinion Justice Harlan presented the views he had expressed in similar cases previously. In the first place the infringement of the right to contract for one's own labor was slavery within the meaning of the Thirteenth Amendment and Congress' power to pass appropriate legislation enforcing this amendment was exercised in the passage of the section of the Revised Statutes which had been consistently upheld as constitutional in previous cases. Thus Harlan and the majority of the Court disagreed on (1)
the fact that the right to contract for one's labor was a right secured by the Thirteenth Amendment and (2) the above was not only constitutional but applicable to the activities of Hodges and the others.38 Said Harlan:

Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States on account of their race, to enjoy all the privileges that inhere in freedom....So legislation making it an offense against the United States to conspire to injure or intimidate a citizen in the free exercise of any right secured by the constitution is broad enough to embrace a conspiracy of the kind charged in the present indictment.39

To support his view that the Thirteenth Amendment not only protected persons against physical bondage but also

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

39. Ibid., p. 27. Harlan quoted from Strauder v W. Va. (100 US 303, 310) "A right of immunity, whether created by the Constitution or only guaranteed by it may be protected by Congress." Similar views Harlan pointed out were expressed by the Court majority in Prigg v Pennsylvania (16 Pet. 539) and U.S. v Reese (92 US. 214).
protected them against the incidents of slavery, Harlan quoted liberally from the majority opinion in the Civil Rights Cases, in which Bradley enunciated what constitutes "badges and incidents of slavery" which the Thirteenth Amendment was designed to prevent. Among them was the disability to make contracts. Harlan then asked:

If the Thirteenth Amendment established, and conferred, without the aid of legislation, the right to be free from the badges and incidents of slavery, and if the disability to make or enforce contracts for one's personal services was a badge of slavery, as it existed when the Thirteenth Amendment was adopted, how is it possible to say that the combination or conspiracy charged in the present indictment, and conclusively established by the verdict and judgment, was not in hostility to rights secured by the constitution? 40

Harlan also found support for the argument that the acts of Hodges were a violation of the Fourteenth Amendment. In Allgeyer v. Louisiana 41 (165 US 578) the Court interpreted

40. Ibid., p. 35. More recent support for this view is that of Jacobus tenBroek: "The striking thing about the Thirteenth Amendment is that it was intended by its drafters and sponsors as a consummation to abolitionism in the broad sense in which thirty years of agitation and organized activity had defined that movement. The amendment was seen by its drafters and sponsors as doing the whole job—not merely cutting the fetters which bound the physical person of the slave, but restoring to him his natural, inalienable, and civil rights...." Anti-Slavery Origins of the Fourteenth Amendment (Berkeley: University of California, 1951), pp. 179-180.

41. 165 US 578.
the word "liberty" in the due process clause to include

not only the right of the citizen to be free from
the mere physical restraint of his person, as by
incarceration, but the term is deemed to embrace
the right of the citizen to be free in the enjoy­
ment of all his faculties; to be free to use them
in all lawful ways; to live and work when he will;
to earn his livelihood by any lawful calling; to
pursue any livelihood or avocation, and for that
purpose to enter all contracts which may be proper,
necessary and essential to the carrying out to a
successful conclusion the purpose above mentioned.42

Although Harlan recognized that the foregoing referred
to state action, he took the position that this definition
of liberty was nothing more or less than the freedom estab­
lished by the Thirteenth Amendment; therefore, that amend­
ment prohibited its violation by private individuals. Any­
one who is deprived of the foregoing rights because of his
race is hindered, according to Harlan, in the exercise of
rights secured to freemen by the Thirteenth Amendment.

Thus the Hodges case re-emphasizes Justice Harlan's
defense of individual rights as he supported the Negro in
his attempt to achieve equality of opportunity with the
white man. One writer on Harlan's views regarding the role
of Negroes makes the following observation:

He believed that they should occupy the posi­
tion that historically they were intended to occupy
by the Thirteenth and Fourteenth Amendments. He
believed that the law should be interpreted as it
was meant and not as the Court thought expedient

42. 203 US 36. Italics Harlan's.
and wise. Though it may be true that his relation to the Negro in political matters may have made him more violent in his dissents, any one who will look fairly at the question must conclude that his doctrine was legally correct.43

To limit the discussion of cases under the Civil Rights Acts to the foregoing might leave the impression that the Supreme Court during Harlan's tenure was opposed to all provisions and applications of these laws. On the contrary, there were several occasions in which Harlan and the majority of the Court were in agreement. For example, in *Ex Parte Virginia*[^44] the Court upheld the conviction of a Virginia judge who had excluded Negroes from State juries in violation of a specific provision of the Civil Rights Acts. The Court ruled that the action of a judge constituted state action and thus violated the equal protection clause of the Fourteenth Amendment.45 The same year the Court also sustained the indictment of Maryland election officials who were charged with stuffing the ballot boxes in a Congressional election in violation of a Civil Rights Act making


[^44]: 100 US 339 (1880).

[^45]: The same principle was followed in *Strauder v W.Va.*, 100 US 303 (1880) and *Virginia v Rives*, 100 US 313 (1880).
this a criminal offense. The Court upheld the act under the "times, places, and manner" clause of the Constitution.

Four years later two cases came to the Supreme Court in which Civil Rights laws prohibiting actions of private individuals were upheld. In one the Court upheld the conviction of private individuals who had used violence against a Negro who attempted to vote in a Congressional election in Georgia. The decision also upheld the same Civil Rights law based on Art. 1, Sec. 4, which had been upheld in the Siebold case. The same year this law was enforced again in a case involving individuals charged with using violence to drive a homesteader off his land which he had settled pursuant to the Federal Homestead Act. The Court held that the actions of Waddell and the other defendants deprived the homesteader of rights secured to him by the laws of the United States and thus it sustained the validity of a Civil Rights Act in its application to this case.

In 1892, in a case involving the lynching of prisoners who were taken from the custody of federal officers, the Supreme Court upheld a Civil Rights statute making it a crime

46. Ex Parte Siebold, 100 US 371 (1880).
47. Ex Parte Yarbrough, 110 US 651 (1884).
to deprive any person of rights secured by the Constitution and laws of the U. S. Said the Court:

Any government which has power to indict, try and punish for crime, and to arrest the accused and hold them in safekeeping until trial, must have the power and the duty to protect against unlawful interference its prisoners so held.49

The Court took somewhat the same position in a case in 1900 in which Harlan wrote the majority decision.50 Here the Court upheld the conviction of defendants charged with murdering a person who had informed Federal revenue agents of the illegal operation of a distillery in Alabama. According to Harlan a citizen had a right "in return for the protection he enjoyed under the Constitution and laws of the United States, to aid in the execution of the laws of his country by giving information to the proper authorities of violators of those laws."51

Thus it can be seen that the Supreme Court was not entirely hostile to the Civil Rights Acts, although it insisted that only those acts which were clearly within the majority's narrow interpretation of the Civil War Amendments would be allowed to stand the test of constitutionality. Throughout all these cases, Harlan concerns himself with one matter only--what was the intent of the framers of these

49. Logan v W. Va., 144 US 263, 294 (1892).
50. Motes v U. S., 144 US 263 (1892).
51. Ibid., p. 462.
amendments and the intent of the legislators who passed the Civil Rights Acts? Because he felt the two types of laws (one fundamental and the others statutory) were passed by the same group in Congress, and since that group was vocal in its desire to provide the Negroes freedom of opportunity as well as freedom from bondage, it was obvious to Harlan that the intentions of those who created these amendments and these laws were better represented by his dissenting opinions than by the interpretations of the majority of the Court. There seems little doubt that Harlan was sincere in his belief that the majority's interpretation of the Civil War Amendments was a circumvention of the intentions of the amendments' creators and that the true meaning of these amendments was sacrificed for what the court thought to be the wiser and more expedient policy for solving the many problems arising from the emancipation of the colored race.

The Separate But Equal Doctrine: Justice Harlan vs the Supreme Court.

No group of cases shows the unique position of Harlan more vividly than those which dealt with the question of the segregation and discrimination of the Negro race. Among the

52. Among the most complete studies upholding Harlan's views is that of Jacobus tenBroek, op. cit. "The only possible method by which Congress could by appropriate legislation enforce Section One [of the 14th Amendment] would be itself to supply the protection to individuals which the state had withheld." p. 204.
cases which concern this issue, four provide a clear picture of Harlan's thinking relative to what has become such a controversial field of constitutional law today.

The first of these cases in which Harlan took part, *Louisville, New Orleans and Texas Railway Co. v. Mississippi*, concerned the constitutionality of a statute passed by the Mississippi legislature in 1888 requiring all railroads carrying passengers in that state to provide equal, but separate, accommodations for the white and colored races. The question to be answered was whether or not the act was a regulation of interstate commerce. If the Court were to decide that it was, then the statute would be unconstitutional as an interference with the federal power to regulate commerce between the states. To sustain this view, the plaintiff relied heavily on the case of *Hall v. DeCuir*, which had been decided in 1877, a few weeks before Harlan took his seat on the Court. In the Hall case, a Louisiana statute passed in 1869 required those engaged in transportation of passengers in common carriers to give all persons traveling within that state equal rights and privileges in all parts of the carrier without distinction as to race.

The Supreme Court held that this law was unconstitutional.

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53. 133 U.S. 587 (1890).
54. 95 U.S. 485 (1877).
because it was a burdensome regulation of interstate commerce. Speaking for the Court, Chief Justice Waite said:

If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without.\textsuperscript{55}

This view that a law forbidding segregation in transportation was a burden on interstate commerce, and therefore unconstitutional, gave hope to the Louisville RR that a law demanding segregation would also be void as a burden on interstate commerce. In the Louisville RR case action was brought by the State of Mississippi against the railroad for the violation of Section I of the Mississippi statute in not providing separate accommodations for the two races. The Court took the position that the Mississippi law applied solely to commerce that was intra-state and thus was not a burden to interstate commerce. Justice Brewer, speaking for the majority, distinguished between \textit{Hall v Decuir} and the Louisville RR case. In the former case, the Louisiana State Supreme Court had interpreted the Louisiana statute as applying to interstate carriers and thus the U. S. Supreme Court could not place a different interpretation upon it.

\textsuperscript{55} 95 US 485 (1877).
Justice Brewer quoted Chief Justice Waite: "Such was the construction given to that act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts." In contrast to the Hall case, on the other hand, Justice Brewer pointed out that when the Louisville RR case was in the state courts "the Supreme Court of Mississippi held that the statute applied solely to commerce within the state; and that construction being the construction of the statute of the state by its highest court, must be accepted as conclusive here."

The Supreme Court majority thus considered the laws in these two cases as quite different. One involved a regulation of and a burden upon interstate commerce and was therefore unconstitutional while the other was concerned with intra-state commerce only, therefore was valid. In both cases the Supreme Court followed the interpretations the respective State Supreme Courts placed on their laws relative to their relations to interstate commerce. The effect these laws had on interstate commerce seems to have been ignored by the majority of the Court. It was in this matter of the "effect" of the statute on interstate commerce that Harlan based his dissent, and Justice Bradley concurred with this.

56. 133 US 590.
57. Ibid., p. 591.
dissent. Harlan pointed out that the Louisville, etc. RR Company owned a line from New Orleans to Memphis, Tennessee.

If one of its passenger trains—starting, for instance, from Memphis to go to New Orleans—enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the Company and the conductor of such trains are liable to be fined as prescribed in the statute, the validity of which is here in question. In other words, it is made an offense against the State of Mississippi if a railroad company engaged in interstate commerce shall presume to send one of its trains into or through that State without such arrangement of its cars as will secure separate accommodations for both races.58

Stripped of the technical distinction between this law and the one in the Hall case, the effects on interstate commerce, according to Harlan, were identical—both burdensome. The charges against the Louisiana law in the Hall case Harlan felt to be pertinent to the Mississippi law in this case. Said Harlan:

I am unable to perceive how the former is a regulation of interstate commerce and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character.59

It is important to note that Harlan takes the position that he is not trying to substitute his interpretation of

58. Ibid., pp. 592-3.
59. Ibid., p. 594.
these two state laws for that of the state supreme courts, as that would be exercising judicial legislation, a practice he opposed. Rather, he was looking at the laws' effects. In these cases the effect of both laws, according to Harlan, was to burden interstate commerce. That fact alone placed both laws in the same category.

Another case dealing with segregation in transportation has become one of the most famous cases in which Harlan took part, that of Plessy v Ferguson. In 1890, the Louisiana legislature passed a law similar to the Mississippi statute in the Louisville RR case. This 1890 law provided that "all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches in each passenger train, or by dividing the passenger coaches in each passenger train by a partition so as to secure separate accommodations," except for street railways. A fine or imprisonment was provided for if a railway officer or a passenger refused to abide by the provisions of this law. The only persons specifically exempted were nurses attending children of the other race.

Unlike the statutes in the Hall and Louisville RR cases, this law was not attacked on the ground that it violated the

60. 163 US 537 (1896).
61. Ibid., p. 540.
commerce clause, rather it was challenged as a violation of the Thirteenth and Fourteenth Amendments. Plessy, seven-eights Caucasian and one-eighth Negro, being a passenger between two points within the state, was assigned by railroad officers to the coach used by those of the colored race, but he insisted that he had a right to sit in the coach reserved for whites. He was ejected from the train and placed in the parish jail to answer the charge of having violated the act.

The majority of the court, with Justice Brown as spokesman, disposed immediately of the charge that the act violated the Thirteenth Amendment. That the act was not such a violation was considered too clear for argument; in fact, the court felt that even the plaintiff was not relying very heavily on this position. The majority could see no relation between involuntary servitude and the provisions of the Louisiana statute. "A statute which implies merely a legal distinction between the white and colored races...has no tendency to destroy the legal equality of the two races, or establish a state of involuntary servitude." 62

As far as the Fourteenth Amendment was concerned, the Court held that the law was still valid because the Amendment demanded nothing more than the legal equality of the races.

62. Ibid., p. 543.
The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinction based on color, or to enforce social, as distinguished from political equality, or the commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police powers.63

It is interesting to note that the court, in upholding validity of segregation, used the analogy of public school segregation "which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."64 The Louisiana statute was also considered similar, in principle, to laws which forbid the intermarriage of the races, or which segregate the races in theatres. In other words, the Fourteenth Amendment was violated only if political equality was violated and not if the equality was merely social.

The contention was made by the plaintiff in error that if persons could be segregated on the basis of race, they could be segregated on the basis of the color of their hair, or the whites could be forced to walk on one side of the

63. Ibid., p. 544.
64. Idem.
street and the colored on the other, or the white men's houses could be painted white and the colored men's black, etc., on the theory that one side of the street is as good as the other or that a black house is as good as a white one. To this the court replied that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." Thus laws which segregate the races must not be "unreasonable." What is the criterion for the legislative determination of a reasonable exercise of its police power? The answer the court gave was that the legislature must act "with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."  

Justice Brown next attacked what he considered to be the basic fallacy in Plessy's brief—the assumption that enforced segregation implied the colored race was stamped with a badge of inferiority. He emphasized this fallacy with a satirical remark that has been frequently quoted: "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that
construction upon it." He also stated that if the colored race should become the dominant race and impose a similar law of segregation, such action would not be considered by the whites as relegating them to an inferior status, consequently why should the colored person assume he is being treated as inferior under the present law? Plessy's argument, according to Justice Brown, assumed that legislation could overcome social prejudice and that the only way equal rights could be secured was by enforced commingling of the two races. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." To Justice Brown and the court majority this case was nothing more or less than an attempt by Plessy to insist that the colored race be made the social equal of the whites and any law which interfered with that social equality was unconstitutional. The Court, on the other hand, insisted that although Negroes had a right to political equality, there was no law which could guarantee them social equality and certainly the state had the right under its police power to pass legislation which would segregate the races in order to maintain the "established usages, customs and traditions of the people," and such segregation was in no sense to constitute an implied superiority.

67. Ibid., p. 551.
68. Idem.
of one race over the other.

In his dissenting opinion in the Louisville RR case, Justice Harlan had concluded with the following statement:

Without considering other grounds upon which, in my judgment, the statute in question might properly be held to be repugnant to the Constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the statute of Mississippi is...a regulation of commerce among the States, and is, therefore, void. 69

It is interesting to speculate as to what the "other grounds" were that Harlan might have considered in finding the Mississippi statute unconstitutional. In his dissent in the Plessy case, there is some indication of what these other grounds might have been, because his objections to the Louisiana law in the Plessy case, would be applicable to the Mississippi statute in the Louisville case. They are both laws in which the "state regulates the use of a public highway by citizens of the United States solely on the basis of race." Harlan first pointed out that the Louisiana statute applied to all citizens of the United States of both races residing in Louisiana. He then cited several cases which upheld his contention that railroads are public highways and thus must be available for use on an equal basis to all citizens, without any public authority operating such highways in a way that discriminated between citizens on the

69. 133 US. 595.
basis of race. Harlan's respect for the dignity of every human being is well expressed in the following quotation:

Every man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. 70

Harlan based his dissent very largely on his belief that laws such as the Louisiana statute in contention here were nothing less than attempts to thwart the freedoms guaranteed the Negro race by the Civil War Amendments. The Thirteenth Amendment, according to Harlan, was designed to prevent "the imposition of any burdens or disabilities what constitute badges of slavery or servitude." 71 In conjunction with the Fourteenth Amendment, it also protected all the civil rights that pertain to freedom and citizenship. Quoting from the courts decision in a previous case, 72 he pointed out that the Civil War Amendments secured "to a race recently emancipated...all the civil rights that the superior race enjoy," and "that the law in the States shall

70. 163 US 554-5.
71. Ibid., p. 555.
72. Strauder v W. Va., 100 US 303.
be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

Harlan also expressed the interesting view that the Court in the Strauder case plainly made the point that the words of the Fourteenth Amendment contained a "necessary implication of a positive immunity" or right to "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." To Harlan, the Louisiana statute violated all these rights and was certainly a step toward reducing Negroes to a subject race. The fact that the statute technically applied to black and white alike did not impress him.

Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodations

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The fundamental objection to the statute, as far as Harlan was concerned, was that it interfered with the personal freedom of citizens. If colored and white wish to travel together, they have every right to do so; and any government which forbids it on the ground of race is infringing on their individual liberty, just as much as any law which forbade both races to the equal use of the streets.

He then vigorously attacked the position of the majority that such a law would be "unreasonable." Such an interpretation he held to be a usurpation of the law-making function by the judiciary. In his view, the courts should have nothing to do with the questions of policy or expediency associated with the making of legislation. That a law may be unreasonable because of public policy does not make the law necessarily invalid. The statute under consideration here was not challenged by Harlan because it was "unreasonable"; he challenged it as contrary to the will and intent of the framers of the Civil War Amendments. To say that the State legislatures may pass "reasonable" legislation enforcing segregation on public conveyances implies that the court will determine which laws are reasonable and which are unreasonable. To Harlan this constituted judicial law-making and

was in direct conflict with the separation of powers principle.

The point that Harlan seemed to make above all others in his dissent is the fact that the constitution does not recognize a caste system in America and that any laws which create such a system are unconstitutional. This point is brought out in an illuminating fashion in the following words of Harlan which have been quoted so frequently in recent years:

But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows or tolerates classes among citizens ....The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.76

Speaking prophetically, Harlan said, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in The Dred Scott case."77 Harlan viewed this legislation as nothing less than a barrier to solving race friction.

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they can

76. Ibid., p. 559.
77. Idem.
not be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

What runs like a thread throughout Harlan's dissenting opinion is the refusal to accept a narrow definition of the phrase "civil rights." To consider the rights of the Negro in this case as merely "social" not "legal" or "political" and consequently unworthy of constitutional protection was to Harlan a position unworthy of consideration, "for social equality no more exists between two races traveling in a passenger coach... than when members of the same race sit by each other in a street car or in a jury box... or when they approach the ballot box in order to exercise the high privilege of voting." Harlan pointed out the irony in our laws which (at that time) forbade Chinese the right to become citizens yet gave them equal rights in Louisiana and superior rights to Negro citizens as far as the provision of the statute under consideration was concerned. He also reminded the court that we boast of the freedoms we enjoy above all other peoples yet the court upheld a law which "practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of 'equal'
accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.\textsuperscript{80}

Because the Supreme Court decision of May 17, 1954, overruled the "separate but equal" doctrine and declared segregation in the public schools to be in violation of the equal protection clause of the Fourteenth Amendment, it will be of interest to look at a case indirectly dealing with this question of public school segregation—a case, incidentally, in which Harlan wrote the majority opinion.\textsuperscript{81}

The case concerned the action of the Richmond County (Georgia) school board to close a high school used by sixty Negro students and use the building for approximately two hundred Negro children in the primary grades. The plaintiffs considered the use of public funds for the support of a high school system for white students as a violation of the Fourteenth Amendment. The relief sought by the plaintiffs was an injunction to enjoin the tax collector from collecting taxes to be used in this system and also to enjoin the board from using any funds it had already collected for its support. The school board, however, denied that it had any responsibility for the establishment of any high school system, but had only the authority to determine the location of high schools throughout the county as the interest and convenience of the people required. In pursuance of this

\begin{itemize}
\item \textsuperscript{80} Ibid., p. 562.
\item \textsuperscript{81} Cumming v Richmond Board of Education, 175 US 528 (1899).
\end{itemize}
authority it had decided that for purely economic reasons it was wiser to use a building to educate two to three hundred Negro primary students than sixty high school students, especially since there were three Negro high schools available in Augusta (Georgia) which the latter could attend.

Speaking for a unanimous court, Justice Harlan made clear that the issue of segregation was not a factor in this case. "Indeed, the plaintiffs distinctly state that they have no objection to the tax in question so far as levied for the support of primary, intermediate and grammar schools, in the management of which the rule as to the separation of races is enforced."

The primary issue in the case centered around the fact that sixty Negroes of high school age were deprived of their school which was converted into a primary school for approximately two hundred Negro children; and that these sixty were left without a high school in an area where high schools for whites were maintained. The demand of the plaintiff that the Board be enjoined from using funds for the support of the white high schools struck Harlan as a solution which would harm the educational opportunities for the white children without providing any benefits to the colored. He felt the decision of the board under the circumstances was justified and not a violation of any clause of the Fourteenth Amendment.

82. Ibid., p. 544.
Its decision was in the interest of the greater number of colored children, leaving the smaller number to obtain a high school education in existing private institutions at an expense not beyond that incurred in the high school discontinued by the Board.\textsuperscript{83}

In other words the substitution of a colored primary school for a colored high school was certainly not racial discrimination. The fact that the educational system was based on segregation seems to have been considered irrelevant by Harlan and the Court. In one statement Harlan indicates that the Court might have been forced to answer different questions if the plaintiff had instituted a proceeding demanding that the Board of Education establish and maintain a high school for Negro children rather than insist on the negative action of enjoining the support of a high school for white children. What these different questions and answers would have been can merely be matters of speculation; although in the light of Harlan's dissenting opinions in the cases already analyzed, it is easy to believe he might have at least insisted that such a school be built or possibly demanded that segregation be discontinued. That he could not make such demands in the present case is borne out by the fact that (1) segregation was not made an issue in the case by either side, and (2) the action of the plaintiff was merely the negative one of preventing the support

\textsuperscript{83} Idem.
of the high schools for the white with no beneficial results to the Negro students. This failure to raise the segregation issue eliminated whatever anti-segregation activity Harlan might have wished to take.

There is one statement by Harlan, however, that does indicate his opinion regarding attempts by the Federal judiciary to regulate the educational system:

We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. 84

What does this tell us about Harlan's attitude toward the separate but equal doctrine of the public schools? Not much that is definite. The Cumming case raises more questions than it answers. The facts were such that it did not

84. Ibid., p. 545. One writer has made the following interesting observation relative to the Cumming case: "Harlan was probably continuing a subtle war against segregation legislation, for he might well have reasoned that if the court could not meddle in local affairs, it could not test for reasonable parity of educational opportunity, thereby discrediting the very justification of segregation. In upholding a clearly arbitrary action on the part of an instrumentality of the State of Georgia, the Richmond County Board of Education, he is strengthening his argument for the minority in the Plessy case." E. H. Hobbs, "Negro Education and the Equal Protection of the Laws." The Journal of Politics, XIV (1952), 496.
offer a true opportunity to discover Harlan's attitude on this matter. The foregoing quotation indicated two things: (1) that the benefits of public taxation should be shared by citizens without race discrimination, and (2) that although generally education supported by state taxation should not be regulated by Federal authority, such regulation is justified "in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." What constitutes an "unmistakable disregard of rights"? In his final statement, Harlan remarked: "We have here no such case to be determined; and as this view disposes of the only question which this court has jurisdiction to review and decide, the judgment is affirmed." This case, therefore, neither proves nor disproves how Harlan felt about the constitutionality of public school segregation. It is in his dissents in the Plessy and Louisville RR cases plus the Civil Rights cases that one finds more substantial support for the view that Harlan would regard such segregation an "unmistakable disregard of rights secured by the supreme law of the land." At least the Cumming case does not prove otherwise.

A case which indicates Harlan's views regarding segregation in higher education is *Berea College v. Kentucky*, which concerned the constitutionality of a Kentucky law making it unlawful for "any person, corporation or association

85. *Idem.*

86. 211 US 45 (1908).
of persons to maintain or operate any college, school or institution where persons of the white and Negro races are both received as pupils for instruction." Any one violating this law was subject to a $1,000 fine and $100 for each day the school was operated after such conviction.

Justice Brewer, speaking for the majority, took the position that the law was not a violation of the U. S. Constitution because

the decision by a state court of the extent and limitation of the powers conferred by the State upon one of its own corporations is of a purely local nature. In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the State would be subserved by some restriction, and the corporation may not plead that in spite of the restriction it has more or greater powers because the citizen has. 87

The important element in the decision concerned the fact that the statute as applied to individuals may have been in conflict with the constitution but be valid as it applied to corporations. "The statute is clearly separable and may be valid as to one class while invalid to another. Even if it were conceded that its assertion of powers over individuals cannot be sustained, still it must be upheld so far as it restrains corporations." 88 It is this question of separability which was the main issue in dispute. The

87. Ibid., p. 54.
88. Idem.
majority view was that whether the act was invalid as applied to individuals was irrelevant. The law was separable and thus it must be judged in regard to its application to corporations. Since the majority held it valid as applied to corporations, the statute was declared as binding on Berea College.

Justice Brewer attacked the view that the statute must "stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all." Said Brewer:

That the legislature of Kentucky desired to separate the teaching of white and colored children may be conceded, but it by no means follows that it would have enforced the separation so far as it could do so, even though it could not make it effective under all circumstances.89

Additional support of Brewer's view was given by the State Supreme Court's belief in the separability of the statute and "when a state statute is so interpreted this court should hesitate before it holds that the Supreme Court of the State did not know what was the thought of the legislature in its enactment."90

Recognizing that the reserved powers of the state to amend or alter a grant of a franchise or a charter to a corporation are subject to limitations, the court majority held

89. Idem.
90. Ibid., p. 56.
that the law under consideration did not "defeat or substantially impair the object of the grant, or any rights vested under it." 91

That the charter granted to Berea College was not impaired by the statute under consideration here is borne out, according to Justice Brewer, by the fact that the Kentucky law did not destroy the power of the college to furnish education to all persons. The objective of the college as defined under the grant and the desire of the school to educate Negroes could both be realized without violating the statute "if the same school taught the different races at different times, though at the same place or at different places at the same time..." 92

In his dissenting opinion, Justice Harlan attacked immediately the position of the majority that the statute was separable as between corporations and individuals. To hold such a position, according to Harlan, was to assume that the legislature considered the teaching of the two races together by corporations as wholly different in its results from such teaching when it was done by individuals. To Harlan it was

91. Ibid., p. 57. The grant referred to here defines the business of Berea College in these words: "Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, 'to promote the cause of Christ.'"

92. Idem.
inconceivable that the legislature recognized such a difference.

It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, at the same time by whomever that institution was conducted. It is a reflection upon the common sense of legislators to suppose that they might have prohibited a private corporation from teaching by its agents, and yet left individuals and unincorporated associations entirely at liberty, by the same instruction at the same time. It was the teaching of pupils of the two races together, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent.93

Following the accepted principle that where the provisions of a statute are inseparable, the validity of one provision will make all provisions invalid; Harlan took the view that the entire Kentucky statute was unconstitutional. He pointed out that section four94 had been held invalid by the highest state court as an "unreasonable and oppressive" exercise of the state's police power. To this view the Supreme Court majority offered no objection. Regarding the section under dispute here, there was at least an implication that in so far as it applied to individuals it was unconstitutional but as applied to corporations it was valid.

93. Ibid., p. 62.

94. "Nothing in this act shall be construed to prevent any private school, college, or institution of learning from maintaining a separate and distinct branch, thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color."
It was Harlan's position that the Kentucky legislature would not have enacted one of these provisions without the other; therefore, these provisions are not separable.

Now that Harlan's view of the inseparability of the provisions of section one is made clear, the next question is whether he felt all the provisions were valid or none of them were valid. To anyone familiar with Harlan's record in the defense of individual rights, his view that the entire statute was unconstitutional should come as no surprise. He wrote, "I am of the opinion that in its essential parts the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void." He believed the statute defeated or at least substantially impaired the object of the charter which the state had given Berea College. "The right to impart instruction, harmless in itself or beneficial to those who receive it," Harlan said, "is a substantial right of property—especially, where the services are rendered for compensation." Even if it were not a

95. Ibid., p. 67. One observer has pointed out that "the great pains taken in the majority opinion to demonstrate that the statute could be construed separably so as to apply only to corporations is persuasive of its unconstitutionality as applied to persons or associations of a non-corporate nature." Note, "Legality of Race Segregation in Educational Institutions." 82 University of Pennsylvania Law Review, 159 (1933).

96. Idem.
property right, Harlan pointed out that it was at least a deprivation of one's liberty by a state in violation of the U. S. Constitution. If the State of Kentucky could prevent children of different races from being taught in the same school, Harlan felt, they could also be forbidden by law from attending the same church. Because he felt the latter to be unconstitutional, he held that the former would be likewise. In the following passage can be seen Harlan's deep feelings toward the whole race question:

Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market place at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question and how inconsistent such legislation is with the principle of the equality of citizens before the law.97

What about segregation in public schools? This case does not answer the question any more directly than did the Cumming case. The majority decision did not discuss the question and Harlan made it clear that his dissenting

97. *Ibid.*, p. 69. Although the separate but equal doctrine is not discussed in this case, Harlan's attitude expressed here would seem to regard such a doctrine as untenable.
opinion had "no reference to regulations prescribed for public schools established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not now be discussed.  

Conclusion

To what extent does the foregoing analysis demonstrate the thesis of this paper that Justice Harlan advocated government action to protect the dignity and integrity of the individual? That Justice Harlan followed this principle relative to the Negro seems obvious from much that has been presented here.

His defense of the individual was made especially apparent when he attacked the attempts to deprive the Negro of equal accommodations in inns and places of amusement. Such treatment was a badge of servitude. Individual dignity was frustrated whenever the Negro was forbidden to exercise any right secured by the Constitution. The laws which enforced segregation of the races purported to apply equally to Negro and white, but Harlan saw that they were aimed at the Negro and based on the premise that the Negro was inferior. In his famous dissent in the Civil Rights Cases, Justice Harlan was particularly vehement in his opposition to the double standard which seemed evident from the failure of the Supreme Court to protect the rights of the Negro to the extent to which it protected the rights of the slaveholder.
under the Fugitive Slave Acts. Justice Harlan was consistent throughout his judicial career in his opposition to acts of discrimination against the Negro. "The law regards man as man," he said in the Plessy case. These few words point out clearly his firm belief in the duty of the law to treat men as men without taking into account their racial differences.

Justice Harlan's faith in the use of government to defend and protect the Negro is also discernible in his opinions. For example, he, alone, felt the Thirteenth and Fourteenth Amendments permitted direct legislation by Congress to enforce these constitutional guarantees, rather than permitting only legislation which would correct abuses of these guarantees by the agencies of state government. In other words, Harlan's plea was for positive action by the Federal government to protect the individual Negro against hostile state action and to provide the environment which would enable him to realize his potentialities. Equality of opportunity, Harlan recognized, was of major importance in the maintenance of individual dignity and integrity, and it was through the instrument of government that this equality would be achieved.

An interesting question this chapter suggests is how to explain the shift in Justice Harlan's position on slavery and the Negro from his views on these matters before 1865. With due consideration being given to the principle of multi-
ple causation, a few observations might be made which could explain this switch—providing, of course, it is understood that each of the contributing factors may have either a substantial or a minimal influence. Any attempt to determine the degree to which each contributed to the shift would be doomed to the level of sheer guesswork, but the following factors probably had at least some influence on Justice Harlan's transformation.

In the first place, the intensely Presbyterian environment of home and school in which Justice Harlan grew up contained a philosophy respecting the dignity of the individual which is consistent with that found in his dissenting opinions analyzed herein. This religious influence very possibly came to the forefront when the Civil War Amendments made illegal the way of life in which Harlan had been reared. He was forced to reconsider the values which had been dominant in a slave society.

How the Civil War Amendments could have forced upon Justice Harlan a readjustment of values can be understood when we recall a second element in his background—a highly developed respect for the law in general and the U. S. Constitution in particular. To a degree, at least, these two influences, the religious and the legal, united and, as a combination, influenced Justice Harlan in his attempts to reconcile the conflict between the property right of the slaveholder, which in 1860 was not inconsistent with our legal
and constitutional requirements and the individual freedom of the Negro, which after the Civil War was guaranteed by those requirements.

A third factor explaining Justice Harlan's transformation is presented by Alan Westin who points out that the Negroes obtained the right to vote after the ratification of the Fifteenth Amendment in 1870; and Harlan, faced with the fact that the Negroes would constitute a sizeable electorate, and being a practical politician, added their interests to those of other groups to whom he made his appeal in his election for Governor of Kentucky in 1871. That there may have been a degree of political expedience behind Justice Harlan's defense of the Negro is quite possible, although it does not explain the firmness of his opinions in behalf of the Negro after he had reached the politically secure refuge of the Supreme Court.

Professor Westin, however, draws a very interesting analogy between the "conversion" of Justice Harlan and that of many southern leaders today who, like Harlan, want to obey the "law of the land" and are opposed to open and violent defiance of the Supreme Court's interpretation of the federal constitution.

Professor Westin compares Justice Harlan's change in attitude toward the Negro to the fervor of the person who has "found religion." Professor Westin writes:

Just as a religious or political convert will hold his faith more strongly, even more combatively, than the born believer, so Justice Harlan had become a staunch supporter of Negro civil rights.\textsuperscript{100}

This also suggests a similarity to the single-mindedness of the reformed drunk toward the evils of alcohol.

A final point that might be considered is one which is raised by the implications of C. Vann Woodward's thesis that segregation legislation was not prevalent in the South until after 1900. Since legalized discrimination was uncommon before Justice Harlan's appointment to the Supreme Court, it cannot be assumed that he would have favored such laws even as early as 1865. It is not inconsistent to oppose the passage of proposed amendments and later to defend their enforcement. Instead of being condemned for inconsistency, Justice Harlan might just as logically be praised for trying conscientiously to enforce Constitutional provisions which he honestly thought wrong at the time they were proposed.

In spite of the interesting speculation in which it is possible to indulge, the main points should not be forgotten, namely that Justice Harlan demonstrated in his opinions on

\textsuperscript{100} Ibid., p. 698.
the position of the Negro a forthright respect for the dignity of the individual and an unfaltering faith in the positive role of government to protect that dignity.
CHAPTER III
MR. JUSTICE HARLAN AND THE INDIVIDUAL IN THE ECONOMIC FIELD

Introduction

Between 1865 and 1877 the problems of Reconstruction overshadowed the equally important problems which were emerging as a result of the tremendous industrial and technological changes taking place. Although these problems were numerous and varied, they resulted from one change in particular—the growth of a technologically integrated society and the concomitant decline of the individual's control over his own destiny. Justice Harlan's ingrained individualism reflected a sincere sympathy for the attempts of the small businessman and the farmer to survive against the increasing dominance of the economy by the monopolistic enterprises and the gigantic railroad combines.

It is ironic that the period in which the average citizen's individuality was being threatened with extinction is known as the period of "rugged individualism." The phrase is indicative of the fact that the times were described in terms of the interests of the dominant groups—the railroads and the industrial combinations. It is to these "individuals" that the term economic individualism refers. But it was the submerged groups that Justice Harlan wished to protect. Just as he defended the dignity of the individual Negro, so he defended the dignity of the individual farmers.
and small businessmen. It is in behalf of these groups that Justice Harlan demonstrated his brand of individualism.

As the abuses of industrial concentration and railroad expansion became increasingly apparent, there gradually developed, especially among agrarian interests, demands for government intervention. What had occurred was the substitution of economic power for political power. As a result of the emphasis on holding constant the power of government a vacuum had been created which was filled by the leaders of industry and business. This development has been vividly described as follows:

Power generated in the economic sphere was merely transformed into political power. Laissez-faire did not insist that the state wither away, but rather that its branches be pruned and its growth circumscribed, while business plants could spread around and above cutting it off from sunlight and water. In this way political considerations were subordinate to economic ones; and the powers of the state, when employed, were generally made to subservce what business deemed its interest.¹

An example of the attitude of the industrial group in the United States is that of the National Association of Manufacturers, which was organized in 1895. On one occasion it was critical of the practice of the Department of Agriculture whereby it distributed free of charge to farmers a vaccine designed to combat blackleg. This was a violation of the laissez-faire concept so dear to business and industry.

However, the NAM was very insistent when it pleaded with the federal government "to promote foreign trade by chartering an international American bank, subsidizing the merchant marine, enacting a protective tariff, and reforming the consular service so as to make it more solicitous of the export needs of American manufacturers."^2

To the American businessman, *laissez-faire* was a doctrine to use when it was in his interests to use it and to ignore when it was expedient to do so. In practice it meant aid my interest but do not aid my competitors; regulate my competitors, but do not regulate me. When government intervened to restrict and regulate, such intervention was contrary to the principle of free enterprise; when government came to the aid of business and industry, such action was the fulfilment of economic individualism through the encouragement of private enterprise. A group which was trying to apply the ideas of positive government became the backbone of what was later called the Granger Movement. In 1867 the National Grange of the Patrons of Husbandry was founded as a secret society made up of farmers who emphasized the need for social and educational reform. After the panic of 1873, it switched its attention to political action in behalf of

government regulation of monopolies, railroads, and warehouses through legislation favorable to agricultural interests. Although it obtained a membership of one million and gained control of several midwestern state governments, its power and influence faded in the 1880's with the rise in farm prices and the failure of several farm co-operatives which the organization had created. Nevertheless, the Granger Movement laid the foundation for later programs which in their philosophy of positive government can be traced through the Populists, the Square Deal and Progressivism of Theodore Roosevelt, Wilson’s New Freedom, as well as the New and Fair Deals of Franklin Roosevelt and Harry Truman. One writer on the Granger Movement stated, "On the whole, it is not too much to say that the fundamental principles upon which American regulation of railroads by legislation has developed were first worked out in the Granger states of the Northwest during the decade of the seventies."  

Although state commissions had long been set up to inquire into the practices of railroads, the Granger Movement can be given the credit for the real stimulus for regulation of railroad rates. In 1871 the Illinois legislature passed laws which set maximum rates and prohibited discriminating fares or charges by railroads and grain elevators; and by so doing, provoked one of the most famous cases found in

constitutional law, *Munn v Illinois*, in which the states' power to regulate the rates of enterprises "affected with the public interest" was announced. Stimulated by the Granger Movement and the fact that state regulation of railroad rates was ineffective beyond state borders, Congress in 1887 passed the Interstate Commerce Act which established the Interstate Commerce Commission. This law is important not merely because it placed one of the nation's largest industries under federal regulation, but more importantly, it made the public realize the impact of the interstate commerce power on the regulation of businesses affecting interstate commerce.

A second area wherein a shift from *laissez-faire* to positive government took place is in the attempt by the Federal government to regulate the activities of trusts and other "combinations in restraint of trade." This was another application of the power to regulate interstate commerce. There was a demand for some means by which the gradual encroachment of economic power in the political area could be curtailed. As an indication of this mounting public protest,

4. 94 US 113 (1877).

an Anti-monopoly Party was formed during the election of 1884. Although it was short-lived, the public outcry continued until both major parties, for the first time condemned trusts and monopolies. Most of the opposition came from farmers and industrial workers, both of whom were helpless victims of monopolistic practices. Beginning in 1889 the anti-trust movement spread throughout the States and eventually all but New Jersey, Delaware, and West Virginia had passed anti-trust legislation. Such legislation, however, proved futile since a corporation chartered in one state could carry on its business in other states. As a result of ineffective state anti-trust legislation plus a Senate investigation which disclosed some very important facts in the practices of beef, oil, and sugar trusts, a bill was introduced by Senator Sherman of Ohio to outlaw combinations in restraint of trade. It became law on July 2, 1890.

Although the Sherman Act left much to be desired, both in its language and in its interpretation, it represented, in conjunction with the Interstate Commerce Act of 1887, the beginning in a steady decline of laissez-faire. That economic individualism did not die with the passage of these laws will be demonstrated in the cases which will be analyzed, but nevertheless, the shift from a philosophy of "the government of business is not the business of government" to one which holds that "the business of government is the welfare of society" slowly took place, culminating in the New Deal of
Railroad Expansion: The I.C.C. and the Supreme Court

Attempts to regulate the rates charged for transportation and storage date back to at least 1870 when Illinois enacted a statute regulating the charge for storing grain in an elevator. This law was upheld in *Munn v Illinois*, before Harlan became a Supreme Court Justice. In sustaining the statute the Court held:

> Where warehouses are situated and their business is carried on exclusively within a State, the latter may, as a matter of domestic concern, prescribe regulations for them, notwithstanding they are used as instruments by those engaged in interstate, as well as in state commerce, and, until Congress acts in reference to their interstate relations, such regulations can be enforced, even though they may indirectly operate upon commerce beyond her immediate jurisdiction.

During the same term of court, the Supreme Court upheld an Iowa statute which established maximum rates for the transportation of freight and passengers and also upheld a similar statute of Wisconsin. The Supreme Court, in these cases, held that the states had the power to pass maximum rate laws and prescribe the rules for railroad operation unless

6. *94 US 113, 114 (1877).*

7. *Chicago, Burlington, and Quincy R.R. Co. v Iowa, 94 US 155 (1877).*

8. *Peik v Chicago and Northwestern R.R. Co., 94 US 164 (1877).* All of these cases were decided before Harlan was a member of the Supreme Court.
restrained by some contract in the corporation's charter. It was further held that until Congress acted in reference to the relations of common carriers to interstate commerce, it was within the state's power to regulate rates even though such laws might affect indirectly persons and things outside the state. This same position was taken as late as 1886 when in the Railroad Commission cases, of which the most famous is *Stone v Farmer's Loan and Trust Co.*, Chief Justice Waite, speaking for the majority, sustained a Mississippi law which limited the amount charged by a railroad for the transporting of people and property within its jurisdiction. Harlan dissented because he believed that the law violated a contract the state had with the railroads in which the state was precluded from absolute legislative control as to rates. Such a law was a violation of the obligation of contract. It was Harlan's belief that the railroad should be left free to determine its own rates as long as they were reasonable.

Although the above cases would seem to have settled the matter in favor of the states in their power to regulate railroad rates, the situation soon changed. In the *Wabash case* the court reexamined the whole subject. In that case

9. *116 U.S. 307 (1886).*

10. *Wabash, St. Louis and Pacific Railway Co. v Illinois, 118 U.S. 557 (1886).*
the Wabash Railway Company had violated an Illinois statute which forbade a railroad from charging higher rates for a shorter distance than it did for a longer one. Such practice was considered by the law to be unjust discrimination. The Supreme Court held that the Illinois law was an interference with Congress' power to regulate commerce between the states. The court said:

It cannot be too strongly insisted upon that the right of continuous transportation, from one end of the country to the other, is essential, in modern times, to that freedom of commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure.\(^{11}\)

In an obiter dictum, Justice Miller declared what appears to be an open invitation for Congress to pass the Interstate Commerce Act in 1887:

That this species of regulations is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear, from what has already been said. And if it be a regulation of commerce, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.\(^{12}\)

The most important attempt made by the Federal government to protect the public against the abuses of railroad

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11. Ibid., p. 577.
expansion was the Interstate Commerce Act of 1887. This act created a five-man commission which had the responsibility for its administration. The I.C.C. also acted as a board of investigation authorized to inquire into railroad management. In order to carry out this purpose effectively, it was given the power to require the presence and testimony of witnesses plus any books and records relevant to the matters under investigation. It could also require annual reporting plus a uniform system of accounting.

The law setting up the Commission was made to apply to all railroads operating in interstate and foreign commerce as well as such commerce by water and rail where through traffic was involved. Since few railroads engaged exclusively in intrastate commerce, most of them carrying some interstate traffic, the act, in effect, applied to almost all railroads, although intrastate traffic was expressly exempted.

As far as rates were concerned, the act provided that charges must be just and reasonable, forbade discrimination between places and kinds of traffic, and outlawed higher charges made under substantially similar circumstances and conditions for a shorter than for a longer distance. In addition, the act required that all rates and fares must be published and could not be increased without ten days public notice. Pooling of traffic or of revenue of competing carriers was also forbidden. 13

Although, as was emphasized earlier, this act was a major step forward in federal regulation of a major enterprise, the actual enforcement of the Act revealed weaknesses that eventually required several amendments.

Two of the most important cases involving the efforts of the Interstate Commerce Commission to provide effective enforcement of the Interstate Commerce Act are Texas and Pacific Railway Co. v Interstate Commerce Commission\textsuperscript{14} and Interstate Commerce Commission v Alabama Midland Railway Co.\textsuperscript{15} These are important for this study because they are the only cases involving the Interstate Commerce Commission, before the Act was amended, in which Justice Harlan wrote opinions. In these two cases he wrote dissenting opinions and in all but a few of the rest he dissented without comment; therefore, it is through an analysis of these two cases that Justice Harlan’s views regarding the Interstate Commerce Commission prior to 1900 can be most clearly understood.

In the Texas and Pacific case the railroad had charged a cheaper rate for goods shipped from New Orleans to San Francisco which had originated in England than it charged for the transportation of goods from New Orleans to San Francisco which were inland commodities. This the I.C.C.

\textsuperscript{14} 162 US 197 (1896).
\textsuperscript{15} 168 US 144 (1897).
considered unjust discrimination. The section of the Interstate Commerce Act that is relevant here reads as follows:

Section 2. That if any common carrier subject to the provisions of this act shall...by any special rate...charge...any person...a greater or less compensation for any service rendered...than it charges...any other person...for doing for him...a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.16

The key phrase has been underlined. The majority of the Supreme Court took the position that the I.C.C. had misinterpreted the Interstate Commerce Act by not recognizing that the circumstances in the two groups of commodities were not "substantially similar." The freight vessels charged a cheaper rate for delivering goods from overseas to points along the Pacific Coast and therefore the railroad felt it must charge lower rates in order to compete with these vessels and thus encourage the shipment of these commodities overland. In other words, if the rates for transporting commodities from New York, Philadelphia or New Orleans to San Francisco were the same for inland commodities as for overseas commodities, the latter would remain on ships; and therefore, to compete successfully the railroad company charged a rate for overseas commodities low enough to make it worth their while to unload at New York, Philadelphia or

New Orleans and go by rail to San Francisco. In his conclusion for the Court, Justice Shiras stated:

The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity.17

In his dissenting opinion in which he was joined by Justice Brown, Justice Harlan emphasized the fact that nowhere in the Interstate Commerce Act was there any justification for either the Commission or the carriers to take the rates established by ocean lines into consideration in determining the charges that an American railroad may make for the transportation of property over its routes. Justice Harlan also pointed out that the majority decision placed American manufacturers and shippers at a distinct disadvantage with those of foreign countries.

I find it impossible to believe that Congress intended that freight, originating in Europe or Asia and transported by an American railway from an American port to another part of the United States, could be given advantages in the matter

17. 162 U.S. 239.

18. Chief Justice Fuller wrote a very short separate dissenting opinion.
of rates, for services performed in this country, which are denied to like freight originating in this country and passing over the same line of railroad between the same points. To say that Congress so intended is to say that its purpose was to subordinate American interests to the interests of foreign countries and foreign corporations.19

Suppose, says Harlan, that the Interstate Commerce bill had contained a clause which provided that the carrier may charge less for transporting imported goods over a particular line than for transporting domestic goods over the same line. Such a clause would never have been passed by an American Congress.

The second case in which Justice Harlan wrote a dissenting opinion was I.C.C. v Alabama Midland Railway Co.20 In this case, the Board of Trade of Troy, Alabama, filed a complaint with the I.C.C. against the Alabama Midland Co. for violating the long and short haul clause which made it illegal for a railroad to discriminate between communities by charging as much or more for a short haul as for a long haul in the same route. In this case the railroad was charging $4.20 per ton to haul phosphate rock to Troy, and only $3.00 a ton to haul the rock to Montgomery, fifty-two miles further. The same discrimination took place relative to cotton and other commodities. The I.C.C. held these rates to be illegal as constituting unjust discrimination. When

20. 168 US 144 (1897).
it ordered the railroad to cease and desist such practices, the I.C.C. established what it considered to be the just maximum rates.

There are two questions in this case: (1) Are the circumstances and conditions between Troy and Montgomery so dissimilar that this discrimination is just? (2) Does the I.C.C. have the power to determine what rates the railroad should charge? In answering both questions the Supreme Court, speaking as usual in these I.C.C. cases through Justice Shiras, decided against the I.C.C. In regard to the first question, Justice Shiras said, "It seems undeniable ... that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water."\(^\text{21}\) This decision virtually nullified the long and short haul clause because the existence of competition was usually easy to prove.

In its answer to the question whether the I.C.C. could determine what rates would be just and reasonable, Justice Shiras stated:

\(^\text{21}\) 168 U.S. 175.
the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future, the railroad companies should follow the rates thus determined to have been in the past reasonable and just. 22

In his dissenting opinion, Justice Harlan continued his opposition to the attitude of the Supreme Court majority which he believed tended to weaken the attempts of the I.C.C. to make the Interstate Commerce law effective. His dissent is short but very much to the point. It is presented here in toto in order that the reader can see exactly how Justice Harlan felt about what he believed the Supreme Court had done to obstruct the intentions of Congress.

I dissent from the opinion and judgment in this case. Taken in connection with the other decisions defining the power 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. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several States. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies.

22. 168 U.S. 162 (1897).
engaged in such commerce. The judgment in this case...proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce --when their interests will be subserved thereby--to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.\textsuperscript{23}

Here is a clear statement of Justice Harlan's faith in government as an instrument to protect the individual in the economic field. Here the individual dignity and integrity is not only that of the small farmer but of entire communities against whom the railroads discriminated. Justice Harlan saw the rising power of organized transportation as a threat to the individual dignity of small communities which had become dependent upon the railroads for economic survival.

Other cases in which Justice Harlan dissented, although without comment, are \textit{I.C.C. v Cincinnati, New Orleans, and Texas Pacific R.R.},\textsuperscript{24} in which the Supreme Court held that the I.C.C. had no power to fix rates for the future, \textit{East}

\textsuperscript{23} 168 US 176-7.
Tennessee, Virginia and Georgia Railway Co. v Interstate Commerce Commission,\textsuperscript{25} in which the court upheld its previous position that

a competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place\ldots\textsuperscript{26}

and Interstate Commerce Commission v Clyde Steamship Company,\textsuperscript{27} in which the court took the same position as it did in the East Tennessee case, above.

Indicative of the weakness of the I.C.C. is the statement in the report of the I.C.C. made in 1897 in which the Commission quoted from Harlan's dissent in the Alabama Midland case, then commented:

It is a statement of the exact situation. The I.C.C. can conduct investigations and make reports. It can, perhaps, correct in a halting fashion some forms of discrimination. It collects and publishes statistical information which would be of value, if, under the law, it could be obtained and published within a reasonable time\ldots But, by virtue of judicial decisions, it has ceased to be a body for the regulation of interstate carriers. It is proper that Congress should understand this. The people should no longer look to the Commission for a protection which it is powerless to extend.\textsuperscript{28}

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As an indication that Congress did intend the Interstate Commerce Commission to become a truly regulatory agency, acts were passed during the first decade of the twentieth century which gave the I.C.C. much of the power it had lost through judicial interpretation. The Elkins Act of 1903 made it a misdemeanor for any carrier to depart from published railroad tariffs. It also punished shippers who received rebates as well as the railroads which granted them. In addition, the act provided injunctive relief to restrain any deviations from the published rates.

The most important act passed to strengthen the power of the I.C.C. was the Hepburn Act of 1906. By this measure, the I.C.C. was increased in membership from five to seven members (with increase in salaries) and its jurisdiction was extended to pipe lines (other than gas and water), express companies, sleeping car companies, and other accessorial services such as private car companies. Most important, the I.C.C. was given a power judicial decisions had forbidden it to exercise—the power to establish maximum rates, to regulate through rates, and require a uniform accounting system. In addition, thirty days' notice of all rate charges was required in order to give the Commission more time for investigation and also to insure publicity of

rates. Only under certain specified exceptions were free passes permitted. The act also placed stricter penalties and higher fines for violation of the Commission's orders. An interesting and important provision, which was designed to remove one of the main causes of discrimination, was the "commodity clause." This was included to prohibit railroads from carrying products of firms in which they had an ownership interest. A case in which this clause was interpreted is U.S. v Delaware and Hudson Company. The lower court had declared the commodities clause unconstitutional whereas the Supreme Court upheld it, but in so doing held that it did not cover a carrier which merely held stock in the commodity which it was carrying, because amendments presented in Congress to that effect were rejected. Said Mr. Justice White for the Court:

If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it.

On this point, Justice Harlan dissented. He felt that stock ownership in a corporation manufacturing or mining a commodity would, according to the clause, prevent a carrier

31. 213 US 414.
from transporting that commodity. In this regard, Justice Harlan made the following statement:

Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.32

Although the Hepburn Act marks the beginning of effective regulation by the I. C. C., it contained some provisions that still hampered the I. C. C. in its job. The act continued to give the courts broad powers of review; it gave the railroads the right to obtain a temporary injunction to suspend the rates presented by the I. C. C.; and it provided that the new rates would not go into effect during judicial proceedings until the I. C. C. order was finally sustained by the courts.

The last important amendment to the Interstate Commerce Act made before Justice Harlan's death, was the Mann-Elkins Act of 1910. This measure gave new birth to the long and short haul clauses by eliminating the troublesome phrase: "under substantially similar circumstances and conditions"

32. 213 US 419 "The result of the decision was that the railroads easily avoided the effect of the commodities clause by organizing separate corporations, the stock of which was owned by themselves, and selling the commodities through these subsidiary companies." T. J. Knight, "The Dissenting Opinions of Justice Harlan," The American Law Review LI (1917), 486-87.
thus making the prohibition against discrimination in this area practically absolute. In order that the railroads might not eliminate waterborne competition altogether, the act provided that if low long-haul rates were permitted to meet such competition, the carriers could not later raise these rates unless for some other reason than the elimination of water carrier competition. The law also provided that proposed rate charges may be postponed for an initial period not to exceed one hundred and twenty days and for a second period of the same length if the first period was insufficient. The purpose of this provision was to aid the I.C.C. in its investigations of rates and also protect the shipper who was overcharged by a rate found later to be unreasonable.

With these amendments to the original Interstate Commerce Act the I.C.C. gradually developed into an effective agency and the courts, in upholding these amendments, have, on the whole, supported the commission in its attempt to be an effective agency. One student of railroad regulation wrote in 1915:

The relationship between the Interstate Commerce Commission and the federal courts since the enactment of the Hepburn amendments, and particularly since 1910, has become greatly improved. There has been a marked tendency on the part of the courts to recognize the supremacy of the Commission as the deliberately selected instrument of
federal railway regulation, and increasingly to manifest a disinclination to interfere with the orders of the Commission on economic grounds or considerations of public policy. 33

Thus Justice Harlan's dissents in favor of a strong Interstate Commerce Commission were not in vain. Although the Court did not agree with his interpretation of what Congress intended, the latter, in the amendments to the act, eventually confirmed Justice Harlan's understanding of what Congress intended. 34

Industrial Concentration: The Sherman Act and the Supreme Court

The Sherman Anti-Trust Act, which was passed in 1890, made illegal "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations." 35 It also provided that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations

33. I. Leo Sharfman, Railway Regulation (Chicago: La Salle Extension University, 1915), p. 215. See also Sharfman's Interstate Commerce Commission, op. cit., p. 41, in which he shows the considerable increase in the number of controversies brought before the I.C.C. following the passage of the Hepburn Act of 1906.

34. See Knight., op. cit. pp. 487-8.

35. 26 Stat. 209, Chap. 647.
shall be deemed guilty of a misdemeanor." Also guilty of misdemeanors are those who make a contract in restraint of trade.

The enforcement of the law was placed under the Attorney General and the various federal district attorneys. When violations of the law took place, the Attorney General and his subordinates had the duty to "institute proceedings in equity to prevent and restrain such violations."

The penalties for violation of this act included a fine of $5,000 or imprisonment for a term of one year, or both. The property of any unlawful combination being transported across state lines was subject to seizure. In section seven the law provided that any person injured in his business or property by any corporation guilty of violating the act was entitled to threefold damages as well as the costs of the suit.

There are several cases under this act, decided during Justice Harlan's tenure, but only a few of them are of particular importance in demonstrating Justice Harlan's views on this important instrument of national power. The most important case is U. S. v E. C. Knight. In this case the Sherman Act took a more severe beating than the Court had ever administered to the Interstate Commerce Act and Justice Harlan wrote a dissent which was over three times as long as the majority opinion of Chief Justice Fuller.

36. 156 U.S. 1 (1895).
In this case the American Sugar Refining Company had acquired, through the purchase of stock in four Philadelphia refineries, control of approximately 98 per cent of the sugar refining business in the United States. The Court, speaking through Chief Justice Fuller, made a distinction between commerce and manufacturing, in which it held that Congress was not trying to regulate manufacturing, it was attempting to regulate commerce. What the law attacked was an act restraining monopoly of trade and commerce among the states, "but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce." In other words, for the Sherman Act to be applicable to a corporation, the latter must be trying to monopolize commerce. Any attempt to monopolize manufacturing was outside the authority of the Act. It was considered outside the control of Congress unless it could be proved that the acquisition of the refineries constituted a restraint of interstate commerce. William Howard Taft later observed that "the court could not apparently look beyond the

37. 156 US 17.
acquisition of property in one State to its ultimate purpose, which certainly was the control of the sale of refined sugar in country-wide trade. In fact, Mr. Taft took the position that the Sherman Act was made effective by the Supreme Court except in the E. C. Knight case and the decision in this case went the way it did only because of the failure of the government to prove that the purchase of the four refineries was "only a step in a great scheme to monopolize the business of selling refined sugar among the States of the U. S., a fact that, it would seem, might have been easy to establish." He also felt that Justice Harlan's dissenting opinion "represents much more fully the present view of the Court as to what may constitute a direct restraint upon interstate commerce than does the opinion of Chief Justice Fuller."

Because it is true that Justice Harlan's dissenting opinion has become the accepted one, and also because it expresses more clearly than elsewhere Justice Harlan's views on anti-trust policy in particular and the role of the Federal government in general, it seems appropriate to devote considerable attention to it.

39. Ibid., p. 82.
40. Ibid., p. 58.
Justice Harlan made it clear at the outset that he felt the American Sugar Refining Company presented a grave threat to the nation and if Congress could not restrain it, and monopolies like it, "it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the national government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling in their own interests, the entire trade among the States in food products that are essential to the comfort of every household in the land." If Congress does not have the power to stop such monopolies, then, Harlan felt, "the Constitution has failed to...place commerce among the States under the control of the common government of all the people." In this opinion is found one of the clearest expressions of Justice Harlan's concept of the commerce power and the Federal government's exercise of it:

Commerce among the States...is a unit, and in respect of that commerce, this is one country, and we are one people. It may be regulated by rules applicable to every part of the United States, and state lines and state jurisdiction cannot interfere with the United States. Under the power with which it is invested, Congress may remove unlawful obstructions, of whatever kind, to the free course of trade among the States....Any combination, therefore, that disturbs or unreasonably obstructs in buying and selling articles manufactured to be sold

41. 156 U.S. 19.
42. 156 U.S. 24.
to persons in other States or to be carried to
other States—a freedom that cannot exist if the
right to buy and sell is fettered by unlawful re­
strains that crush out competition—affects...
directly the people of all the states; and the
remedy for such an evil is found only in the ex­
ercise of powers confided to a government, which
...was the government of all, exercising powers
deleated by all, representing all, acting for
all.43

Speaking directly to the majority view that manufac­
turing and commerce are separate functions because the for­
mer precedes the latter, Justice Harlan emphasized the fact
that when the manufacturing function has ended, that which
was produced becomes a subject of commerce. Buying and
selling also inevitably follow manufacturing, and when they
deal with articles carried from one state to another, they
are as much commercial intercourse as the actual transpor­
tation of the commodities themselves. In the classic case
which still governs much of the Court's thinking on the
commerce power, Gibbons v Ogden, Chief Justice Marshall
stated that the commerce was not "confined to prescribing
rules for the conduct of individuals as the actual employ­
ment of buying and selling, or of barter." Thus Harlan
cemented the direct relationship between commerce and buying
and selling.44

43. 156 us 32-3.
44. 156 us 35-6.
Justice Harlan placed great faith in the power of the national government to protect the people as a whole from any threat which could not be adequately controlled by any one state, consequently there was no good reason why the Federal government "must fold its arms and remain inactive while capital combines...to destroy competition...through­out the entire country, in the buying and selling of arti­cles...that go into commerce among the states."  

When the decision in the Knight case was announced it looked as though the Sherman Act would become a farce. Taft points out that "both Mr. Olney and Mr. Cleveland concluded the evil must be controlled through state legislation, and not through a national statute, and they said so in their communications to Congress."  

Although the disappointment of the Sherman Act's sup­porters was well founded, subsequent cases proved that the law was not to be ignored altogether. For example, in Addy­ton Pipe and Steel Co. v U.S. the court by a unanimous de­cision held that the company violated the Sherman Act when it negotiated an agreement in which the iron-pipe companies

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45. 156 us 43.

46. Taft. op. cit., p. 60. That Olney was opposed to the Sherman Act is indicated in a letter he wrote to his secretary, in which he said after the Knight case, "I... have taken the responsibility of not prosecuting under a law I believed to be no good...." Quoted in Carl Swisher, American Constitutional Development (New York: Houghton Mifflin Co., 1943), p. 430.

47. 175 us 211 (1899).
of the Ohio and Missouri Valleys agreed to maintain prices and share profits and that no signer of this agreement would offer pipe for sale to any purchaser (usually a municipality seeking public competitive bids) without the permission of the combination and such permission would be granted only after the members of the combination had secretly bid to see which would make the bid providing the best profits to be divided among the members. Even the most laissez-faire-oriented members of the Court could not deny such an agreement was a violation of the Sherman Act. In fact, Justice Peckham, who had announced that the right to make contracts was incorporated in the due process clause, held that even liberty of contract can not apply to "those private contracts which directly and substantially . . . regulate to a greater or less degree commerce among the states." 49

One of the most important cases to strengthen the Sherman Act was one in which Justice Harlan wrote the majority opinion, Northern Securities Co. v. U. S. 50

This case concerned an agreement made by the majority stockholders of the Great Northern and the Northern Pacific Railroads to combine into a holding company which would take

49. 174 US 229.
50. 193 US 197 (1904).
over the Northwestern part of the United States in inter­
state railroad transportation.

The defendants, relying on the Knight case decision,
held that the agreement was not a violation of the Sherman
Act because it was a mere contract to acquire property, in
the same sense as the acquisition of sugar refineries by
the E. C. Knight Company. The defendants also asserted
that there was no evidence to demonstrate that in their
agreement and activities under it there had been any re­
straint on interstate commerce.

Justice Harlan, however, refused to accept this inter­
pretation. He emphasized the fact that the inevitable re­
sult of the agreement would be to prevent competition and
to tend towards a monopoly in interstate transportation in
the area concerned:

That to vitiate a combination such as the act
of Congress condemns it need not be shown that such
combination in fact results or will result in a
total suppression of trade or in a complete monop­
oly, but it is only essential to show that by its
necessary operation it tends to restrain interstate
or international trade or commerce, and to deprive
the public of the advantages that flow from free
competition.\textsuperscript{51}

An important controversy developed over the wisdom of
anti-trust action against railroads—even among those who
agreed on the evils which existed under a laissez-faire

\textsuperscript{51} 193 US 332.
attitude toward them. The point made by those who oppose breaking up railroad combinations and preventing pools is that competition in rates is inevitably suicidal and roads must combine to survive. In an analysis of the Northern Securities decision the following observation has been made:

It has been the antiquated doctrine of the Courts that the relations between common carriers and the public are regulated by the principle of competition....[which] as an effective regulator of railroad rates has forever disappeared...

The Sherman Anti-trust law was never intended as an instrument for breaking up railroad combinations....[It] is properly applicable to businesses of a private nature, such as the coal trust, the sugar trust, the oil trust, or the steel trust, when they act oppressively. The railroad business is not private, but public. Railroad companies are chartered to perform public functions of a highly necessary character. They are subject to constant supervision and direct public control. Their charters can be revoked if the rights of the public are violated. They can be duly punished if they discriminate unfairly against individuals or places. If their rates for carrying passenger or freight are too high, these can be reduced by the state legislatures, or by railroad commissions duly empowered.52

Another writer, after emphasizing the ruinous effects of railroad competition, the instability of general rate-cutting, and the evils which result from discriminatory practices, writes in favor of railway cooperation. As long

as the powers of the I.C.C. are sufficiently extensive to control consolidations, there is little danger of excessive charges. "Moreover," he writes, "we find at the present time [1915] that in spite of the fact that cooperation between carriers is for the most part illegal, the railroads have found it absolutely essential to work together by means of voluntary cooperative associations." 53

That this point of view eventually became the dominant one is indicated by the passage of the Transportation Act of 1920 which curtailed the restrictions on railroad consolidations at the same time it increased the powers of the Interstate Commerce Commission. That this act did not cover all the problems of railroad regulation is a fact, but also another story than the one told here.

In spite of the trend away from restricting railroad consolidation, Justice Harlan's opinion in the Northern Securities case was an important contribution to anti-trust development because of the rule that courts might look into the intentions of a combination, and if found to be a restraint on interstate commerce, the trust can be enjoined before such intentions can be realized. Taft took the position that Justice Harlan's decision "was a most important step

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53. Sharfman, Railroad Regulation, op. cit., p. 62. This point is emphasized by the fact that James J. Hill, when he heard about the decision in the Northern Securities case, said that the outcome of the case made no difference to him except that he now had to sign two certificates instead of one.
forward in the useful application of the anti-trust act.

"In fact he felt that if the E. C. Knight case were again brought before the court (1914), a different result would be reached."  

The case involving the Beef Trust applied the Sherman Act successfully against a genuine trust. Here Justice Holmes spoke for a unanimous court when he said:

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale, from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce."  

Considering that Justice Holmes was no great friend of the Sherman Act, this case was a great victory for those wanting to see the act used for the purpose for which it had been created. This "current of commerce" concept seems to anticipate the "flow of commerce" of Jones-Laughlin Steel case of 1937.

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58. He called the Sherman Act a humbug based on economic ignorance and incompetence. Quoted in Swisher, *op. cit.*, p. 543.
The two final cases under the Sherman Act to be discussed here are two of the last cases to be decided while Justice Harlan was a member of the Court. These cases, Standard Oil v U. S., 59 and U. S. v American Tobacco Co., 60 are so similar in treatment, both by the Supreme Court and by Justice Harlan, that they can be discussed together. The Standard Oil Trust was without doubt one of the major provocations for the passing of the Sherman Act. It controlled 85 per cent of the oil refining business in the country and its ruthless practices were legendary. In speaking for the Court, Chief Justice White took the position that the words, "restraint of trade," used in the Sherman Act, had their origin in common law and thus must be interpreted to mean what they meant in their common law usage; therefore, the statute is applicable only to "unreasonable" combinations in restraint of trade. Since this "rule of reason" was part of the common law, it must also be part of the Sherman Act. This same rule of reason was used in the decision breaking up the American Tobacco trust.

In both cases Justice Harlan concurred in the majority decisions but refused to accept the "rule of reason." He refused to accept the idea that the Supreme Court had a right to read into the Sherman Act the word "unreasonable,"

59. 221 US 1 (1911).

60. 221 US 106 (1911).
as applied to combinations in restraint of trade, and he stood for the rigid enforcement of the law as it was written, regardless of the consequences to individuals or even the community at large. He called it judicial legislation.\(^1\)

An interesting question is raised here whether the rule of reason is judicial legislation. Ex-president Taft took the same position as that taken by Chief Justice White and also pointed out that the rule was merely the adoption of the phrase used by Justice Peckham in the *Trans-Missouri and Joint Traffic Association* cases in which he said: "The act of Congress must have a reasonable construction; or else there would scarcely be an agreement or contract among businessmen that could not be said to have, directly or remotely, some bearing upon interstate commerce, and possible to restrain it." Taft believed that Justice Harlan was in error and felt that this error may be inferred by inference to his own course of reasoning in his very able and convincing dissenting opinion in the Sugar Trust case....But when the Court came over to him and that opinion, he could not bring himself to see the real victory he had won....He proceeded [in the Sugar Trust case] exactly as the Chief Justice did in the Standard Oil case, to find out what the common law definition of undue and unreasonable restraints of trade was to bring the case before him within the statute.\(^2\)

\(^1\) *Standard Oil v U. S.* 221 US 105.

\(^2\) Taft, *op. cit.*, p. 91-93.
Taft also attacked those who believed the rule of reason weakened the Sherman Act. He opposed those who believe the rule results in the court saying: "There are good trusts and bad trusts, and we have the power to say what are good trusts and bad trusts, according to our economic and political views." This power the Court does not have, said Taft, and it should not have this power, because it is legislative and not judicial. According to him, the Court, in presenting the "rule of reason," adopted the following line of reasoning:

It is evident what the Congress had in its mind from the language it uses. We know from current history the evil it sought to remedy. It has used terms that had a well-understood meaning at common-law—to wit, restraint of trade, monopoly, combination, and conspiracy. It is a settled rule of all American and English courts in construing statutes and constitutions that common-law terms are to receive common-law meaning unless there is good reason to the contrary. In the light of reason, and applying common-law meaning to such statutory terms, we hold that such incidental restraints as were reasonable at common law were not intended to be included within the term "restraints of trade" used in the statute.63

What seems to this writer to be the error of Taft's reasoning is the assumption that all courts will interpret the common-law concepts identically. To say that what is reasonable under common law is unreasonable under the Sherman Act is to assume that the former is an exact determination or standard upon which all will readily agree.

That the rule of reason introduced such confusion among business men as to what they could and could not do was demonstrated by the results of a survey made in 1911 in which the National Civic Federation circulated a questionnaire to leading businessmen which contained the question, "Do you believe that the Sherman Law, as now interpreted, is made clear and workable?" Of the 1,033 who responded, 841 answered in the negative and 192 in the affirmative. In other words, a great many businessmen did not know whether their practice would label them "good trusts" or "bad trusts" and apparently only the Supreme Court could decide it for them.

Where do these cases lead us in determining Justice Harlan's views on anti-trust policy in particular, and on the role of the national government in general? His views on the anti-trust policies are clear. He was convinced that the practices of the trusts were detrimental to the nation as a whole and no one state was in a position to prevent them; therefore, it was the national government alone which had the power to match these industrial giants. He was firm in his belief that if the federal government could not prevent the trend toward economic power usurping political power, then nothing could restrain this trend so harmful to the general welfare. Justice Harlan was no blind defender of laissez-faire, as the cases in this chapter demonstrate.

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64. Senate Committee on Interstate Commerce, Hearings on the Control of Corporations (1911-12), p. 499.
Edward S. Corwin emphasized this fact when he wrote, "Yet even when **laissez-faire** was strongest in the court, there were dissident voices. A hardy stand-outer in this earlier period was Justice Harlan, whose dissents deserve more fame than they have been accorded for keeping the spark of life going in the **corpus juris** of our constitutional law during a very damp season."^65

In his dissenting opinions Justice Harlan contributed much to the refinement of both the Interstate Commerce Act and the Sherman Act. The amendments to the I.C.C. confirmed the views of Harlan regarding the intentions of Congress toward regulation of the railroad industry. It is no exaggeration to say that if the dissenting opinions of Justice Harlan in the I.C.C. cases had been accepted by a majority of the court, the most important provisions of the Elkins Act, the Hepburn Act, and the Mann-Elkins Act would not have been necessary to amend the original act of 1887. In regard to the anti-trust cases, the views of Justice Harlan in the E. C. Knight case became virtually the views of the court almost immediately and certainly constituted the official position of the Court in the Jones, Laughlin Steel case of 1937.

^65. **Constitutional Revolution, Ltd.** (Claremont: Claremont College Press, 1941), p. 89.
Again we find that Justice Harlan spoke for the dignity of the individual. In this controversy it was for the individual farmer who was trying to obtain a reasonable freight rate from the railroads, the individual businessman who tried to stay alive amidst the cut-throat methods of the industrial giants, and the other consumers who had every right to expect more equitable treatment as a result of this increase in the regulatory power of the federal government. Here is Justice Harlan speaking from his Presbyterian and frontier individualism, in behalf of the individual farmer and businessman who are being protected by new rules of the game by which economic man struggles for the good life. The Interstate Commerce Commission and the Sherman Anti-Trust Act were the instruments to be used to guarantee this protection and Justice Harlan fought to see that they were made as effective as possible.
Should The Bill of Rights be Nationalized?

One of the most interesting constitutional questions in the area of civil liberties is whether the provisions of the Bill of Rights apply to the states as a result of the due process clause of the Fourteenth Amendment. That the freedom of speech, press, religion, assembly, and petition of the First Amendment do so apply is a settled issue.¹ What is less certain is the application of the procedural rights of the Fourth, Fifth and Sixth Amendments. Justice Cardozo's opinion in Palko v Connecticut is the clearest attempt to decide this question of what rights are nationalized and which ones are not by referring to those as nationalized which are essential to the "scheme of ordered liberty." The important point is that the accused is guaranteed a "fair trial", but it is not necessary that every trial must provide one, and only one, type of procedure. Much the same view was expressed by Cooley:

The principles, then, upon which the process is based, are to determine whether it is "due process" and not any considerations of mere form. Administrative and remedial process may be changed.

from time to time, but only with due regard to the landmarks established for the protection of the citizen.

It is on this issue that Justice Harlan was most at odds with the Supreme Court, not only during his service on the Bench but also with the Supreme Court since that time. In terms of the constitution interpreted by the Supreme Court, Justice Harlan's insistence on complete incorporation of the Bill of Rights into the due process clause of the Fourteenth Amendment has been a voice in the wilderness. In fact it is highly doubtful if the majority of the Supreme Court will at any time accept Harlan's position on this matter. Nevertheless, although Justice Harlan's position may never be the accepted one, his position on this question is still one of the Court's most articulate and consistent defenses of individual rights. Here the rights of the individual as a defendant are propounded. That his opinions were sometimes illogical will be demonstrated in this analysis, but that he never veered from his fight to preserve the dignity and integrity of the individual will be as obvious in these cases as it has been in those discussed previously.

Therefore, the Supreme Court, as shall be demonstrated in this chapter, has decided that indictment by grand jury,

and the guarantee against compulsory self-incrimination are among the rights in the Bill of Rights which are not essential to a "fair trial." On all these issues Justice Harlan dissented from the court's position.

The Bill of Rights and Procedural Due Process: Justice Harlan's Lost Cause.

One of the earlier cases in this group, and probably the most famous, is Hurtado v California. The facts of the case are quite simple. The constitution of the state of California provides that indictment by the grand jury may be replaced by indictment by information. The California legislature passed a law providing for this change. On February 20, 1882, the District Attorney of Sacramento County made and filed an information against Hurtado, charging him with the murder of Jose Antonio Stuardo. In May Hurtado was brought to trial and convicted of murder in the first degree, with the day of execution fixed for July 20, 1882. In an appeal to the Supreme Court of California, the judgment of the District Court was affirmed. After a second execution date had been set and another appeal made, the case was finally brought up to the U. S. Supreme Court on a writ of error.

3. 110 US 516 (1884).
Justice Matthews, speaking for a majority of the court, held that such a substitution was not a violation of the Fourteenth Amendment. Quoting the Supreme Court of Wisconsin, he declared:

> But its design was not to confine the States to a particular mode of procedure in judicial proceedings, and prohibit them from prosecuting for felonies by information instead of by indictment. Administration and remedial proceedings must change from time to time, with the advancement of legal science and the progress of society.

Justice Matthews then admitted that although the soundness of indictment by grand jury may have been emphasized by publicists and jurists such as Lord Coke, they are often misunderstood. When indictment by grand jury is mentioned, it is as a mere example of due process as it actually existed in cases in which it was customarily used. Such does not prove that due process would have been violated without such indictment. Matthews also quoted several English and American jurists to the effect that "due process" does not mean a particular form or procedure but rather as Chancellor Kent stated, "The better and larger definition of due process of law is that it means law in its regular course of administration through courts of justice," or as Justice Johnson said in Bank of Columbia v. Okely that the words

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4. Ibid., pp. 520-1.
5. 4 Wheaton 235, 244.
"were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

Matthews next discussed the opinion in Murray's Lessee v. Hoboken Land and Improvement Co., 6 which was relied upon by Hurtado. In this case what constitutes due process of law was determined by looking "to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors...." In answer to this Matthews pointed out:

But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians. 7

He then pointed out that it has been recognized that many of the procedures under the Magna Carta has gone through radical transformation in the history of legal procedure. Ordeal by Water, jury made up of constitutional judges of the Court of Exchequer and a grand jury which "heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion" make us wary of our so-called

6. 18 Howard 272.
7. 110 US 529.
"ancient liberties." In further refutation of the argument that indictment by grand jury had its origins in the Magna Carta, Matthews stated:

The concessions of Magna Carta were wrung from the King as guarantees 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, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land....

Applying the U. S. Constitution and its specific provisions to this case and reasoning therefrom, Justice Matthews quoted from a number of opinions to show that what constitutes due process of law varies with the state legislature and as long as such legislatures do not violate specific provisions, the mode of procedure may be consistent with the due process clause in several different aspects. What emerges is that the procedure must be consistent with a "fair trial," and what is "fair" is not measured by a very particular form. In fact Matthews held that since the due process clause was also in the Fifth Amendment along with the guarantee of indictment by jury, the latter is not a necessary element in due process and if the intention had been to apply grand jury indictment to state procedures, it

8. Ibid., p. 532.
would have been specifically provided for in the Fourteenth Amendment just as it was in the Fifth.

Justice Harlan, in his dissenting opinion, traced the origins of due process back to Magna Carta and to its phrase by "the law of the land." He also quoted freely from English and American jurists and political leaders to show that the rights of Englishmen were also the rights of the colonists. "In the Congress of the Colonies held in New York in 1765, it was declared that the colonies were entitled to all the essential liberties, privileges and immunities, confirmed by the Magna Carta."9 Of course this argument misses the point made by Matthews, namely, that "due process" does not contain the guarantee of indictment by grand jury. To argue, as Harlan did, that the principle of due process comes from the Magna Carta and that it is a protection against state governments as well as federal, is admitted by Matthews. It doesn't answer the question as to what the phrase "due process" covers.

Harlan then quoted freely from early state constitutions to show how the framers consistently applied the due process theme to the states. This protection, Harlan pointed out, was eventually transferred to the central government with the adoption of the Bill of Rights in the U. S. Constitution. The inclusion of a due process clause in the Fourteenth Amend-

9. 110 US 539.
ment similar to the one in the Fifth Amendment was no accident, according to Harlan—thus he continues to belabor an entirely irrelevant point. He went on, however, to make a statement which definitely draws the issue between himself and the rest of the court (as well as the majority of the Court ever since) when he said that the Fourteenth Amendment "evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property which had been imposed upon the general government." As this statement stands, Matthews and most judges would agree with it; but when one understands that Harlan viewed "due process" as including indictment by grand jury, it is apparent from Matthew's opinion and the subsequent opinions of the Supreme Court that Harlan is the "eccentric exception" to whom Frankfurter referred in the Adamson case in 1948. Harlan's all-inclusive interpretation of the due process clause is revealed in his statement refuting Matthews argument that if indictment by grand jury were transferred to the states through the Fourteenth Amendment then there would have been no need to include both the due process clause and the indictment clause in the Fifth Amendment. Harlan refuted this by pointing out that there are other rights listed in the Fifth Amendment which the courts would not permit the states to violate such as double jeopardy and self-incrimination. Harlan said:
If the argument of my brethren be sound, those rights...were not deemed by our fathers as essential in the due process of law prescribed by our constitution; because...had they been regarded as involved in due process of law they would not have been specifically and expressly provided for, but left to the protection given by the general clause forbidding the deprivation of life, liberty, or property without due process of law.¹⁰

Harlan pointed out that under the majority reasoning the state could do away with trial by jury and thus have cases decided by a single judge. Thus can be seen how far Harlan was from the court of his day and the majority of the court ever since that time because subsequent cases have demonstrated that the Supreme Court has never accepted self-incrimination, double jeopardy, and trial by jury as procedural elements incorporated in the due process clause of the Fourteenth Amendment.

One of the few parts of Harlan's argument which is not anticipated and answered by Matthews concerns a distinction between capital and minor offenses. Harlan took the position that in spite of the fact that information rather than indictment had been permitted in some cases, such had not been the situation where a capital offense was invoked. There followed several quotations from English law to indicate that information was regarded permissible for crimes other than where capital offenses had been committed. This argument seems, however, to undermine Harlan's previous idea

¹⁰. Ibid., p. 548.
that due process contains the element of indictment by
grand jury which, if so, would make the degree of crime
irrelevant, and therefore, since Harlan can't have it both
ways, he destroys, or at least seriously weakens, his ear-
lier argument when he presents this later one.

Harlan's final argument attacks Matthew's idea that a
state must not be bound by "settled usages" if it is to pro-
gress. Said Harlan, "It is difficult, however, to perceive
anything in the system of prosecuting human beings for their
lives, by information, which suggests that the state which
adopts it has entered upon an era of progress and improve-
ment in the law of criminal procedure." To Harlan, the
elimination of indictment by grand jury is a step backward.
He even stated that without indictment by grand jury, "Anglo-
Saxon liberty would, perhaps, have perished long before the
adoption of our constitution."12

Another case which demonstrates Harlan's belief in the
nationalization of procedural due process is that of Thomp-
son v Utah.13 In this case the accused, Thompson, had been
charged with stealing a calf. He was convicted by a jury
of twelve persons in the District Court of the Second Judi-
cial District of the Territory of Utah, before Utah became

11. Ibid., p. 553.
12. Ibid., p. 554.
13. 170 U.S. 343 (1898).
a state. He was recommended to the mercy of the court. A new trial was granted, and the case was removed to another county, but the trial was not held until the admission of Utah into the Union as a state.

In the second trial, Thompson was again found guilty, this time by a jury of eight persons. By the statutes of the Territory of Utah, a jury trial of twelve persons was guaranteed, but by the constitution of the state of Utah, a jury trial of eight persons was provided for in non-capital cases. Thompson appealed this conviction on the grounds that as applied to him, the provision for a eight-man jury was an ex post facto law because the act for which he was convicted was committed while Utah was a territory and all criminal cases in a District Court were tried by law before a jury of twelve persons at that time.

In the appeal to the Supreme Court of Utah, the judgment of conviction was affirmed, the court holding that the trial of the accused by a jury of eight persons was not inconsistent with the Constitution of the United States. The decision of the Supreme Court of the United States, however, overruled the judgment of the Utah Supreme Court and Justice Harlan wrote the majority decision—with Brewer and Peckham dissenting.

Harlan first pointed out the fact, admitted by all, that the Federal government has complete control over the
territorial governments but at the same time is required to provide the same procedural guarantees in the territories that are required in the Federal courts. Therefore, the Federal government could not have provided for eight-man juries in the Utah Territory even if it had wanted to do so. Consequently, Harlan asked:

Was it competent for the state of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a Territory, namely, to provide for his trial by a jury of eight persons?^4

Harlan, of course, denies that the state of Utah has powers to provide for an eight-man jury which the Federal government did not have. This position, it seems to the author, is more than a mere denunciation of an *ex post facto* law. It is at least a strong implication that the procedural guarantee in the Bill of Rights of a twelve-man jury is applicable to the proceedings in state courts as well as Federal. That Harlan took this view is made more explicit in a case to be discussed later.15 It is interesting that in the light of the strong implication of Harlan's belief in the nationalization of the trial by jury provisions of the Bill of Rights, no other members of the court wrote as much as a concurring opinion disagreeing with the implication referred to. It is also unfortunate that although

Brewer and Peckham dissented, neither wrote a dissenting opinion.

Another statement which shows Harlan's belief that a trial by less than twelve jurors was inadequate is the following: "...the wise men who framed our Constitution of the United States and the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors." Harlan made this statement while rejecting the contention of the Supreme Court of Utah that the state was not in conflict with the Sixth Amendment when it provided for an eight-man jury in non-capital cases.

In his conclusion, however, Harlan emphasized the ex post facto character of the problem and not the question of whether a state can provide for eight-man juries, therefore, much that has been said by the author here is speculation as this case relates to Harlan's views on the nationalization of the Bill of Rights.

A case which leaves no doubt about Harlan's views in this matter is Maxwell v. Dow. This case also came out of the State of Utah. On June 27, 1898, an information was filed against Maxwell by the county prosecuting attorney in

17. 176 US 581 (1900).
a state court of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of only eight persons, and was convicted and sentenced to imprisonment for eighteen years.

Maxwell attempted to obtain a writ of habeas corpus from the Utah Supreme Court on the ground that his imprisonment was unlawful because he was prosecuted without indictment by grand jury and was tried by a jury composed of eight instead of twelve persons. He claimed that these procedures were a violation of the privileges and immunities clauses of the Fifth and Fourteenth Amendments as well as a violation of the due process clause. Since his application for the writ was denied, the case was appealed to the U. S. Supreme Court.

There were two questions in the case: (1) Is the substitution of information for indictment by grand jury a violation of either the privileges and immunities clauses of the Fifth and Fourteenth Amendments or the due process clause of the Fourteenth Amendment? (2) Is a trial in a state court by a jury of eight instead of twelve a violation of any of the aforementioned clauses?

In its decision, the court affirmed the judgment of the Supreme Court of Utah. Speaking for the court, Justice Peckham disposed of the argument against the state's use of information by citing frequently the Hurtado case, and thus
refused to agree that such state court procedure violated the due process clause of the Fourteenth Amendment. He also held the Fourteenth Amendment's privileges and immunities clause did not apply because exemption from trial for an infamous crime, excepting under grand jury indictment, was not one of those privileges and immunities of a United States citizen which a state was prohibited from abridging.

Peckham also refused to consider the Fifth Amendment as relevant because the Bill of Rights provisions were intended as restraints on the federal government only and the Fourteenth Amendment does not alter the situation. Thus the court refused to accept the nationalization of that provision of the Bill of Rights requiring indictment by grand jury. Employing the same reasoning to oppose the nationalization of the trial-by-jury-of-twelve guarantee, Justice Peckham stated: "If the States have the power to abolish the grand jury... the same course of reasoning which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. 18

In his concluding statement, Justice Peckham cited the opinion of Justice Brewer in Brown v N. J., 19 in which he said: "The State has full control over the procedure of its

18. Ibid., pp. 602-3.
19. 175 US 172.
courts, both in civil and criminal cases, subject only to the qualification that such procedure must not mark a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitutions. 20

This last statement contains the real crux of the problem—that is, what, exactly, are the "fundamental rights" and what procedures actually do "conflict with specific and applicable provisions of the Federal Constitution"? To Justice Harlan these are grand jury indictment and a jury of twelve men. Any alteration of these provisions conflicts with the Federal Constitution.

As far as the question of the constitutionality of "information" is concerned, Harlan held the same position that he did in the Hurtado case, and he dissented in this case also on the question of an eight-man jury, which is not surprising in the light of his statements in the Thompson case. To Harlan the privileges and immunities referred to constitute at least "those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair." 21 That Harlan considered these to include the provisions of the Bill of Rights is indicated by his statement that the people adopted the first ten amendments "and what they had in view by so doing was to make it

20. 170 US 605.
certain that the privileges and immunities therein specified ...could never be impaired or destroyed by the National Government." Harlan then traced the history of trial by jury wherein he showed that trial by such a body has not only been regarded as a fundamental right but that trial jury should consist of twelve members.

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

Here can be seen the impasse reached between Harlan and the rest of the court. What rights are fundamental? What are the privileges and immunities the Fourteenth Amendment is guaranteed to protect? Harlan regarded a trial by twelve persons as a fundamental right, the rest of the court did not and most Supreme Court judges since have disagreed with Harlan. The same situation existed and exists relative to Harlan's insistence that trial by a jury of twelve is one

22. Ibid., p. 608.
23. Ibid., p. 612.
of the privileges and immunities mentioned in the Fourteenth Amendment.

In regard to the due process clause, Harlan also saw grounds for voiding the eight-man jury. He fell back on Murray's Lessee v Hoboken[^24] where it was stated that if any particular process of law is challenged as unconstitutional only two criteria can be used: either the process violates specific provisions of the constitution, or it is contrary to "those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors."

With a trace of irony, Harlan also pointed out that many decisions upheld property rights under the due process clause so it shouldn't have been too much to expect the court to use it to protect the life and liberty of the citizen.

If then the 'due process of law' required by the Fourteenth Amendment does not allow a State to take private property without just compensation but does allow the life or liberty of the citizen to be taken in a mode that is repugnant to the 'settled usages and the modes of proceeding' authorized at the time the Constitution was adopted and which was expressly forbidden in the National Bill of Rights, it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen.[^25]

Justice Harlan reveals clearly his impatience toward those who would permit nothing to threaten the rights of

[^24]: 18 Howard 272.
property but would not prevent judicial procedures which could place the individual defendant's life or liberty in jeopardy. In the view of Justice Harlan the defendant's procedural rights were being compromised, and he rose to their defense as he had done relative to the individual dignity of the Negro, the farmer, and the small businessman.

Harlan also pointed out that if the States could take away one right in the Bill of Rights, they could take away all others. In the following statement we find the clearest expression of Harlan's position in favor of complete nationalization of the Bill of Rights.

The right to be tried when charged with a crime by a jury of twelve persons is placed by the constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments, originally limited only the powers of the National Government...since the adoption of the Fourteenth Amendment, the privileges and immunities specified therein are, in my opinion, also guarded against infringement by the States. 26

The final case to be discussed in this section on nationalization of the Bill of Rights is one of the most famous in the group--Twining v N. Y. 27 Albert Twining and David Cornell were indicted by the grand jury of Monmouth County, New Jersey, and were charged with knowingly exhibiting a false paper to a bank examiner, with intent to deceive him as to the condition of the company. In February,

26. Ibid., p. 617.
27. 211 US 78 (1908).
1903, the company had closed its doors and so a bank examiner went to examine the books. He found an entry indicating that the company had made a recent payment of $44,875 for 381 shares of stock. When he inquired by what authority the purchase was made, he was informed that it was done by the Board of Directors. He was even shown a paper recording the meeting of the board at which the transaction took place, as well as the names of those who were present. This was the paper mentioned in the indictment.

The prosecution charged that the two men knew that it was false and they knowingly exhibited it to the examiner. Neither Twining nor Cornell called any witness nor did either of them testify, although New Jersey law permitted them to do so. They were found guilty and sentenced to six and four years' imprisonment respectively. This judgment was affirmed by the New Jersey Supreme Court and the New Jersey Court of Errors and Appeals.

The point of contention in the case was the fact that in his charge to the jury, the judge implied that there was something suspicious about the fact that the defendants would not take the stand to refute specific charges made against them. The judge said: "...the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter
of significance." Speaking of Cornell's refusal to deny the charge that he had shown the false paper to the examiner, the judge said: "He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration." The judge also said in his charge: "Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him." Thus the judge implied that the jury could look with suspicion on a defendant who refused to deny a specific charge made against him. In other words, the defendant's failure to take the stand was a factor which could work against him. The defense contended before the Supreme Court that such failure should imply absolutely nothing for nor against the defendant. By telling the jury that they may take into consideration the defendant's failure to deny a specific charge, the judge was putting the defendant at a disadvantage by his failure to testify.

The main question, therefore, that the Supreme Court was called upon to answer was whether or not the parts of the charge set forth were violations of the Fourteenth Amendment.

28. Ibid., p. 81.
29. Ibid., p. 82.
30. Ibid., p. 83
Amendment. The question of whether or not the due process clause of the Fourteenth Amendment incorporates the guarantees against compulsory self-incrimination of the Fifth Amendment was not part of the defense argument, "but it is argued that this privilege is one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment, and it is specifically argued that the privileges and immunities of citizens of the United States, protected against state action by that Amendment, include those fundamental personal rights which were protected against National action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect."31

Speaking for the court, Justice Moody went into some detail in citing the Slaughterhouse Cases 32 because of the contention by the defense that the guarantee against compulsory self-incrimination is one of the privileges and immunities protected by the Fourteenth Amendment. "The civil rights sometimes described as fundamental and inalienable, which before the Civil War Amendments were enjoyed by state

31. Ibid., p. 93.
32. 16 Wallace 36.
citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. 33

Having disposed of the idea that exemption from self-incrimination is one of the fundamental rights of national citizenship, included in the privileges and immunities of citizens of the United States, Moody then turned to another contention of the defense, namely, that the "safeguards of personal rights which are enumerated in the ... Bill of Rights ... are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. 34 Moody spent little time on this contention. Although he admitted that many jurists have felt that this contention was correct, the Court in several decisions had long since settled the question. "We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgement by the States. 35

Justice Moody next turned to the question of whether compulsory self-incrimination was a violation of the due process clause of the Fourteenth Amendment. He defined "due process" as part of the "settled usages and modes of proceed-

33. 211 US. 96.
34. Ibid., p. 98.
35. Ibid., p. 99.
"Ings" mentioned in Murray's Lessee v Hoboken Land Co. but also stated, "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law." He pointed out that compulsory self-incrimination was found in English law four hundred years after Magna Carta, and thus he expressed doubt that it is an essential element in due process of law.

Only four of the original thirteen states insisted that there be incorporated in the U. S. Constitution this guarantee against compulsory self-incrimination. In fact, two of these four states did not incorporate the privilege in their own constitutions. "The inference is irresistible," said Moody, "that it has been the opinion of constitution makers that the privilege...is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried."38

Justice Harlan, in his dissent, followed the course one familiar with the cases analyzed here would expect. Continuing in his belief that the provisions of the Bill of Rights

36. 18 Howard 272.
37. 211 US 101.
38. Ibid., p. 110.
apply to the States through the Fourteenth Amendment, Har­
lan stated his belief that immunity from self-incrimination is protected against state action by both the privileges and immunities clause and the due process clause of the Four­
teenth Amendment. 39 Harlan also regards this immunity as fundamental to our liberties. After pointing out its long history in America and England, he insisted that this immuni­ty was one of the privileges and immunities of the Fifth Amendment and therefore must have been in the minds of those who put the privileges and immunities clause in the Four­
teenth Amendment. "It is common knowledge," said Harlan, "that the compelling of a person to incriminate himself shocks or ought to shock the sense of right and justice of everyone who loves liberty." 40 To Harlan, the narrow inter­pretation of the Fourteenth Amendment by the majority would prevent that amendment from being any bar to the violation of other rights by the states. "According to the majority opinion," Harlan commented:

...the Fourteenth Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance cruel or unusual punish­ments (such as the thumb screw, or the rack or burning at the stake) might be inflicted. So of a state law, which infringed the right of free speech, or authorized unreasonable searches or

39. Ibid., p. 117.
40. Ibid., p. 123.
seizures of persons, their houses, papers or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.41

Thus Justice Harlan sees the loss of one provision of the Bill of Rights as grounds for the loss of all, as far as protection against state action is concerned. That this danger was later averted by the concepts of preferred status for the First Amendment could not have been known by Harlan; therefore, maybe his fears can be understood.

What becomes vividly clear in these opinions of Justice Harlan is his profound devotion for liberty—for the right of every accused person to have every advantage the constitution provides. To Harlan any procedural right which is of value should be possessed by every accused person whether involved with Federal authorities or those of the states. That the Supreme Court has never accepted Harlan's faith in the complete nationalization of the Bill of Rights may indicate that Harlan is in error on this issue, but at least it is error on the side of an increase in freedom in general and an increase in the rights of the individual in particular.

Does the Constitution Follow the Flag? The Insular Cases.

There is another group of cases in which Justice Harlan upheld the right of the accused. They involved the procedural due process of courts in the possessions acquired by the

41. Ibid., p. 125.
United States as a result of the Spanish-American War and specifically with the question of whether or not the procedural guarantees of the Bill of Rights applied to those courts. That is, does the Constitution follow the flag?

In one of the most important cases, *Hawaii v Mankichi*[^2] the Court divided with Justices Brown, McKenna, White, Day and Holmes deciding that the Fifth Amendment provisions for grand and petit juries were not necessarily applicable to the Hawaiian Islands, whereas the opposite point of view was taken by Chief Justice Fuller, and Justices Peckham, Brewer, and Harlan.

The Mankichi case came to the Supreme Court on appeal from the United States District Court in Hawaii, which had released Mankichi on a writ of *habeas corpus* because he had been convicted of manslaughter by a verdict of only nine of twelve jurors. The lower court had held the conviction violated the constitutional guarantee of trial by jury, requiring the common law jury of twelve with verdict unanimous. Although the laws of Hawaii had allowed the procedure which was used, the lower court held that the United States Constitution extended with full force over the Hawaiian Islands immediately after their annexation by the United States.

Speaking for a majority of the Court, Justice Brown held that it was not the intent of Congress to have the

[^2]: 190 US 197 (1903).
Constitution apply to the Hawaiian Islands merely by the resolution of annexation. "There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice, when such interference would result in imperiling the peace and good order of the islands."43

The annexation resolution, according to Justice Brown, continued the existing laws of Hawaii, so far as they were not contrary to the U.S. Constitution, until Congress should determine otherwise. The most important point in the case concerns whether or not the conviction of Mankichi by a majority of nine jurors instead of by a unanimous twelve was one of the laws of Hawaii which was contrary to the U.S. Constitution. Pointing out that he did not believe Congress intended the Constitution to extend in its entirety to the Hawaiian Islands, Justice Brown said,

If the negative words of the resolution "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that, every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by

43. Ibid., p. 214.
less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress.

Justice Brown did not deny that the annexation resolution required the full application of the Constitution, but for matters of expediency and practicality he felt it would be absurd to think that Congress intended an interpretation which would free all criminals convicted during the period from August, 1898, to June, 1900. He attempted to justify this attitude favoring expediency on the ground that the rights involved in this case were not "fundamental"; therefore, he recognized that the Constitution forbade Congress from taking action in the territories expressly forbidden but did not require every element of procedural due process be observed when it was not practical. He stated:

We would go even further, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being. 45

Here is a position similar to that of Justice Cardozo in Palko v Connecticut in which he made a distinction between

44. Ibid., p. 216.
rights which are fundamental and rights which are not, a distinction that Justice Harlan never accepted. To him all the rights of the Bill of Rights, procedural as well as substantive, were fundamental.

Justice Harlan, in a dissent longer than the three other opinions combined, held that only two questions needed to be answered to arrive at a just decision: 1) What, at the time of the arrest and trial of the accused, were the relations between Hawaii and the United States? and 2) By what law were the personal rights of the people of Hawaii then determinable? 46

He answered the first question by saying that the Treaty of 1897 provided that it was the desire of the Hawaiian government to become "incorporated into the United States as an integral part thereof and under its sovereignty." Although not ratified, the object of this treaty was provided for in the Joint Resolution of July, 1898, which stated that the islands "are hereby annexed as part of the territory of the United States." According to Justice Harlan, the Secretary of State led the United States' representative in Hawaii to believe that the Joint Resolution and the Treaty had the same objective in view, namely,

46. Ibid., p. 227.
to incorporate Hawaii as an integral part of the United States and under its sovereignty.\textsuperscript{47}

Because Justice Harlan considered Hawaii to be a part of the United States, he answered the second question by stating that the United States Constitution was the law which determined the personal rights of the people of Hawaii. What is of particular significance in this case is that all municipal legislation was to remain in force in Hawaii until Congress legislated otherwise; but only such municipal legislation as was not contrary to the Constitution. "Necessarily, therefore," said Justice Harlan, "if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States."\textsuperscript{48}

Justice Harlan resented the view of the Court which held that as a result of inaction by Congress such municipal legislation as that dealing with criminal trials would remain in force although in conflict with the Constitution. "It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament."\textsuperscript{49} To say that not until the Act of Congress of 1900\textsuperscript{50} were

\begin{itemize}
\item \textsuperscript{47} Ibid., p. 232.
\item \textsuperscript{48} Ibid., p. 234.
\item \textsuperscript{49} Ibid., p. 236.
\item \textsuperscript{50} Granted the right of indictment by grand jury and unanimous verdict of a petit jury.
\end{itemize}
the procedures used by Hawaii unconstitutional is to place Congress above the Constitution. The will of Congress, not the Constitution, thus becomes the supreme law of the land.

It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of or become indifferent to principles, which had been supposed to be essential to real liberty.51

This concern over the pressure of commercialism behind the majority decision was indicated by Harlan in a letter he wrote to Chief Justice Fuller in which he expressed worry over what he thought was happening to America. He wrote:

The more I think of these questions the more alarmed I am at the effect upon our institutions of the doctrine that this country may acquire territory inhabited by human beings anywhere upon the earth and govern it at the will of Congress and without regard to the restraints imposed by the Constitution upon governmental authority. There is danger that commercialism will sweep away the safeguards of real freedom and give us parliamentary in place of constitutional government.52

Justice Harlan showed himself to be an opponent of the trend toward imperialism which was characteristic of the

51. Ibid., pp. 239-40.
period. He saw in the majority decision a real danger of encouraging imperialistic tendencies:

It would mean that...the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction...called "dependencies" or "out-lying possessions," over which we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires, nor as the people governed may wish.53

Justice Harlan demonstrated in his dissenting opinion not only his hostility to imperialism but also his impatience with any decision which appeared to sacrifice a true interpretation of the Constitution in favor of expediency. He opposed those who believed that the Constitution should be interpreted according to what the "apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary."54 He had no sympathy for the majority concern over the consequences of following the Constitution strictly. "The consequence of a particular construction" said Harlan, "may be taken into account only when the words to be construed are ambiguous."55 If the municipal officers convicted persons

53. 190 US 240.
54. Ibid., p. 241.
55. Ibid., p. 247.
Without trial by unanimous jury after the treaty of 1898, then it's no one's fault but their own that these persons should be released. One writer on Justice Harlan pointed out a characteristic that seems to be borne out in this dissent when he said that Justice Harlan "adhered closely to the precepts of the Constitution combating at every turn attempts to strain its interpretation in order to solve particular exigencies."56

One case involving double jeopardy in the Philippine Islands is *Kepner v. U. S.*57 In this case Justice Harlan concurred in the majority decision which held that a man who has been acquitted by the court of first instance cannot be tried again in an appeal brought by the prosecution. The facts were that Kepner, a lawyer in Manila, was accused of embezzlement of his client's funds and was acquitted. On the appeal by the prosecution to the Supreme Court of the Philippine Islands, the lower court decision was reversed and Kepner was found guilty and sentenced to "imprisonment for one year, eight months and twenty-one days, suspended from any public office or place of trust and deprived of the right of suffrage."58


57. 195 US 100 (1903).

58. Ibid., p. 111.
The Supreme Court of the United States reversed the decision of the Philippine Supreme Court because the Military Government in the Philippines in 1900 provided the guarantee against double jeopardy in its general orders governing the rights of an accused person in Philippine courts. It is true that double jeopardy was prohibited in the Philippines under Spanish law but this phrase had always meant that a person was not in jeopardy until there had been a final judgment in the court of last resort. Thus the trials in the court of first instance plus all the appeals constituted one continuous proceeding. Justice Day interpreted the double jeopardy clause of the military government order according to the common law meaning whereby "protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense." As was pointed out, Justice Harlan concurred in this decision without comment, but in a later case he stated that he had concurred in the decision in this case because he felt that from the moment of the acquisition of the Philippines, the inhabitants became entitled to all the rights of the Bill


of Rights; thus to Justice Harlan, the existence of a military government order and an act of Congress establishing these guarantees were irrelevant and unnecessary.

One particularly interesting point in this case is the dissent by Justice Holmes who took the same view of double jeopardy as that followed under Spanish law. Justice Holmes stated:

If, as is possible, the constitutional prohibition should be extended to misdemeanors.... we shall have fastened upon the country a doctrine covering the whole criminal law, which, it seems to me, will have serious and evil consequences. At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny....It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than one time in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause.61

Another case involving questions similar to those raised in Hawaii v Mankichi was that of Dorr v United States. In this case the question was whether, "in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method

61. Ibid., p. 134. Justices White and McKenna concurred. Justice Brown dissented by saying that although he believed the common law view of double jeopardy was the right one, the Spanish view ought to have been applied here.

has been made by the accused and denied by the courts es-
tablished in the islands. Relying heavily on Hawaii v
Mankichi, Justice Day, speaking for the Court, emphasized
the fact that Congress may determine the system for trial
of crimes committed in the Territories ceded by treaty.

The treaty with Spain ceding the Philippines to the United
States provided that "the civil rights and political status
of the native inhabitants of the territories hereby ceded
to the United States shall be determined by Congress."

Thus since Congress may determine what rights are to
be provided such territories, it must be assumed, accord-
ing to Justice Day, that in the absence of the guarantee of
trial by jury, such a right does not exist.

Justice Day also relied on the distinction of fundamen-
tal and non-fundamental rights made by Justice Brown in the
Mankichi case, thus taking the position that trial by jury
is not a fundamental right. Justice Day pointed out that
the preservation of an orderly and efficient system of ad-
judication is the goal which should be achieved; and if the
United States acquired an island of savages, the requirement
of trial by jury would make that goal impossible to achieve.

Justice Day, therefore, takes the same position as that of
Justice Brown in the Mankichi case when the latter felt the

63. Ibid., p. 139.
64. Article IX, Quoted by Justice Day. Ibid., p. 143.
court must take into consideration the practical effects of applying the procedural guarantees of the Bill of Rights to the territories ceded by treaty from Spain.

What is particularly interesting in this case is that Justices Peckham and Brewer and Chief Justice Fuller concurred in the majority decision although they had all dissented in the Mankichi case. Why did they change? They changed, according to Justice Peckham, simply because of the Mankichi case. Said Peckham:

That case was decided by the concurring views of a majority of this court, and although I did not and do not concur in those views, yet the case in my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands.65

Justice Harlan, however, refused to capitulate. He remained adamant in his views that guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.66

The majority view that trial by jury is not a fundamental right Justice Harlan refused to accept as he had done in

66. Ibid., p. 154.
in the Hurtado and other cases. The majority position that this constitutional right can be disregarded in the Philippines Justice Harlan regarded "as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for." As to the impracticability of trial by jury in the Philippines, Justice Harlan regarded the inconveniences to administration of justices resulting from his view as of slight consequence compared to "the dangers to our system of government arising from judicial amendments of the Constitution."

As far as Justice Harlan was concerned, the crucial point was whether the persons being tried are under the authority of the United States government. If they are, then they must have all the protection the Constitution guarantees. Said Harlan, "The Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction."

In another interesting Philippine case, Trono v. U.S., the plaintiffs in error were accused of murder and in the

67. Ibid., p. 155.
68. Idem.
69. Ibid., p. 157.
70. 199 U.S. 521 (1905).
trial court, without a jury, were convicted of simple assa ult. They appealed to the Supreme Court of the Philippine Islands which reversed the lower court decision and convicted them of murder in the second degree, thus sentencing them from eight to fourteen years imprisonment. The main question in this case concerned the matter of double jeopardy. Was this double jeopardy? If so, did it apply to the Philippine Islands?

In the majority decision Justice Peckham took the position that under the Kepner ruling, double jeopardy did apply to the Philippines and did prohibit an acquitted person from being tried again on appeal, but in this case the facts were different enough to justify affirming the action of the Philippine Supreme Court. The essential and controlling difference to Justice Peckham was the fact that in this case the accused appealed, whereas in the Kepner case the prosecution appealed. Said Peckham:

The difference is vital between an attempt by the Government to review the verdict or decision of acquittal in the court of first instance and the action of the accused person in himself appealing from the judgment and asking for its reversal, even though that judgment, while convicting him of the lower offense, acquits him of the higher one charged in the complaint.\(^71\)

According to Justice Peckham, the accused waives his right against double jeopardy when he appeals a decision.

71. Ibid., pp. 529-30.
"The accused by his own action has obtained a reversal of the whole judgment, and we see no reason why he should not, upon a new trial, be proceeded against as if no trial had previously taken place." 72

In his dissent Justice Harlan took the position he had taken in earlier cases, that since the accused was not indicted by a grand jury and was convicted without a trial by jury, the United States Constitution was violated. As he had said in other cases:

I am unable to perceive how a principle declared by the supreme law of the land to be essential in all prosecutions for crime against the United States can be recognized as applicable to a part of the people subject to the sovereign jurisdiction of the United States, and yet be denied to another part of the people equally subject to the national authority. 73

As far as the double jeopardy question was concerned, Justice Harlan stated that if the accused had been indicted by grand jury and had received a trial by jury, he would still have dissented because he felt (as did Justices McKenna and White) that acquittal in the court of first instance on the serious crime of murder made consideration of the charge by a higher court constitute double jeopardy. The fact that the appeal was brought by the accused seemed to be immaterial to Justice Harlan.

72. Ibid., p. 533.
73. Ibid., p. 536.
In those cases where the rights of accused in the United States' possessions were involved, Justice Harlan displayed a remarkable consistency. Even in the face of changed opinions of other justices, who were influenced by earlier majority decisions with which they still could not agree, Justice Harlan remained unmoved in his conviction that the rights of a citizen of the United States under the Bill of Rights are equally applicable to any and all inhabitants under the authority of the United States.

In a world in which today people are either losing these rights or are farther away than ever from achieving them, the views of Justice Harlan seem particularly valuable. If Justice Harlan's words had represented the majority view rather than that of dissent, the insular cases might well have provided a magnificent record of the extension of American freedom to colonial peoples under U. S. control.

Due Process and the First Amendment: Justice Harlan Anticipates Gitlow.

One of the interesting facts which has emerged from the study of civil liberties during Justice Harlan's tenure on the Court, is that cases dealing with the First Amendment are almost non-existent. Although such cases take up a very
considerable part of the present Supreme Court's attention, before World War I the Court was called upon to decide questions raised by the First Amendment on very rare occasions. One such occasion was in the case of Patterson v. Colorado. 74 Patterson was charged with publishing a group of articles and a cartoon reflecting on the motives and conduct of the Colorado Supreme Court "in cases still pending and were intended to embarrass the court in the impartial administration of justice." 75

In answer to these charges, Patterson claimed that although the articles and cartoon were published, there was no contempt, the cases were not pending at the time of the offending publications, and they were motivated by Patterson's sense of public duty. He also defended his action on the ground that what he had published was the truth.

Speaking for the Court, Justice Holmes upheld the contempt conviction of Patterson. He stated that what constituted contempt and what determined whether a case was still pending were matters left to local law. These "are questions which the local law can settle as it pleases without interference from the Constitution of the United States." 76

74. 205 US 454 (1906).
75. Ibid., p. 459.
76. Ibid., p. 460.
The most interesting point dealt with Patterson's freedom of speech and press. Justice Holmes pointed out that this freedom was not violated because it concerns previous restraint "and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." The freedoms are for false statements as well as true and correspondingly, the subsequent punishment extends to the truth as well as to the false. Therefore, Patterson's defense on the basis of the truth of his articles was futile. Holmes stated:

A publication likely to reach the eyes of a jury, declaring a witness in a pending cause a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.78

The fact that the case involved a judge and not a jury did not alter the situation. According to Holmes, if a judge feels that a publication is trying to interfere with the administration of the law by impugning the judge's motives, he may fine it for contempt without violating anything in the United States Constitution.

77. Ibid., p. 462.
78. Idem.
In a short dissenting opinion, Justice Harlan enunciated his belief in the widest possible latitude for the guarantees of the First Amendment and their application to the States through the Fourteenth Amendment.

Justice Harlan held that since the right of assembly and petition were held in *U. S. v. Cruikshank*\(^79\) to constitute attributes of "national citizenship," so also would the other rights of the First Amendment, freedoms of speech, press, and religion. Through this reasoning Justice Harlan "nationalized" the First Amendment by linking it to the privileges and immunities clause of the Fourteenth Amendment:

As the First Amendment guaranteed the rights 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.\(^80\)

Justice Harlan then took exception to Justice Holmes' statement that the purpose of the free speech clause was not to prevent the punishment of speech which may be deemed contrary to public welfare. Taking the liberal position, Justice Harlan stated:

I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights

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79. 92 US 542, 552.

80. 205 US 464.
of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor a State since the adoption of the Fourteenth Amendment can, by legislative enactments or by judicial action, impair or abridge them. 81

In his concluding statement, Justice Harlan took a position similar to that of Justice Holmes many years later:

I go further and hold that the privileges of free speech and of a free press...constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press. 82

Not only did Justice Harlan anticipate the nationalization of freedom of speech in the Gitlow case 83 but he also anticipated the court's acceptance of his liberal position regarding freedom of criticism of courts by the press. Since 1941 the Supreme Court has increasingly broadened the rights of newspapers to report on trials and criticize their

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81. Ibid., p. 465.
82. Idem.
conduct without fear of being successfully charged with contempt. 84

It should be emphasized again, however, that Justice Harlan's anticipation of later decisions is only an incidental point of this study. The purpose remains to demonstrate his defense of the individual. In all the cases analyzed here (in this chapter) Justice Harlan took the position which would broaden the rights and liberties of those accused of crime. Whether his view that every state court must provide all the specific procedural guarantees in the Bill of Rights was wise or foolish, whether it was reasonable or unreasonable, or whether it was constitutionally sound or unsound is irrelevant. Again, if he was in error, it was in favor of an increase in rights, in providing too much liberty for the individual.

Nowhere in his many opinions is there a more positive defense of individual liberty than in his dissent in Patterson v Colorado, particularly in his opposition to Justice Holmes' position that speech may be curtailed by the legislature whenever it thinks public welfare demands it. Again it is the rights of the individual that must be safeguarded.

84. See Bridges v California, 314 US 252 (1941); Pennekamp v Florida, 328 US 331 (1946); Craig v Harney, 331 US 367 (1947).
CHAPTER V
MR. JUSTICE HARLAN AND THE INDIVIDUAL
IN THE FIELD OF LABOR RELATIONS

Introduction

This chapter is concerned with Justice Harlan's relationship to the problem of labor's quest for social justice. For purposes of clarity it will be divided into three parts: first, the cases dealing with laws regulating the liability of employer for injuries of employees will be analyzed; second, the cases concerning laws regulating the hours of labor will be discussed; and third, there will be presented an analysis of cases dealing with a variety of labor regulations, such as yellow dog contracts, peonage, safety appliance acts, and the amount of wages or the manner in which they may be paid.

During the time that Justice Harlan was on the Supreme Court, the number of cases dealing directly with certain types of labor relations cases, such as child labor laws and minimum wage laws, was virtually non-existent. There was no Federal child labor law until after Justice Harlan's death and the first minimum wage law in the United States was passed in Massachusetts in 1912.¹

One of the main reasons that other types of labor regulating cases did not appear as frequently as in later years was due to the fact that at that time the Federal Judiciary Act forbade the appeal to the Supreme Court of a case in which the state court of last resort had held the state law with which the case was concerned unconstitutional. In other words, a state law could not be interpreted by the Supreme Court unless it had previously been held constitutional by the highest court in the state. If the latter court found the act to be unconstitutional, the matter was settled without appeal to the United States Supreme Court being possible even though the law was challenged as contrary to the Federal Constitution. Therefore, many state labor laws (as well as other types of social legislation) were declared invalid without the Supreme Court being able to review them. This situation was not changed until the passage of the Judiciary Act of 1914, three years after the death of Justice Harlan.

**Employers' Liability Cases**

One of the problems in the field of labor relations which did receive attention from the Supreme Court, however, was that of employer liability for injuries of employees caused by the negligence of a fellow-worker. Under the common law an employer could not be held responsible for the injury or death of an employee unless it could be shown that
the employer was responsible. If the harm resulted from the negligence of another employee, the injured employee could not collect damages from the employer.

In 1886, the Supreme Court upheld two of the early state statutes which abolished this fellow-servant rule as it applied to railroad employees. In both these cases, Justice Field spoke for a unanimous court, including Harlan. In the first, Missouri Pacific Railway Co. v Mackey, the court upheld a Kansas law typical of several that were being passed to protect railroad employees:

Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its' engineers, or other employees, to any person sustaining such damage.3

The railroad company challenged the law as a violation of the due process and equal protection clauses of the United States Constitution, but the Court denied both assertions. The law was considered merely an extension of the doctrine which had always held railroads liable for injuries to passengers.4 Justice Field also pointed out that statutes exist in all the states giving a state the right to "prescribe the liabilities under which corporations created by its laws shall conduct their business in the future

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2. 127 US. 205 (1888).
3. Ibid., p. 205.
where no limitation is placed upon its power in this respect by their charters."  

To the charge that this law was special legislation discriminating against railroads, thus a violation of the equal protection clause, Justice Field stated that there was nothing wrong with special legislation as long as "all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred, and the liabilities imposed."  

Special legislation, he emphasized, is permitted especially if the company regulated is hazardous. This is to protect the safety of the public as well as the employees. 

Harlan participated in deciding a second case in 1888, Minneapolis and St. Louis Railway Co. v Herrick, in which an Iowa employer liability law was upheld on the authority of the Missouri Pacific case without further elaboration. In 1899, Harlan concurred in the decision of the court which upheld unanimously an Indiana employer liability statute in Tullis v Lake Erie and Western Railway Co. 

After these and other similar state laws had been established as valid, other cases arose in regard to the breadth

5. Ibid., p. 208.
6. Ibid., p. 209.
of the laws as far as the definition of employees was concerned. For example in *Chicago, Kansas and Western Railroad Co. v. Pontius*\(^\text{10}\) the Court held that the Kansas statute applied to a bridge carpenter employed by the railroad and therefore the law was not limited to employees actually traveling on the train. In *Louisville & Nashville Railroad Co. v. Melton*\(^\text{11}\) the Court unanimously upheld the application of the Indiana employers' liability statute to a member of the railroad construction crew. In a similar case\(^\text{12}\) the Court upheld another employers' liability law as applicable to a section crew foreman who while standing beside the track was killed when the train derailed and a car fell upon him.

An interesting controversy arose over a provision of an Iowa statute to the effect that "no contracts which restrict such liability shall be legal or binding." In the case of *Chicago, Burlington, & Quincy Railroad Co. v. McGuire*\(^\text{13}\) a brakeman, who had been injured, had a contract with the company's Relief Department providing that if he were injured and should receive benefits payable to him in accordance with

\(^{10}\) 157 U.S. 209 (1894).

\(^{11}\) 218 U.S. 36 (1909).


\(^{13}\) 219 U.S. 549 (1910).
the regulations of the Relief Department, such payments would discharge any and all further claims against the company. After he had sustained his injuries, the Relief Department gave him $822, which under the contract constituted full satisfaction of the claim. When McGuire brought suit against the railroad under that provision of the Iowa law which prohibited such contracts from limiting the company's liability, the railroad challenged the provision as a violation of liberty of contract under the due process clause of the Fourteenth Amendment. In a unanimous decision, the Court held that the law did not violate liberty of contract. Said the Court, "Freedom of contract is a qualified and not an absolute right. There is no absolute freedom to contract as one chooses....Liberty implies the absence of arbitrary restraint—not immunity from reasonable regulations and prohibitions imposed in the interests of the community."¹⁴

In all of the aforementioned cases, Justice Harlan concurred with the decision; therefore, in none of them is there an opportunity to hear directly from Justice Harlan. It is not necessary, however, to be content with this, because Harlan did speak in behalf of an Ohio employer liability statute in an opinion he handed down while sitting on the U. S. Circuit Court of Appeals in the Sixth Circuit.¹⁵ This

¹⁴. Ibid., p. 567.
case arose as the result of the injury of one Edward Van Dusen, a yard brakeman, who was injured as a result of the negligence of a conductor. The employer, Pierce, took the position that the law did not apply in this case because he, Pierce, was not the direct employer but was merely a receiver of the railroad, acting under the orders of a Federal court. In other words, the question involved whether or not the Ohio law was applicable to cases against the receiver of a railroad as well as to actions brought directly against railroad corporations.

In his opinion Justice Harlan refused to let the intent of the state legislature be distorted by following the letter of the law:

...in our judgment the statute is applicable to actions against receivers of railroad corporations. To hold otherwise would be to subordinate the reason of the law altogether to its letter. While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words. The appointment of a receiver of a railroad does not change the title to the property or work a dissolution of the corporation.\(^{16}\)

To the charge that the Ohio law discriminated against railroads, Justice Harlan answered by saying, "As it applies to all railroad corporations operating railroads within the State, it is, within the meaning of the state constitution,\(^{16}\)

\(^{16}\) Ibid., pp. 344-5.
general in its nature; and as it applies to all of a given class of railroad employees, it operates uniformly throughout the State. ¹⁷

Thus it can be seen that the Supreme Court in all these employer liability cases took the side of the individual worker. In what way does the attitude of Justice Harlan differ from that of the Court? In two instances in particular Justice Harlan took a more solicitous position toward the welfare of the individual worker than a majority of the Court: in cases dealing with employer liability where state statutes were absent, that is, as it is interpreted under the common law and second, in the interpretation of an employer liability law passed by Congress.

In regard to the first area, Justice Harlan did not dispute the common law rule that an employer is not responsible for injuries to an employee caused by the negligence of a fellow servant, but he did take the position in favor of the injured party when there was a dispute over whether or not the party responsible for the injury was a fellow servant. For example, in Chicago, Milwaukee & St. Paul Railway Co. v Ross¹⁸ the conductor was responsible for the injury to a locomotive engineer. In a decision for a unanimous court, Justice Field held for the injured worker on the ground

¹⁷. Ibid., p. 357.

¹⁸. 112 US 377 (1884).
that the conductor was not a fellow servant but was a representa-tive of the company, and therefore his negligence must be assumed by the company. In *New England Railroad Co. v Conroy*\(^\text{19}\) however, the entire Court, with the exception of Harlan held that the negligence of a conductor is the negligence of a fellow worker. As a result of this decision, a brakeman who was injured as a result of the negligence of a conductor failed to recover damages from the railroad. The court felt that its analysis of the supervisory activities of a conductor in the *Ross* case was exaggerated and thus the rule laid down to the effect that the conductor was a vice-principal of the railroad was overruled.

Justice Harlan, in the only dissenting opinion, stated that he could not see any good reason for abandoning the rule in the *Ross* case. "As the conductor commands the movements of the train and has general control over the employees connected with its operation, the company represented by him ought to be held responsible for his negligence resulting in injury to other employees discharging their duties under his immediate orders."\(^\text{20}\) Justice Harlan concluded by saying that if the conductor is not the vice-principal, it is difficult to say who is. In other words, how can a railroad be sued under common law if no one in actual operation of the trains

\(^{19}\) *175 US. 323 (1899).*

can be considered a representative of the company? Such a
decision as that of the majority in this case made it vir-
tually impossible to obtain damages for injury to an em-
ployee because everyone who could remotely be charged with
negligence was considered a fellow-servant. 21

In another common law case 22 decided the same term,
the Court held that an express messenger was not permitted
damages from injury caused by a train wreck because he was
not a passenger on the train. He was an employee of an ex-
press company and was riding in a railroad car set apart for
the use of the United States Express Company under a con-
tract between the railroad and the express company which
stipulated that the express company employee (in this case
Voigt) would ride in this car free of charge. The contract
also stipulated that the express company would hold the rail-
road company "harmless from all liability the railway company
might be under to employees of the express company for injury
they might sustain while being transported by the railway
company over its line for the purpose aforesaid, whether the
injuries were caused by negligence of the railway company
or its employees or otherwise." 23

21. This is assuming that the injury does not result
from a collapsed bridge, faulty equipment, or some other non-
human cause or from a direct order from a high company offi-
cial.

23. Ibid., p. 500.
The decision by Justice Shiras, in which all but Justice Harlan concurred, hinged on whether or not this case should follow the rule of Railroad Co. v Lockwood\textsuperscript{24} in which a drover who was traveling on a free pass for the purpose of taking care of his stock on the train was declared to be a passenger. If Voigt is in a situation analogous to Lockwood, then Voigt is also a passenger and should recover damages from the company for his injuries. The Court, however, decided that the cases were not analogous and Voigt was not a passenger. He accepted the job and the free ride voluntarily. "His contract to relieve the companies from any liability to him...for injuries he might receive in the course of his employment, was deliberately entered into as a condition of securing his position as a messenger."\textsuperscript{25} Justice Shiras stated that Voigt's relation to the railroad company was more like that of an employee rather than of a passenger; and since he could not recover as an employee because of the common law fellow-servant rule, he should not be able to recover here. That Voigt had agreed to the waiver of liability and had accepted the job as messenger with that waiver in mind is the crucial point in this case.

\textsuperscript{24} 17 Wallace 357.

\textsuperscript{25} 176 US 513. An important factor is that by law no railroad is permitted by contract to rid itself of liability for injuries to passengers.
is borne out by the fact that cases which showed that postal clerks were treated as passengers were considered irrelevant because even though the positions of express messengers and postal clerks seem to be analogous, the latter, in no case cited, voluntarily entered into any contract exempting the railroad from liability. Shiras stated:

To make the cases analogous it should be made to appear that the Government, in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company.

In his dissent, Justice Harlan stated in two brief paragraphs that the rule in the Lockwood case should be applied here. He stated:

...the judgment should be affirmed upon the broad ground that the defendant corporation could not, in any form, stipulate for exemption from responsibility for the negligence of its servants or employees in the course of its business whereby injury comes to any person using its cars, with its consent, for purposes of transportation. That the person transported is not technically a passenger and does not ride in a car ordinarily used for passengers is immaterial.

To Harlan apparently the only thing that mattered was that Voigt was not an employee of the railroad and therefore did not come under the fellow-servant rule. Although he

26. Ibid., p. 518.
27. Ibid., pp. 520-21.
does not discuss the analogy to the postal clerk cases, it seems logical that he would put the express messenger in the same class with postal clerks because from his dissenting opinion one gets the implication that the matter of agreement by Voigt to the contract exempting the railroad from liability is irrelevant. In fact, following the Lockwood rule, Harlan stated that "it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." There seems to be apparent here an attempt on the part of Harlan to broaden the rights of injured parties as far as possible.

The second area where Justice Harlan took a position supporting the rights of injured workers was in his support of the Federal Employer Liability Act of 1906 which was declared unconstitutional by the Supreme Court in the first Employers' Liability Cases. Speaking for the majority Justice White held that the law was too broad. That Congress had the power to pass an employer liability law applying to employers in the territories and the District of Columbia was admitted. That Congress had the power to pass such an

28. Ibid., p. 520.

29. 207 US 463 (1907). The law was titled; "An Act relating to liability of the common carriers in the District of Columbia and territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employees."
act which involved injuries to employees engaged in interstate commerce was also admitted. But this law, the Court held, covered all employees of an interstate carrier, such as employees in railroad repair shops, clerks in railroad stations, railroad warehouses, etc. That Congress could regulate employees so indirectly connected with interstate commerce the Court would not admit.

According to White, if the Supreme Court interpreted the act to apply only to employees engaged directly in interstate commerce, then that part of the act dealing with employees in the territories and the District of Columbia would become restrictive—where no restriction is constitutional. That is, if the Court interpreted one part of the law to make it constitutional, it destroyed the act in its other part. 30 White refused to consider the part which applied to territories and the District of Columbia constitutional because he considered the two parts inseparable. 31 He felt the parts depended on each other; that it was not likely that Congress would have passed one part without the other.

Justice Moody wrote a dissenting opinion in which he upheld the constitutionality of the act in all its parts.

30. Ibid., pp. 500-501.

31. In El Paso & Northeastern Ry Co. v Gutierrez, 215 US 87 (1909), a unanimous court held the part of the Employers' Liability Act dealing with territories and the District of Columbia to be valid, thus separable. Apparently White concurred.
Justice Harlan (with Justice McKenna concurring) dis­sented by saying that he believed Congress intended the act to apply "only to cases of interstate commerce and to em­ployees who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to do­mestic commerce or commerce completely internal to the State in which the wrong or injury occurred." By adopting Har­lan's interpretation the intent of the Congress would have been recognized and the object of the law would have been achieved. The irony of the decision is that it threw out the claim of the plaintiff who brought suit as the result of the death of a fireman on a locomotive actually engaged in moving an interstate commerce train. The dissenters' at­tempts to save the intent of Congress were finally vindica­ted when Congress passed another Employers' Liability Act, meeting the objective raised by White and making explicit what the dissenters knew to be Congress' intent originally. This new law was upheld unanimously by the Supreme Court af­ter Harlan's death.

There were a great many cases dealing with injuries to railroad workmen, and in most of those read by this author, Justice Harlan supported the claims of the injured worker. Out of forty-one cases dealing with this problem of labor,

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32. Ibid., p. 540. Justice Holmes also wrote a short dissenting opinion.

33. Second Employers' Liability Cases, 223 US. 1 (1912).
which were analyzed, Justice Harlan failed to support the claims of the injured workman in only eleven, and in all but one of these, the decision was unanimous. In all eleven of these cases there was no employers' liability statute; therefore, the common-law rule regarding liability was invoked. In all these eleven cases, the injured employee had either been injured by a fellow-servant or he had been guilty of contributory negligence. In six of the thirty cases in which Justice Harlan had upheld the rights of the fellow-servant, he did so as a dissenter. In one of these he dissented with Justice Miller, in another, he dissented with Chief Justice Fuller, and in three he dissented with Chief Justice Fuller and Justice Field, and in one, he dissented alone. In the other cases the decision to uphold the injured workman was unanimous in nineteen and divided in five.

From the foregoing analysis it would seem that Justice Harlan tended to uphold the rights of the individual worker in every case where it was legally possible, that he had done so even when he had to dissent from the majority opinion, and finally, that he supported the individual worker more often than any other member of the Court. This writer has come across nothing in Justice Harlan's opinions of

34. B & O Railroad v Baugh, 149 US 368 (1892). Court held by 7 to 2 vote that a fireman injured by an engineer is injured by a fellow-servant, therefore cannot recover damages.
elsewhere that would indicate that he was labor-minded; therefore, his defense of the worker seems merely a reflection of his support of individual rights against great power.

Regulation of Hours

In cases involving state laws regulating the hours of labor, all except one were decided in favor of the state statute. Three of these cases were decided before 1900, and in all Justice Harlan concurred in the majority opinion. In the first, *Barbier v Connolly* Justice Field, who spoke for a unanimous court, upheld a city ordinance prohibiting washing and ironing in public laundries from 10 o'clock at night until six in the morning. This, the Court held, was purely a regulation within the police powers of any municipality, and therefore was no violation of any clause in the Fourteenth Amendment. In a case decided the same term, *Soon Hing v Crowley*, Justice Field again spoke for a unanimous court in upholding the same municipal ordinance. It was contended that the statute discriminated against the Chinese who operated many of the laundry establishments. The Court, however, took the position that it could not inquire into the motives of

36. 113 US. 27 (1884).
37. *Soon Hing v Crowley*, 113 US. 703 (1884).
legislators in enacting laws, except as such discrimina-
tion was apparent on the face of the acts or be inferrible from their operations.\textsuperscript{38}

The third case dealing with laws of labor, decided before 1900, was \textit{Holden v Hardy}.\textsuperscript{39} Justice Brown, speaking for the majority, including Justice Harlan, upheld the constitutionality of a Utah statute of 1896 which established an eight-hour day in mines, smelters and ore reduction works. Refusing to accept the contention that it violated the equal protection and due process clauses of the Four-
teenth Amendment, Justice Brown held the statute to be within the police power of the state. He expressed no opin-
ion, however, on the constitutionality of all statutes of the laws of labor. Justice Brown said, "The question in each case is whether the legislature has adopted the stat-
ute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."

The first case dealing with the regulation of the laws of labor in which Justice Harlan wrote an opinion was in

\textsuperscript{38} When such discrimination was obvious, the court did not hesitate to declare such legislation void, as it did without dissent in \textit{Yick Wo v Hopkins}, 118 US 356 (1885).

\textsuperscript{39} 169 US 366 (1897).

\textsuperscript{40} \textit{Ibid}., p. 398.
Atkin v Kansas. In this case he spoke for a majority of six, with Chief Justice Fuller, and Justices Brewer and Peckham dissenting. The Kansas legislature had passed a law establishing an eight-hour working day to be applied to all employees of the state or its political subdivisions and also to private corporations doing work under public contracts. Atkin had contracted with Kansas City to furnish the materials for construction of brick pavement on public streets. He hired George Reese to shovel and remove dirt, and had required him to work a 10-hour day.

When he was charged with violating the law, he held it to be in violation of the Fourteenth Amendment. Speaking for the majority, Justice Harlan specifically refused to express any opinion on the validity of a maximum hour law affecting pure private work for private parties, but held the Kansas law to be valid under its police power. A state, he held, can stipulate, as an employer, the conditions under which work done for it should be performed. He stated:

...whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies, should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them.\footnote{Ibid., p. 222. Italics Harlan's.}

\footnote{191 US 207 (1903).}
Not only did Justice Harlan find no reason for disputing this power, but he upheld the state's authority upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. 43

To those who held that the Kansas law was mischievous in its tendencies, Justice Harlan reiterated a point he made in several cases—that the evils of such a law are not as great as would be the judicial legislation which would result from overruling it. Said he:

...the answer is that the responsibility therefore rests upon legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives....The legislative enactments should be recognized and enforced by the courts as embodying the will of the people unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. 44

The only other case dealing with regulation of working hours in which Justice Harlan expressed an opinion was in

43. Ibid., p. 224.
44. Ibid., p. 223.
his dissent in the only case in which these State laws were held invalid, the famous case of *Lochner v New York*.\(^\text{45}\)

Speaking for a majority of 5 to 4, Justice Peckham held that the New York statute establishing a ten-hour working day in bakeries went beyond the police power of the state. His decision hinged on the simple question of whether or not work in bakeries was hazardous enough or unhealthy enough to justify a state law restricting the working hours therein. Justice Peckham recognized the right of a state to superimpose its police power over the contract rights of an employer and employee, providing the law an actual protection of public health, safety, morals, or welfare. Regarding the New York statute, however, Justice Peckham stated:

...a law like the one before us involves neither the safety, the morals nor the welfare of the public, and the interest of the public is not in the slightest degree affected by such an act.\(^\text{46}\)

Justice Peckham then stated that the trade of a baker was not an unhealthy one to the degree that this exercise of the police power could be justified. He also attacked what he believed to be the real motives of the legislators ---"simply to regulate the hours of labor between the master and his employees in a private business, not dangerous in any degree to morals nor in any real and substantial degree,

\(^{45}\) 198 US 45 (1904).

to the health of the employees."\(^{47}\) In a statement attacked by Justice Holmes, Justice Peckham said, "we do not believe in the soundness of the views which uphold this law."\(^{48}\)

In his dissent, in which he was joined by Justices White and Day, Justice Harlan seemed to agree with Peckham that a state law which can not be demonstrated as protecting public health, safety, morals, or welfare would violate freedom of contract, because he attacks Justice Peckham's opinion on the very point that working in bakeries is unhealthy and such employees do need protection.\(^{49}\) He quoted from Professor Hirt's *Diseases of the Workers* and from a report of the New York Bureau of Statistics of Labor to show the unwholesome conditions under which these laborers worked.

This argument that the workers are in an unhealthy occupation is not the only point made by Justice Harlan, however. He expressed in this case, as he had done before, his belief in judicial self-restraint. He pointed out that "the rule is universal that a legislative enactment, Federal or State, is never to be disregarded or held invalid unless it be, beyond question, plainly or palpably in excess of legis-

\(^{47}\) Ibid., p. 64.

\(^{48}\) Ibid., p. 61. Said Holmes: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics.*" p. 75.

\(^{49}\) For example, he said, "...the Court may inquire whether the means devised by the States are germane to an end which may be lawfully accomplished and have a real... relation to the protection of health...." Ibid., p. 69.
Applying this principle to the present case, Justice Harlan said:

This statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. 51

All the Court should have recognized in this case, thought Justice Harlan, was the fact that the question of the law's relation to public health was "one about which there is room for debate and for an honest difference of opinion," 52 therefore, said Harlan, "Let the State alone in management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal constitution." 53

In the only other cases relevant to working hours which were decided while he was on the Court, Justice Harlan did not present his position explicitly. For example, he concurred in the opinion of Justice Holmes in Ellis v U.S. 54 in which a Federal eight-hour law on federal public works

50. Ibid., p. 68.
51. Ibid., p. 69.
52. Ibid., p. 72.
53. Ibid., p. 73.
54. 206 U.S. 246 (1906).
was upheld by a unanimous court. Justice Holmes stated that "we see no reason to deny to the United States the power thus established [in Atkin v Kansas] for the States."^55 On the same day the Court handed down through Justice Holmes' opinions two other cases in which this Federal law was applied. In both of these (Eastern Dredging Co. v U. S. 56 and Bay State Dredging Co. v U. S.)^57 Justice Holmes held that the employees were not involved in public projects because the soil in which the channels were being dug was not in the United States. He also held that the employees covered by the law must be "laborers or mechanics" and the employees involved in these cases were more like seamen."^58

Justices Harlan and Day concurred in a dissenting opinion in both cases written by Justice Moody who held that the dredging operations were definitely public works and the employees were laborers and mechanics, and not seamen. The dissenters felt that the workers had nothing to do with navigation and the dredges and scows had no steering gear, sails or other methods of self-propulsion, therefore, could not be classified as vessels. Said Justice Moody, "The question

55. Ibid., p. 255.
56. 206 U.S. 246 (1906).
57. Idem.
58. Ibid., p. 260. Justice McKenna accepted Justice Holmes' views as they related to the Eastern Dredging case but not as they applied to the Bay State Dredging case.
here is what were the men when they were engaged in the work of excavation?...I think they were then laborers or mechanics....They were employed to do the work of laborers and mechanics; in the main they actually did that work, and whatever they did which was of the nature of seamen's work was a mere incident to the fact that they labored upon a floating platform instead of upon the dry land."^59

It seems obvious that here was a case the decision of which turned on the simple judgment of how the workers and their equipment were to be classified. It is very likely that Justice Harlan considered this, too, a situation in which there was room for honest difference of opinion, and in case of such doubt, the decision ought to be in favor of applying the law rather than of restricting it. Of course it may also be a matter of opinion whether the application of the law was in support of or in opposition to the welfare of the workers; but the fact remains that such a law was doubtless passed as a piece of social legislation for the purpose of promoting the welfare of all workers who came under it and any decision which tended to broaden that coverage would also more likely achieve that purpose.

In the two remaining maximum-hour cases in which Justice Harlan participated, the Court upheld the maximum-hour

59. Ibid., p. 265.
laws. In the first, *Muller v Oregon*, Justice Brewer, who had concurred in Justice Peckham's decision in the Lochner case, upheld an Oregon law establishing a 10-hour working day for women in any mechanical establishment, or factory, or laundry in Oregon. It was challenged on the grounds that it violated section one of the Fourteenth Amendment, that it was class legislation in that it did not apply equally to all persons similarly situated, and that it was not a valid exercise of the police power. In his decision for a unanimous court, Justice Brewer, relying heavily on the famous brief submitted by Louis Brandeis, held that women's functions in society and the damage that factory and laundry employment might do to her bodily structure justified special legislation in her behalf and was consistent with the police power of the state to protect public health, safety, morals, and welfare. This decision, of course, did not overrule the Lochner case because this opinion was merely based on the belief that it is within the police power to protect the health of women in factories even if it wasn't within the police power to protect the health of employees in bakeries.

In the final case in this category, *Baltimore and Ohio R.R. Co. v I.C.C.* the Court, speaking through Justice Hughes, upheld a Federal law of 1907 which regulated the

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60. 208 US 412 (1907).
61. 221 US 612 (1910).
hours of labor of railway employees engaged in interstate commerce. It was challenged on the ground that it was beyond the commerce power of Congress because it applied to railroads whose employees were engaged in intra-state business. Refuting this contention, Justice Hughes stated, "The length or hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends." 62

In all the cases discussed in this section, there is apparent a greater degree of support for social legislation, State and Federal, than, it seems to this author, the Supreme Court has been given credit for. Even though the Supreme Court has been relatively liberal in these cases, it also seems obvious that Justice Harlan has shown a more liberal attitude than the majority of the Court when one considers the Court's attitude in the Lochner case. Therefore, in these cases, as in the others which have been analyzed, Justice Harlan appears as a consistent (if not a lone) defender of the rights of the individual worker in his quest for economic justice.

Miscellaneous Labor Cases

Among the most interesting cases involving the worker are those dealing with peonage. Two in particular are of

62. Ibid., p. 619.
special significance in revealing the attitude of Justice Harlan on this matter. The first case is one which came to the Supreme Court on two different occasions. It arose as a result of the following section of the Alabama Code:

Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer...and refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars.

This law had been on the Alabama statute books since 1896, but its enforcement was greatly handicapped by the fact that it was found to be very difficult to prove an employee had intended "to injure or defraud his employer." As a result, an amendment was passed in 1907 which contained the following provision:

The refusal of any person who enters into such contract to perform such act or service...without just cause, shall be prima facie evidence of the intent to injure this employer or landlord or to defraud him.

Bailey made a contract to work for a year at $12 a month. He received $15 at the time the contract was made and he was to receive $10.50 a month for twelve months.

64. 211 US 455.
65. Ibid., p. 456.
After working for about a month, Bailey quit and refused to fulfill the contract or refund the $15. He was subsequently arrested and held for trial on the charge of having accepted money from his employer with the intent to defraud him. After his arrest, Bailey sued out a writ of *habeas corpus* on the ground that the Alabama statute was a violation of the United States Constitution.

When the case came to the Supreme Court in 1905, Justice Holmes did not discuss the constitutional questions because it was brought to the Supreme Court through what he called a "short cut." The Alabama Supreme Court had upheld a lower court denial of Bailey's discharge on a writ of *habeas corpus*, then the U. S. Supreme Court was asked to act on this denial; therefore, Bailey had never been indicted and convicted, so Justice Holmes felt the whole case was brought to the Supreme Court prematurely. He felt there were not enough facts to rule on the contention that the Alabama statute was unconstitutional. He stated:

The trouble in dealing with this contention is due to the meager facts on which this case comes before us at this stage. If the principal case had been tried, it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events...was such that in view of its operation and intent the whole statute ought to be held void. It may be...that the amendment creates a presumption that cannot be upheld. But we cannot deal with these questions now. All that appears from the record...is that the plaintiff in error, is held on a charge of having obtained money under a written contract with intent
to defraud. There is no doubt that such conduct may be made a crime.66

In other words, Justice Holmes could see no reason for not upholding the lower court's refusal to discharge Bailey because no trial on the facts had been held and not enough information had been made available to judge whether or not the statute discriminated against a particular class of people or eliminated the presumption of innocence which every defendant has a right to enjoy.

Justice Harlan, with Justice Day concurring, wrote a vigorous dissent in this case. He did not discuss the constitutionality of the Alabama statute, but took the position that the constitutionality of the law should have been decided. He admitted that it was a well-established rule that the Supreme Court does not, in advance of a person's trial, discharge upon habeas corpus one who is alleged to be held in custody by the state in violation of the United States Constitution, but, he wrote:

Whether the accused, in seeking his discharge by the state court, adopted a mode of procedure authorized by the local law was for the Alabama courts, not for this court to determine. The state court recognized the proceeding by habeas corpus to be in accordance with the local law, for the Alabama Supreme Court...entertained his appeal and passed upon the constitutionality of the statute under which he was held in custody...He was entitled, of right, to bring the case here upon writ of error and have this court determine the question, distinctly

66. Ibid., p. 454.
raised, whether the statute of Alabama, as applied to his case, did not infringe privileges belonging to him under the Constitution of the United States.  

In the first appearance of this case, therefore, the question of whether the Alabama statute was constitutional was not decided. The issue turned on the question of whether or not the case had been brought prematurely, making a decision on the law's validity impossible.

Even though Justice Harlan does not state his views on the law's constitutionality, his impatience with the strict legality of Justice Holmes' position makes one suspect that Justice Harlan is very much opposed to the statute. The only way this question could be settled, however, was for Bailey to be tried and convicted and then appeal the conviction again in order that the constitutional questions raised earlier could be answered.

This course of events actually did take place. Bailey was convicted in the Montgomery City Court of the charge of intending to defraud his employer and the only evidence of such fraud was the prima facie evidence of refusal to work permitted in the 1907 amendment. The Alabama Supreme Court upheld the statute and it was brought in 1910 to the U. S. Supreme Court.

This time the Supreme Court declared the 1907 amendment invalid in a decision written by Justice Hughes. He  

67. Ibid., p. 458.
pointed out that there was not a particle of evidence indicating that at the time Bailey made the contract he had any intention to defraud his employer. In fact, he had actually worked upwards of a month before quitting, Justice Hughes stated:

Was not the case the same in effect as if the statute had made it a criminal act to leave the service without just cause and without liquidating the debt? To say that he has been found guilty of an intent to injure or defraud his employer, and not merely for breaking his contract and not paying his debt, is a distinction without a difference to Bailey.

Justice Hughes particularly resented the fact that Bailey was left by the statute without the right to enjoy presumption of innocence. In its operation the law was as invalid as it would admittedly be if it permitted his employer to seize him and hold him until he paid the fifteen dollars or paid it off in labor. It is as invalid, Justice Hughes held, as a law which permitted the state police to prevent a worker from escaping and force him to work out his debt. Said Justice Hughes:

What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory

68. 219 US 236.
presumption which upon proof of no other fact exposes him to conviction and punishment.\textsuperscript{69}

Justice Hughes made it clear at the outset that the fact that Bailey was a Negro was immaterial; therefore, there was no assumption that the law was designed to discriminate against Negroes. Also Justice Hughes judged the case as though it concerned a statute of Idaho or New York; therefore, the particular racial circumstances of Alabama were of no consequence in the decision. That Justice Harlan was opposed to the Alabama statute is borne out by his concurrence in the decision of Justice Hughes. The attitude of Justice Holmes toward the law, which was not apparent when the case came to the Supreme Court in 1908, was expressed with severe logic in a dissent from the view held by Justice Hughes.

In an opinion concurred in by Justice Lurton, Justice Holmes held that liability for failure to perform the labor promised in a contract established in a criminal action cannot be considered peonage any more than the payment of damages for such failure as a result of a civil action for breach of contract. Justice Holmes stated:

\begin{quote}
Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a state adds to civil liability a criminal liability to fine, it simply intensifies the legal
\end{quote}

\textsuperscript{69} Ibid., p. 244.
motive for doing right, it does not make the laborer a slave.70

According to Justice Holmes, if a fine can be imposed, so can imprisonment at hard labor. In fact, the forced labor as a punishment for crime is a well-established exception to the Thirteenth Amendment's prohibition of involuntary servitude. "If the contract is one that ought not to be made, prohibit it," said Justice Holmes. "But if it is a perfectly fair and proper contract, I can see no reason why the State should not throw its weight on the side of performance."71

Although Justice Holmes pointed out that punishment at hard labor could be attached to the mere breach of contract, he did not rest his case on this point. In fact, he denied that the statute actually did have such an effect. He made a distinction between prima facie evidence and substantial evidence. The amendment to the statute stated that the refusal to perform the work contracted for or to return the money given would constitute only prima facie evidence and Justice Holmes felt that a fair jury would not convict if the only evidence were a departure after several months of work. He rested his case on the judgment of a jury. His belief that they would make a fair appraisal of a man's inten-

70. Ibid., p. 246.
71. Ibid., p. 247.
tions was based either on a profound faith in the jury system or his acceptance of Justice Hughes' statement that the case is to be judged as though it were from Idaho or New York. Regarding the latter, Justice Holmes began his dissent with that statement. Which decision is the more realistic is a matter of opinion, but there seems little doubt that the views of Justice Hughes (in which Justice Harlan concurred) represent a more sympathetic attitude toward the plight of the laborers who get caught up in such a law.

Justice Hughes took no chances on what a jury might do when it is told that, in the absence of evidence to the contrary, the mere refusal of a debtor to fulfill his contract is proof that he intended to defraud his employer. That Justice Harlan concurred in the majority decision should come as no surprise to anyone familiar with his many opinions in behalf of the individual. In case any doubt should remain on this point, attention is called to another case in which it was contended that workers were victims of peonage--the case of Robertson v Baldwin. 72

This case resulted from the enforcement of a Federal statute which authorized justices of the peace in port cities to issue warrants for the apprehension and return of seamen who had deserted their ships. The law also required seamen to carry out the contracts contained in their shipping

72. 165 US 275 (1896).
articles. Speaking for the majority, Justice Brown held that the federal law was not a violation of the Thirteenth Amendment because the latter was never intended to change the traditional practice of making military and naval service exceptions to the prohibition against involuntary servitude. He based the bulk of his case on a recitation of historical practices regarding the traditional attitude toward sailors in their contract relations. Never had seamen been able to quit working until a voyage was completed and the term of their contract was ended.

In a lone dissent, Justice Harlan came to the support of the seamen. He emphasized the fact that involuntary servitude can exist only as a punishment for crime. "A condition of enforced service, even for a limited period in the private business of another," he said, "is a condition of involuntary servitude." He considered Justice Brown's references to ancient laws as irrelevant because they existed at a time when there was a much lower value placed on the worth of the individual. Such laws as these have no bearing on what is proper in a free society.

The main point that Justice Harlan made was in his distinction between public and private service. The seamen in this case were not in the same category as the members of

73. Ibid., p. 282.
74. Ibid., p. 292.
the Army and the Navy. The latter were employed in the performance of public duties; and if they should quit, the public welfare would be in jeopardy. Also they are supported by public funds and perform a public service. The former, on the other hand, were employed by a private business. In his opinion that the Federal law was unconstitutional, Justice Harlan said in this regard:

"To give any other construction to the constitution is to say that it is not made for all, and that all men in this land are not free and equal before the law, but that one class may be so far subjected to the involuntary servitude as to be compelled by force to render personal services in a purely private business with which the public has no concern whatever." 75

Justice Harlan emphasized that any contract in which a person voluntarily became the slave of another would be as invalid as one in which he was forced to be another’s slave. 76

The heart of Justice Harlan’s views are expressed in his statement that involuntary servitude begins at the moment one who has contracted to work for another is compelled to continue his service beyond the point when he wishes to quit. Justice Harlan stated:

He may be liable for damages for the non-performance of his agreement, but to require him, against his will, to continue in the personal service

75. Ibid., pp. 299-300.
76. Ibid., pp. 300-301.
of his master is to place him and keep him in a condition of involuntary servitude.\textsuperscript{77}

In a final remark that recalls his hostility to slavery, Justice Harlan stated, "We may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen."\textsuperscript{78}

This defense of the rights of seamen was vindicated after Justice Harlan's death in that the sentiments expressed by him in this case were given legal sanction through the Seaman's Act which Congress passed in 1914.

Throughout this chapter there has been an attempt to demonstrate that Justice Harlan's support of the cause of the individual ran like a continuing thread through all the cases in which the rights of the workingman were at stake. In earlier chapters, it will be recalled, cases were analyzed which demonstrated Justice Harlan's devotion to the principle of maximum latitude in the enjoyment of individual freedom.

What happens when a statute is passed which is designed to apply in the workingman's behalf and still tends to deprive workers as well as employers of the freedom to contract under conditions and terms considered satisfactory to both sides? To a degree this kind of conflict has arisen in many cases, but in one in particular this conflict was especially

\textsuperscript{77} Ibid., p. 301.
\textsuperscript{78} Ibid., p. 303.
sharp—the case of *Adair v. U. S.* 79 in which Justice Harlan upheld his interpretation of freedom of contract to declare unconstitutional a section of the Erdman Act which made it illegal to discharge an employee simply because of his membership in a labor organization.

In this case, William Adair, an agent of the Louisville and Nashville Railroad Company, discharged one O. B. Coppage because of his membership in a labor union. Adair was arrested and charged with having discriminated against an employee in violation of Section 10 of the Erdman Act of 1898. Justice Harlan, in his decision from which Justices Holmes and McKenna dissented, held that the section was in violation of the due process clause of the Fifth Amendment because the liberty in that clause "embraces the right to make contracts for the purchase of the labor of others and equally the right to make contracts for the sale of one's own labor," provided that it was not inconsistent with the public interest. Without assuming that he would have decided the case the same way if the railroad company rather than Adair had been indicted, Justice Harlan stated:

"...it is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal

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79. 208 US. 161 (1907).
80. Ibid., p. 172.
liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to public interests.\footnote{Idem.}

Justice Harlan saw this law as a curtailment of freedom, the freedom of an employer to prescribe the conditions under which he will accept the labor of another and the right of an employee to sell his labor upon such terms as he deems proper. The right of an employer to fire a worker is now equated with the right he upheld in the peonage case for an employee to quit his job.

To Justice Harlan, Adair had as much right to dismiss Coppage for belonging to a union as Coppage had to quit his job because the employer hired some men who were not union members. The naivete of Justice Harlan's assumption that the status of employer and employee were equal is well demonstrated by his remark: "In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."\footnote{Ibid., p. 175.} This is very possibly the most direct statement that Justice Harlan ever made on the bench in support of laissez-faire. In spite of it, however, it would be much easier to prove that Justice Harlan
was a supporter of paternalism than of *laisssez-faire*.

In addition to his attack on the statute as inconsistent with the Fifth Amendment, Justice Harlan also felt it could not be upheld as a regulation of interstate commerce. He stated:

> What possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? ...Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. 83

Justice Harlan concluded his opinion by pointing out that if Congress had the power to pass such an act as that found invalid here, it could also require interstate carriers to employ *only* union laborers or it could forbid them to employ *any* union men. That such laws would be unconstitutional is, according to Justice Harlan, beyond any doubt. In the light of the liberal interpretation of the commerce clause since 1937, Justice Harlan's analogies might be out of date. In few areas of constitutional law do we find Justice Harlan more a product of his times than in this case.

Two other cases in which similar views are expressed by other

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83. Ibid., p. 178. To which Justice Holmes replied that they have as much to do with interstate commerce as safety couplers.
Justices and concurred in by Justice Harlan are cases in which the conservative position was held by unanimous courts—In re Debs \textsuperscript{84} and Loewe v. Lawlor. \textsuperscript{85}

In the Debs case, the Supreme Court, speaking through Justice Brewer, upheld the right of the President to issue an injunction to stop a strike which obstructed the flow of commerce in general and the United States mails in particular. Such was the situation resulting from the refusal of the American Railway Union to handle Pullman cars on the railroads in cooperation with the workers who were striking against the Pullman Manufacturing Company. Anyone familiar with his defense of a strong national government should not be surprised that Justice Harlan agreed with Justice Brewer when he stated:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.\textsuperscript{86}

Here again was simply a case in which conflict arose between principles. Doubtless for Justice Harlan it was a conflict between the rights of workers to strike and the

\textsuperscript{84} 208 U.S. 274 (1908).
\textsuperscript{85} 158 U.S. 582.
right of the Federal government to prevent such strike when it obstructed the carrying out of well-established powers of the government. Justice Brewer recognized this conflict when he made clear that the right to strike per se was not abolished by this decision.

The right of any laborer, or any number of laborers, to quit work was not challenged. The scope and purpose of the bill was only to restrain forcible obstructions of the highways along which interstate commerce travels and the mails are carried. And the facts set forth at length are only those facts which tended to show that the defendants were engaged in such obstructions. 87

Although the right to quit work is not the same as the right to strike, Justice Brewer seems to feel that the right to strike is permitted as long as it does not obstruct the operation of a power of the Federal government. Actually the right to strike, per se, is not decided by this decision, although there is little doubt that a strike accompanied by violence could be legally stopped. This was made obvious when Justice Brewer stated, "...no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob, with its accompanying acts of violence." 88 That Justice Harlan agreed with this position may be assumed, although the fact that much of this is dicta makes it impossible to be absolutely certain of his views.

87. Ibid., p. 598.
88. Ibid., p. 599.
In the *Danbury Hatter's* case \(^{89}\) the decision by Chief Justice Fuller was also unanimous so the views of Justice Harlan must be assumed to be essentially the same as those of the Chief Justice. This case dealt with a boycott of hats manufactured by D. E. Lowe of Danbury, Connecticut, by members of the United Hatters of North America, a labor union affiliated with the American Federation of Labor. This boycott was carried out in order to force the Danbury hat manufacturers to establish a union shop. It was contended by the plaintiffs that the union was a combination restraining the hat trade in violation of the Sherman Anti-Trust Act.

The Supreme Court held that the contention was valid and thus ruled against the union. In his opinion, Chief Justice Fuller quoted from Justice Harlan's decision in the *Northern Securities* case to the effect that "the act declares illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states."\(^{90}\) With such a forthright statement no one can longer doubt Justice Harlan's views on the matter. This statement coupled with his vigorous concurring opinions against the "rule

90. Ibid., p. 297.
of reason" (to come in the 1910 session\(^91\)) makes it obvious why Justice Harlan could not have been expected to dissent in this case. Actually, it was so well-established that labor unions were to be covered by the Sherman Act that they were specifically excluded in the Clayton Act of 1914.

Attention has already been called to the sympathetic attitude of Justice Harlan relative to the claims of injured workers seeking damages under the employer liability statutes and under the common law where such statutes were absent. With the exception of such justices as Brewer and Peckham, the Supreme Court took a consistently favorable position toward the claims of the individual worker. Justice Harlan took a stand slightly more favorable as evidenced in the Conroy\(^92\), Voigt\(^93\), and first Employer Liability\(^94\) cases. In all other cases the Supreme Court upheld the injured workmen's rights unanimously.

Much the same degree of difference between Justice Harlan and the Court can be seen in the analysis of the cases dealing with legislation establishing a maximum working day. In these cases the court maintained pro-labor position except for the Lochner case in which Justice Harlan and others

\(^91\) In the American Tobacco and the Standard Oil cases discussed in Chapter III.
\(^92\) See footnote No. 22.
\(^93\) See footnote No. 25.
\(^94\) See footnote No. 32.
dissented. Justices Peckham and Brewer, in these cases as in the employer liability cases, took a stand less sympathetic toward the workingman than did the majority of the Court on most occasions, with Justice Harlan taking a more sympathetic position in defense of the worker as an individual than that taken by the Court majority.

The position of Justice Harlan in these cases is not inconsistent with his defense of the dignity and integrity of the individual. In the Adair, Debs, and Danbury Hatter's cases, his stand seems in contradiction to that in the Lochner case; however, it is so only if it is assumed that Justice Harlan was pro-labor, per se. The point is, however, that in all these cases he defended the freedom of the individual. In the Adair case he supported the freedom of both the employer and the employee to negotiate any contract agreeable to both parties. There is evidence that in the Debs case he concurred in the Court's decision because he wished to uphold the authority of the Federal government in what he regarded as an emergency situation, although he wished the lower court would be lenient with Debs and his companions.95 He also believed that the Court would be less embarrassed by this broad interpretation of Federal power.

relative to Debs if it had been less narrow in its interpretation of Federal power relative to the income tax controversy. In the Danbury Hatter's case Justice Harlan probably concurred in the majority decisions because of his belief that the individual entrepreneurs were being coerced by the newly emerging power of labor combinations. This view is not inconsistent with his opposition to any combination in restraint of trade which he expressed so vehemently in his attack on the "rule of reason" in the American Tobacco and Standard Oil cases.

96. Idem.
Income Distribution: The Income Tax Controversy

One of the major social problems during the years covered by this paper was the gap that was spreading between the incomes of the upper and lower classes. Although the income for basic subsistence was not high, (the Massachusetts Bureau of Labor Statistics reported at the turn of the century that a family of five persons required $754 a year) more than 4,000,000 families, or nearly one-third of the nation received less than $400 a year, one-half of the families received less than $600 annually, and two-thirds received less than $900. Only one family in twenty received more than $3,000 as a yearly income. In contrast to the low economic status of the masses, the wealth of the upper class was tremendous. Whereas 91 per cent of the 12,690,152 families in 1899 owned 29 per cent of the wealth, according to George K. Holmes of the Census Bureau, 9 per cent of the families owned 71 per cent of the wealth.

Coincidental with this income maldistribution was the panic of 1893 in which the Federal government found itself in financial difficulties due partly to a sharp decline in

2. Ibid., p. 134.
government revenues. This decline was due largely to the McKinley Tariff, which was so successful in its protectionism that imports were curtailed; and thus revenues from customs duties declined. Simultaneously the depression had cut into internal revenues. As a result the treasury surplus of 1890 became a $70,000,000 deficit by 1891.

To alleviate this situation Congress passed the Wilson Tariff, which was designed originally to decrease tariff rates according to the Democratic pledge made in the election of Cleveland; but by the time it emerged from the Congress, it had undergone over six hundred changes, most of them upward. Because the sponsors had expected that a further decrease in customs revenue would result, they added a provision which was to cause an uproar of controversy that was resolved only after the Supreme Court interpreted it out of existence: a 2 per cent income tax on all incomes over $4,000.

What all of this had to do with the problem of maldistribution of income is simply that revenue had to be found by the federal government, and the issue arose as to whether it should continue to come from customs duties, as had been traditional, or whether it should come from a tax on personal income. Those who favored the latter used the argument that a duty on imports was paid, in higher prices on consumer goods, by the masses who were in a less advantageous financial position than those receiving above $4,000.
a year. The income tax, in other words, would provide revenue for the government by taxing according to the ability to pay. One income tax expert, who opposed all the other arguments for the income tax, felt this argument which emphasized the maldistribution of income to be the one which made the case for the tax acceptable:

Everywhere we meet the growing complaint that great wealth does not bear its share of the public burden. If, then, the tariff, as it actually exists, imposes too large a share of this burden on the expenditures of the poorer classes, and if the state and local revenue systems do not succeed in reaching the abilities of the more well-to-do classes, the argument becomes exceedingly strong in favor of some form of tax which will redress the inequality.

It is this argument which...was really at the bottom of the movement for the income tax of 1894 and which explains the great development of income taxes abroad.3

It must be understood, therefore, that in this chapter dealing with the taxpayer, the emphasis is not on Justice Harlan's attempts to help the taxpayer avoid the payment of taxes, but rather it is on his attempts to see that taxation is related to the promotion of a more equitable distribution of income. Of course, this is a policy matter which the Supreme Court was in no position to initiate, but

3. Edwin H. A. Seligman, The Income Tax (New York: The Macmillan Co. 2nd Edition, 1914), p. 640. He also pointed out that "the chief argument which was responsible for the passage of the Sixteenth Amendment and the enactment of the law was...that wealth is escaping its due share of taxation." p. 675.
when Congress took action to development a tax system based on the ability to pay, Justice Harlan, among others, did his best to see that such a tax policy could be achieved within the framework of the Constitution. By far the most important case on this subject was *Pollock v. Farmers' Loan and Trust Co.* which came to the Supreme Court twice. The first time, the Court divided evenly between eight justices, Justice Jackson being absent. Because the vital constitutional questions involved were not settled, it came to the Court on a rehearing with all nine members sitting.

The case arose as a result of an attempt by Charles Pollock, a stockholder of the Farmers' Loan and Trust Co., a New York corporation, to prevent it from paying a tax of 2 per cent on the net profits of income derived from real estate and municipal bonds owned by it. Pollock claimed that the tax was a direct tax and therefore must be apportioned among the several states according to their population, as provided in Article 1, Section 2, Cl. 3 of the U. S. Constitution. He also held that income from municipal bonds was not taxable, under the principle of intergovernmental tax immunity.

In the majority decision by Chief Justice Fuller, it was held that the tax was a direct tax and therefore unconstitutional. It was conceded by both sides to the dispute that a federal tax on municipal bonds was unconstitutional.

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on the principle that income can't be taxed (except by the principle of apportionment) because a tax on such income is a tax on its source—in this case, land. Since a tax on land is a direct tax, then a tax on the income from land is also a direct tax, consequently, it is valid only if levied according to the principle of apportionment.5

This reasoning ruled out the application of the tax on incomes from real and personal property plus that from municipal bonds, but what was wrong with maintaining the tax on income from labor? Here the question of separability was involved. It is a well settled rule that one provision of a law may be held constitutional while another provision is held invalid provided that the two provisions are separate enough so that each can stand alone and would have been passed without the other. Chief Justice Fuller held, however, that these provisions were not separable. If the tax on income from real and personal property were eliminated, then the entire tax burden would have been shifted to labor, the trades, and the professions; and in the light of Congress' intent to make this a tax on capital, this intent would be frustrated. Consequently, the partial unconstitutionality of the 1894 income tax rendered it void in its entirety.

In his dissenting opinion, Justice Harlan relied heavily on Hylton v U.S.6 in which the Supreme Court had held

5. Ibid., p. 630.
6. 3 Dall 171 (1796).
in a unanimous decision that a tax on carriages was an indirect tax because, as Justice Chase stated:

The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must even determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax should be laid by that rule.

Therefore, for one hundred years the Court had let stand a rule that a tax was direct only if it could be applied according to the rule of apportionment without resulting in "great inequality and injustice." Since an attempt to apply the income tax according to the rule of apportionment would be grossly unjust, Justice Harlan held that by following the principle in the Hylton case, the income tax must be considered an indirect tax and allowed to stand.

Justice Harlan also cited the unanimous decision in Springer v U. S. in which an income tax passed during the Civil War was upheld as an indirect tax. Applying the rule in the Hylton case that a tax which if apportioned would be

8. 102 US 586.
unjust could not be called a direct tax, the majority decision held: "This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes are few and small, it would be intolerably oppressive." 9

In the light of these two cases, Justice Harlan held that the majority decision was ignoring the principle of stare decisis:

It seems to me that the Court has not given to the maximum of stare decisis the full effect to which it is entitled. While obedience to that maxim is not expressly enjoined by the Constitution, the principle that decisions, resting upon a particular interpretation of that instrument, should not be lightly disregarded where such interpretation has been long accepted and acted upon by other branches of the government and the public, underlies our American jurisprudence. 10

Justice Harlan believed that the majority decision implied that the money raised by the Union through income taxes was carried out in violation of the Constitution. After a lengthy argument for his position based on previous cases, the writings of publicists, and other sources, Justice Harlan spoke at great length on his general views of the majority position. He stated:

I have a deep, abiding conviction, which my sense of duty compels me to express, that it is

10. Ibid., p. 662-3.
not possible for this court to have rendered any judgment more to be regretted than the one just rendered.\(^ {11}\)

He predicted that the decision of the majority "may sow seeds of hate and distrust among the people of different sections of our common country" because it held that a tax on income from real property can be laid and collected through the apportionment system.\(^ {12}\)

Justice Harlan felt strongly about this case because it struck at two of his most fervently-held beliefs--the need for a strong, central government and the need for the government to protect the rights, political and economic, of the individual against the power of wealth. In regard to the first, he stated:

In my judgment...this decision may well excite the gravest apprehension. It strikes at the very foundations of national authority, in that it denies to the general government a power which is, or may become, vital to the very existence and preservation of the Union in a national emergency, such as that of war with a great commercial nation, during which the collection of all duties upon imports will cease or be materially diminished.\(^ {13}\)

In regard to his belief in the protection of the individual against the power of wealth, he stated:

11. Ibid., pp. 664-5.
12. Ibid., p. 665.
13. Ibid., p. 671.
By its present construction of the Constitution, the Court, for the first time in all its history, declares that our government has been so framed that in matters of taxation for its support and maintenance, those who have incomes derived from the renting of real estate or from the leasing or using of tangible personal property, or who own invested personal property, bonds, stocks, and investments of whatever kind, have privileges that cannot be accorded to those having incomes derived from the labor of their hands, or the exercise of the skill, or the use of their brains. 14

In the same vein, Justice Harlan pointed out that any attempt to apportion the income tax among the several states on the basis of population could not "possibly be made without doing gross injustice to the many for the benefit of the favored few in particular states." 15

So much has been said in criticism of this dissent, 16 that it may be well to quote at length the concluding paragraphs before commenting on that criticism:

Undue and disproportioned burdens are placed upon the many, while the few, safely entrenched behind the rule of apportionment among the States on the basis of numbers, are permitted to evade their share of responsibility for the support of the government ordained for the protection of the rights of all.

I cannot assent to an interpretation of the Constitution that impairs and cripples the just powers of the National Government in the essential matter of taxation, and at the same time discriminates against the greater part of the people of our country.


15. Ibid., p. 671.

The practical effect of the decision today is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organization, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of aggregated wealth any more than the property of the country should be at the mercy of the lawless.17

This is the opinion that was criticized as more of a political "stump address at a Populist barbecue."18 In the light of this criticism it is interesting to note that one newspaper reported that as a result of this opinion, Justice Harlan was considered by several Populists as their logical candidate for President.19 A particularly bitter criticism of Justice Harlan came from the pen of Edwin L. Godkin, the editor of the Nation. His magazine had published in 1878 a fierce criticism of the income tax proposal of the Grangers as a communistic attack on wealth.20 Proposals for an income tax he held were poisoning the Americans "with the dregs of European Communism."21 In his attack on Harlan's

17. 158 US 685.


dissenting opinion, he referred to him as an "agitator" expounding "the Marx gospel from the bench." In an article in the Nation entitled "Justice Harlan's Harangue," Godkin wrote:

...a considerable portion of the public ascribe such things invariably to what is known as the 'presidential bee.' They say that no man sitting in a place of such honor would so grossly violate its proprieties did he not hope thereby to give himself some chance of a dignity for which judicial-mindedness is not a preparation, and the attractions of which hardly any American is able to resist. If experience in such matters had any guiding influence, however, no such amendment [making Supreme Court Justices ineligible for any other office] would be necessary, for the Presidency has never been attained by the arts of the demagogue.

There were also reports that Justice Harlan shook his finger at Justices Field and Gray and Chief Justice Fuller as he became increasingly vehement. Professor Farrelly in his article on this dissent includes a letter that Justice Harlan sent to his sons, James and John, in which he explains to them what actually happened. He denied having


23. The Nation, May 30, 1895, p. 418. The following statement appeared, after Justice Harlan's death, in The Nation, Oct. 19, 1911; entitled "Supreme Court Timber": "The opportunity and the distinction which the Supreme Court offers have always been rightly regarded as independent of anything pecuniary. That there are we see illustrated in Justice Harlan," p. 356.

24. Farrelly, op. cit., p. 175.
gestured in the face of the Chief Justice and said he merely read part of his dissent to Justice Field because the latter had been carrying on a running conversation with Justices Fuller and Gray while the dissent was being read. As far as being overly vehement is concerned, Justice Harlan explained that he had been told his voice did not carry well in the courtroom, so he was determined that this time he would be heard. He wrote:

My voice and manner undoubtedly indicated a good deal of earnestness, and I am quite willing that it should have been so interpreted. I felt deeply about the case, and naturally the extent of my feeling was shown by my voice and manner....I never wrote an opinion about which I was better satisfied so far as the sentiments contained in it are concerned.  

Justice Harlan then charged that the attacks on his dissent came primarily from large newspapers with huge incomes, and who wished to avoid paying any taxes at all. "In some instances," he stated, "they come from the organs of financial gamblers whose business in life is to make corners in the market in order to get money at the expense of the general public and without regard to the distress which their operations give to those who are affected by it." This accusation is particularly significant because it indicates

25. Ibid., p. 179.

that Harlan identified himself with the public at large, as a defender of its welfare against the economically powerful minority.

In this letter Justice Harlan showed particular hostility toward Edwin Godkin, who he called the "meanest one of all...who seizes whatever opportunity he has to lie....Godkin could not live without lying. He would sleep uneasily if he felt that the previous twenty-four hours had been passed without his telling a falsehood." 27

Then in words which seem to indicate that there was something still remaining from his days as a Know-Nothing politician, Justice Harlan wrote: "He is a low breed foreigner who has no sort of affection for this country or our institutions." 28

Continuing in his hostility to slavery and the monied interests, Justice Harlan predicted that the American people would eventually consider the majority decision as hateful as the Dred Scott decision and that it would have the effect, if recognized permanently as good law, of making the "freemen of America the slaves of accumulated wealth." 29 He also attacked Russell Sage as an "unmitigated scamp" and Corliss P. Huntington as "one of the monster swindlers of this age of money getting."

27. Idem.
In the conclusion of his letter, Justice Harlan expressed profound regret that he had been charged with having been motivated by political ambitions. He felt that such charges weakened his effectiveness as a Supreme Court Justice and stated, "I am not a candidate for political station and would not under any circumstances abandon my present position for any office within the gift of the people." In fact, he referred to a letter he had written several years previously in which he had advocated a constitutional amendment which would make a Supreme Court Justice forever ineligible to any Federal or State office.  

Considerable attention has been given here to this letter because it is a revealing episode incident to the Pollock case. It represents a significant piece of evidence of Justice Harlan's feelings and attitudes expressed in a candid moment as he writes to his sons. More is revealed about a man in such a letter than is shown in a dozen formal opinions from the Olympian atmosphere of the Supreme Court.

As a final footnote to the Pollock case, the following observation by a writer on taxation is pertinent to the view that the dissenters and not the court majority followed the precedents: The writer, Sidney Ratner, is comparing  

30. Idem.

the Pollock case with Flint v Stone Tracy Co.,\textsuperscript{32} decided in 1911 in which the court unanimously upheld a Federal Corporation tax as an indirect tax on the privileges of doing business in a corporate capacity. He writes:

The importance of the Court's decision in Flint v Stone Tracy Company lies in the fact that the Court in 1911 willed or chose to follow precedents which would sustain the corporation tax instead of being willing, as the Court in 1895 did, to disregard the available precedents and to use those categories which would invalidate a tax to which powerful business interests were opposed. The explanation for the Court's volte-face is to be found in two factors: the change of personnel within the Court between 1895 and 1911 and the change in public sentiment and the balance of political power. The entire country had become more sensitive and responsive to measures for advancing the social welfare, and the more intelligent conservatives, such as Taft and Root realized the need for moderate social reforms to head off discontent which otherwise might have turned to radical and even revolutionary measures.\textsuperscript{33}

\textbf{Inheritance and Assessment Taxes}

Just as the income tax was one of the instruments of those fighting for social and economic reforms, so the inheritance tax was another. Both types were designed to meet the increasing cost of government made necessary by the increase in its responsibilities to society and they also represented the best way to see that such revenue was raised from those best able to pay. Therefore, in the cases

\textsuperscript{32} 220 US 107 (1911).

\textsuperscript{33} Ratner, \textit{op. cit.}, p. 296.
involving these taxes, it can be seen that the liberal, pro-
gressive position was the one which interpreted the tax
statutes in a way which would make most likely the realiza-
tion of the purpose for their enactment, namely, raising the
most revenue while stemming the trend toward centralization
of wealth.

A case which demonstrates clearly the position of the
Supreme Court and Justice Harlan on this matter is Knowlton
v. Moore. This case arose under the Act of Congress of
June 13, 1898, which levied a tax on legacies to immediate
relatives according to the following scale:

<table>
<thead>
<tr>
<th>Legacies in Amt. of</th>
<th>Taxed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $10,000</td>
<td>No tax</td>
</tr>
<tr>
<td>$10,000 to $25,000</td>
<td>$0.75 for each $100.</td>
</tr>
<tr>
<td>25,000 to 100,000</td>
<td>1.25 &quot; &quot; &quot;</td>
</tr>
<tr>
<td>100,000 to 500,000</td>
<td>1.50 &quot; &quot; &quot;</td>
</tr>
<tr>
<td>500,000 to 1,000,000</td>
<td>1.87 &quot; &quot; &quot;</td>
</tr>
<tr>
<td>over $1,000,000</td>
<td>2.25 &quot; &quot; &quot;</td>
</tr>
</tbody>
</table>

The estate of Edwin Knowlton was distributed according
to his will in the following manner:

- Daughter was left $1,731,000.
- Sister " 100,000.
- Brother #1 " 100,000.
- Brother #2 " 100.
- Church " 5,000.
- Residual amount for contingencies -- $717,800.

\[34\] 178 US 41 (1899).
The issue in the case was whether the rate of tax should be figured on the total of $2,559,899.65 of the estate (thus taxing all bequeaths at the rate of $2.25 for each $100) or whether each bequest should be taxed according to its amount.

According to the method employed by the tax collector, the sister paid a tax of $112.50 (based on $2.25 / $100), whereas under the latter method, she would have paid no tax at all because she received less than $10,000. The brother who received $100,000 paid a tax of $2,250 instead of the $1,120 which he would have paid if the tax had been figured according to the scale; he would have paid at the rate of $1.12 per $100 instead of $2.25 per $100.

There is no question that the law was ambiguous and either interpretation was possible. The majority of the Supreme Court, speaking through Justice White, held that the method used by the tax collector was wrong. According to Justice White the law required that the tax be figured on the amount each legatee received and not on the size of the estate as a whole.

Justice Harlan, with Justice McKenna concurring, dissented. He stated:

In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole

35. Except the bequest to the church which was figured at a different rate.
amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor or trustees exceeds ten thousand dollars, then every part of it constituting a legacy or distributive share, except the share of a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.\(^36\)

The writer on taxation referred to earlier feels very strongly that Justice White distorted the intent of Congress and as a result the "Treasury lost millions of dollars which otherwise might have been realized, and the centralization of wealth was not counteracted to the extent that Congress had desired."\(^37\)

In a group of cases dealing with assessment taxes, Justice Harlan presents a point of view which does not deny the validity of these taxes but which does insist that the person assessed against not be required to pay a tax greater than the actual benefits received. In a leading case in which this matter came before the Supreme Court in 1898\(^38\), Justice Harlan wrote the majority opinion. In it he upheld the

\(^{36}\) Ibid., pp. 110-11.

\(^{37}\) He also stated: "Unfortunately from the liberal point of view, Justice Harlan was able to persuade only Justice McKenna to concur in this dissent." Idem. In agreement with Ratner's views on the illiberal aspects of the Knowlton decision is Randolph S. Paul, Taxation in the U. S. (Boston: Little-Brown and Co., 1954), p. 59.

\(^{38}\) Norwood v Baker, 172 US 269 (1898).
principle that the owners of property upon which assessments are imposed need not pay any tax in excess of what they receive by reason of any public improvements. To do so, Justice Harlan held, would be taking private property for public use without compensation. Justice Harlan stated:

There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property....It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement and without any right in the property owner to show...that the sum so fixed is in excess of the benefits received. 39

Justice Harlan's interpretation in this decision was successfully challenged in a group of subsequent cases, the leading one being French v Baker Asphalt Paving Co.40 This case dealt with the assessment of property which had benefited from the paving of the street running in front of it. The question raised was whether the cost of local improvement could be assessed against abutting property according


40. 181 US 324 (1900). Decided at the same time and the same way were Wight v Davidson, 181 US 371, Tonawanda v Lyon, 181 US 389, Webster v Fargo, 181 US 394, Cass Farm Co. v Detroit, 181 US 396, Detroit v Parker, 181 US 399, et al.
to frontage without a preliminary hearing being held to determine the benefits to be derived by the property being assessed. Justice Shiras, speaking for the majority answered in the affirmative whereas Justice Harlan, in a dissenting opinion concurred in by Justices White and McKenna felt otherwise. What is interesting is that both sides argued over the meaning of the decision written by Justice Harlan in the Norwood case—the majority holding that it was distinguishable from the current case and Justice Harlan holding that it was analogous. Justice Harlan said in his dissent:

In my opinion the judgment in the present case should be reversed on the ground that the assessment in question was made under a statutory rule excluding all inquiry as to special benefits and requiring the property abutting on the avenue to meet the entire cost of paving it, even if such cost was in substantial excess of the special benefits accruing to it. 41

According to Justice Shiras any property which is lost under the guise of legal proceedings can be remedied through courts of equity. The Norwood case, he held, dealt with an extreme situation in which the entire cost of the improvement plus the costs of condemnation proceedings were thrown on the property of the person whose land was condemned.

"This appeared, both to the court below and to a majority

41. Ibid., p. 370.
of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power. 42

Thus the difference seemed to be that the majority of the court would uphold an assessment which did not appear to be confiscatory even where there was no preliminary hearing to determine whether the property owner was receiving benefits equal to the degree of assessment. Justice Harlan insisted on the preliminary hearing as a guarantee that the due process clause of the Fourteenth Amendment would not be violated.

In an earlier case dealing with assessment taxes, 43 the Court upheld a New York statute which declared an assessment be paid by owners of property abutting the improvement after preliminary hearings were held to determine the extent of benefits received. The circumstances were such, however, that Justice Harlan concurred in a dissenting opinion written by Justice Matthews. An earlier New York statute had been held void because hearings had not been provided for, but before the law was held invalid, many of the taxes had been paid. The new assessment law provided for an assessment equal to the amount which was still unpaid. Justice

42. Ibid., p. 344.
43. Spencer v. Merchant, 125 US 345 (1887).
Matthews stated in dissent (with Justice Harlan's approval)

[The New York legislature] took that portion of the old assessment...which remained unpaid, and which had been declared void, and revived it by a mere act of legislation as against the parties who had been judicially declared not to be bound by it, adding interest upon it from the time when it was first charged to the State by virtue of the cancellation, as well as a part of the expenses incurred in making the original assessment. Such an act of the legislature seems to be in violation of the due process clause of the Fourteenth Amendment.44

Thus Justice Harlan agreed with Justice Matthews in the latter's attempt to protect the taxpayer not only against tax assessments without a preliminary hearing but also against the payment of taxes with interest accumulating back to the time when they were held to be invalid. If the new law had established a new assessment with the right of preliminary hearing, doubtless there would have been no objection, but to charge the taxpayers the added interest plus a part of the expenses incurred in the making of the original assessment was clearly a violation of the due process clause. Here Justice Harlan is on the side of the taxpayer, trying to protect him against what he apparently felt to be an abuse of the government's right to tax.

State Corporation and Franchise Taxes

It was common practice for state legislatures to enact statutes that taxed corporations resident in other states

44. Ibid., p. 361.
but doing business in the state concerned. These statutes were often challenged on the ground that they discriminated against foreign corporations in favor of domestic ones or that they imposed a burden on interstate commerce. Justice Harlan did not invariably take the side either of the corporation or the taxing authority concerned, but he did guard carefully against any situation in which he felt foreign corporations were being treated unjustly in favor of domestic ones or in which a state was taxing that portion of a corporation's business which was interstate in character.

An example of the former arose in New York State v Roberta. A New York statute had provided, among other things, that corporations of New York, or other states, doing business in New York must pay a franchise tax. Among the corporations exempted were those involved in manufacturing which were "wholly engaged in carrying on manufacture... within this State...." Parke, Davis & Company, a drug manufacturing corporation of Michigan, carried on business in New York and was required to pay a franchise tax in accordance with the law. It protested the tax on the ground that it was an attempt to discriminate against the products of out-of-state corporations in violation of the equal protection clause of the Fourteenth Amendment. Speaking for the Court majority in upholding the New York statute, Justice

45. 171 US 658 (1898).
Shiras held that the object of the law was not to impose a tax on products of other states while exempting similar domestic products from taxation: "It is true," he said, "that manufacturing...within the State of New York is exempted from the tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State."46

Here the Court judged the case on the basis of what it considered to be the object of the statute. Justice Harlan in a dissenting opinion felt that the effect of the law should be the deciding factor. He wrote:

Can it be doubted that, whatever may have been the ostensible object for which the New York statute was passed, the natural and reasonable effect of the statute is to withhold from goods not manufactured in New York—and because they were not there manufactured—that equality in the markets of New York which, we have often said, is secured by the National Constitution to the like products of other States?
If the plaintiff corporation can be taxed on its capital employed in New York in the business of selling its goods, manufactured in Michigan, while capital employed in New York by a like manufacturing corporation is exempted from taxation because, and only because, it is wholly engaged in manufacturing in that State, is it possible to deny that such legislation injuriously discriminates against the manufactures of Michigan in favor of the like manufactures of New York?47

46. Ibid., p. 663.
47. Ibid., p. 681.
Since, therefore, the effect of the statute was to discriminate against foreign corporations, the fact that the purpose of the law may have been otherwise, did not alter the additional fact that the law became in practice a violation of the equal protection clause. Justice Harlan also felt that the law was a burden on interstate commerce. He stated:

If each State in the Union should enact a statute exempting from taxation the franchise and business of corporations or companies wholly engaged in carrying on manufacture within its limits, but taxing [those] whose manufacturing is carried on in other States, it is easy to see that commerce among the States would be as much at the mercy of discriminating state legislation as it was under the Articles of Confederation....

Another case in which Justice Harlan felt that an out-of-state corporation was being discriminated against was that of Fire Association of Philadelphia v New York. The Court majority upheld a New York statute which required fire-insurance corporations chartered in other states but doing business in New York to pay a higher tax than that paid by domestic corporations. The Court held that because a State

48. Ibid., pp. 679-80. Another case in which Justice Harlan (with Justice Miller) dissented against a statute which had a bad effect if not badly motivated was in Home Insurance Co. v N. Y. 134 US 594 (1889). Here the law in effect, if not in language, placed a tax on U. S. bonds held by an insurance company in violation of the principle of intergovernmental tax immunity.

49. 119 US 110 (1887).
may forbid a corporation to do business in that State, then it must also have the power to place restrictions on business that it does carry on in the State. From this view Justice Harlan dissented. He stated:

The denial of the equal protection of the laws may occur in various ways. It will most often occur in the enforcement of laws imposing taxes. An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community. So a corporation is denied that protection when its property is subjected by the State, under whose laws it is organized, to more burdensome taxation than is imposed upon other domestic corporations of the same class.50

Thus Justice Harlan applied the same protection against discrimination to corporations that he had consistently applied to individuals. These cases show that Justice Harlan was not pro-business nor anti-business per se; but merely that he remained a vigorous defender of every taxpayer's right to equitable treatment.

Miscellaneous Taxation

Another example of this attitude was in a lone dissent in Antoni v Greenhow.51 In 1871 Virginia had passed a law providing for the sale of state bonds. The law stated that the interest coupons of the bonds could be used as payment

50. Ibid., pp. 120-1.
51. 107 US 769 (1882).
for taxes, and that any tax collector could be forced by a writ of mandamus to receive them in such payment. In 1882 a law was passed by the Virginia legislature to solve the problem resulting from an accumulation of fraudulent coupons. The law provided that all taxes must be paid in currency and no longer should interest coupons be accepted in payment. If anyone, however, should offer these coupons in payment (in addition to the currency) and they were found to be genuine after being submitted to a jury, the money paid would be refunded. The point is that the procedure by which coupons could be used to pay taxes had been changed by the statute of 1882. The Court held that this was not an impairment of the obligation of contract because the coupons were still receivable and the method of receiving them was immaterial.

Justice Harlan, however, did not agree. He held in his dissenting opinion that the change in method imposed a burden on the coupon holders to such an extent that the coupons became virtually worthless because of the greater expense to which the holder had to go to prove them genuine. The statute of 1882, Justice Harlan held "does impair the obligation of the contract, by imposing new and burdensome conditions, which not only prohibit the collector from receiving coupons in payment of taxes when offered, but require the taxpayer to pay his taxes in money, not to be returned to him unless...he submits...to a jury trial, and proves to the satisfac-
tion of twelve jurymen that the coupons tendered are genuine and legally receivable for taxes." Since the taxpayer was not able to recover the costs of bringing the suit before a jury, this method could cost him more than the coupons were worth.

In another case, Ficklen v Shelby County, Justice Harlan dissented alone from a majority opinion by Chief Justice Fuller who upheld a Tennessee statute which imposed a license tax on "factors, brokers, buyers, or sellers on commission, or otherwise, doing business within the state." The law also provided that if no capital were invested then the tax would be applied upon the gross yearly commissions, charges, or compensations received for such business. Justice Harlan dissented on the ground that these taxpayers were required to pay taxes on their earnings obtained in interstate business and thus the tax was a burden on interstate commerce. He saw the tax as no different from one which made the granting of a license as a merchandise broker depend on the applicant's paying a given percent of his earnings obtained in the previous year in interstate commerce. If such a law were passed, he had no doubt the Supreme Court would declare it invalid. The statute under consideration in this case, Justice Harlan felt, had the same effect. "It seems,"

52. Ibid., p. 812.

53. 145 US 1 (1891).
he said, "that if the local authorities are discreet enough not to indicate in the ordinance under which they act their purpose to tax interstate business, they may successfully evade a constitutional provision designed to relieve commerce among the States from direct local burdens."

This remark by Justice Harlan seems to indicate his belief that federal supremacy was threatened in cases in which the commerce power was to any degree jeopardized by state tax statutes. There is a tendency on his part to look behind the tax and make certain that its effect does not interfere with a federal power. This refusal to accept any revenue measure as a tax "on its face" seems to be Justice Harlan's attitude as it applies to state measures vis-a-vis Federal powers but not when the situation is reversed. For example, Justice Harlan concurred in the decision which upheld the Federal tax on oleomargarine in _McCray v. U. S._.54

Another example of Justice Harlan's objection to state taxes which in effect interfere with a federal power is his opposition to any attempt by a state to tax a corporation on the basis of business done outside the state's jurisdiction. This attitude was expressed in a series of dissents by Justice White in which Justice Harlan concurred along

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54. _Ibid._, p. 28.

55. 195 U.S. 27 (1904) Dissent by Chief Justice Fuller and Justices Brown and Peckham. It would be interesting to speculate whether he would have looked behind the Federal child labor tax which was overthrown in _Bailey v Drexel Furniture Co._ in 1922.
with Justices Field and Brown. The leading case in this group was Adams Express Co. v. Ohio. The State of Ohio passed a law creating a board of assessors to assess the property in Ohio of telegraph, telephone, and express companies. Each such company was required to file a return with the state auditor, setting forth, among other things, the number of shares of its capital stock, plus the par value and market value of its shares at the time of the return. It was also to contain a statement of the entire real and personal property owned by the companies and where such properties were located and their value as assessed for taxation. Express companies were also required to include a statement of their entire gross receipts, from whatever source derived, for the year ending the first day of May, of business wherever done.

Although the law provided that the tax would be based on the value of the company's property in the State, in practice the tax proved to be much higher than the companies thought just because the size of the tax was influenced by the amount of property, capital, and gross receipts existing outside the state.

The majority of the Court held that the nature of the express business made it necessary to treat the business, for purposes of taxation, as a unit. Attempts to tax only the property in Ohio would result in less than a fair return

56. 165 U.S. 194 (1896).
to the state because the express company's actual property in Ohio was small, so any attempt to tax its business had to consider the amount of such business elsewhere.

Justice Fuller, speaking for the majority, stated, "... the property of an express company distributed through different States is as an essential condition of the business united in a single specific use. It constitutes but a single plant, made so by the very character and necessities of the business." 57

To Justices Harlan, White, Field, and Brown this was a tax on interstate commerce and as such a burden on that commerce. Justice White stated that the decision of the majority upheld the principle that

...although actual property situated in States other than Ohio may not be assessed in that State, yet it may take all the value of the property in other States and add such portion thereof, as it sees fit, to the assessment in Ohio, and that this process of taxation of property in other States, in violation of the Constitution, becomes legal provided only, it is called taxation of property within the State. 58

This decision, said Justice White, violates the rule which forbids one State to extend its power of taxation beyond its jurisdiction to property in another State. Inter-

57. Ibid., p. 222. This is known as the "unit in use" principle of determining the extent of state taxation of foreign corporations.

58. Ibid., p. 240.
...s corporation...cannot go from one State into another State...for the purpose of there engaging in interstate commerce business without subjecting itself to the certainty of having a proportion of all its property situated in the other States added to the sum of property, however small, which it may carry into the State to which it goes, for the purposes of taxation therein.\textsuperscript{59}

This same conflict arose in other cases,\textsuperscript{60} and in all of them the court divided five to four with Justices White, Field, Brown, and Harlan dissenting on the grounds presented by Justice White in the Ohio case. Thus Justice Harlan and the other dissenters upheld the right of corporations to carry on business in any state which permitted such business without that state taxing them beyond the amount represented by the corporation's assets within the State's jurisdiction. They also refused to uphold state statutes which they felt burdened interstate commerce.

That Justice Harlan should be associated with the dissenting opinions in these cases is consistent with his defense of 1) freedom of the individual (in these cases the corporations), 2) protection against unfair discrimination, and 3) protection against any attempt to burden the exercise

\textsuperscript{59} Ibid., pp. 242-3.

\textsuperscript{60} Adams Express Co. v Indiana, 165 US 255 (1896); Adams Express Co. v Kentucky, 166 US 171 (1896); Henderson Bridge Co. v Kentucky, 166 US 150 (1896).
of a Federal power (in these cases the power to regulate interstate commerce). The majority decision in the Adams Express case was an impairment of the company’s freedom to locate as little of its property as it wishes in a state without having it taxed beyond its value because of the amount of company assets outside the state. The decision was also an encouragement to state discrimination of foreign corporations in favor of domestic firms because the tax on the assets of the former within the state’s jurisdiction is higher in proportion to the value of these assets than would be the tax on domestic corporations wholly engaged in the carrying on of business within the state. Finally, the decision presented a burden to interstate commerce in that it permitted corporations doing business in more than one state to be subjected in one state where its assets are small to a tax based on assets outside the state which are large. Such a situation would tend to discourage corporations from going from one state to another for the purpose of engaging in interstate commerce there, thus having the effect of burdening interstate commerce. Incidentally, whether the decision of the majority actually had these effects is irrelevant. That the dissenting justices believed it did is the important point for an understanding of the pattern of their constitutional values. Looked at in this light and in relation to the other cases in this chapter and before, Justice Harlan again emerges as one dedicated to the encouragement
of freedom, fair treatment, and the unhampered exercise of federal power which not only does not impair individual rights but positively promotes them.
In the preface of this dissertation it was stated that an attempt would be made to demonstrate that the judicial role of Mr. Justice Harlan was that of a defender of the dignity of the individual and of the power of government to provide the legal and constitutional instruments for its protection. It is the purpose of this concluding chapter to demonstrate through the summarizing of his opinions that what was attempted has been achieved.

That Justice Harlan was the Court's most consistent defender of the individual integrity of the Negro not only has been demonstrated by the cases analyzed in Chapter II, but has become the best known characteristic of Justice Harlan. An extensive description of the pertinent cases would merely belabor the obvious. Louis Boudin described the Supreme Court's treatment of Negro rights in the 1880's as "the most disgraceful chapter in the judicial history of this country." He considered the dissenting opinion of Justice Harlan in the Civil Rights Cases, "one of the ablest opinions written by that able jurist, and probably one of the greatest opinions ever written by any judge of the

United States Supreme Court. The fact that many may disagree with such high praise does not alter the fact that none would deny Justice Harlan's right to the reputation as the Negro's most faithful defender on the Supreme Court. If Harlan were on the Supreme Court today, he would be expressing his views as a member of the majority rather than as a lone dissenter. The attitude of the Supreme Court in recent years, as indicated by the invalidation of segregation in public schools, municipal golf courses, parks, etc., focuses attention as never before on John Marshall Harlan.

In the last twelve years the Supreme Court has made rapid strides in the direction of Justice Harlan's position on the constitutional rights of Negroes. In addition to Brown v Board of Education of Topeka, which adopted Justice Harlan's position against the "separate but equal" doctrine, there are a great many cases that demonstrate the Supreme Court's acceptance of his interpretation of the equal protection clause. Even before the Brown case the Court was increasing its emphasis on equality in the "separate but equal"

2. Ibid., p. 141.

3. The tremendous expansion since Harlan's day of the commerce power makes it less possible for private enterprise serving the public to be outside Congressional jurisdiction. See Morgan v Va., 328 US 373 (1946), Shelley v Kraemer, 334 US 1 (1948), Henderson v U. S., 339 US 816 (1950).

doctrine. In a more recent case the Court held that a city could not bar Negroes from a college in which the city acted as a trustee. The same year the Supreme Court held invalid a state statute which gave each parish school superintendent complete authority to assign each pupil to a particular school.

There has been an extension of the Brown ruling to other areas of discrimination, such as public beaches, and public golf courses. This is indicative of the rapid advances the Supreme Court has made toward the protection of rights of the Negro in various areas. It is tempting to speculate as to whether the Supreme Court will ever adopt the views of Justice Harlan in his dissenting opinion in the Civil Rights Cases, that is, whether the Supreme Court will hold that private businesses serving the public must cease and desist all forms of discrimination? Over a decade ago Justice Black, speaking for the Court majority, stated:

"Ownership does not always mean absolute dominion."


an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. These words sound very familiar to one who has read many of the dissenting opinions of Justice Harlan.

It is in the question of what constitutes "state action" that the role of the Court in preventing race discrimination is making its most rapid strides. Even Justice Bradley, speaking for the majority of the Court in the Civil Rights Cases, implied that acts of discrimination by private persons are beyond the Fourteenth Amendment only "if not sanctioned in some way by the State, or not done under State authority." The way now seems open for the Supreme Court to declare unconstitutional all laws which compel segregation of persons because of race. Watt and Orlikoff have made the following observation on this same point:

It may be that the concept of "state action" will develop into a positive technique for preventing private infringement of civil rights. For where private infringement rests, even indirectly, on state authority or approval or even tolerance, the ultimate sanction is some kind of state action, usually through resort to the courts.


An example of the foregoing was the situation in *Shelley v Kramer* wherein the Court held that for a state court to uphold a restrictive covenant would constitute state action supporting the right of private individuals to deprive citizens of the right to obtain property, thus violate the Fourteenth Amendment.

That the Supreme Court may some day even broaden the equal protection clause to include "private" discrimination is suggested by a recent observer when he said:

> The Court's decision in the Civil Rights Cases of 1883 still stands as a bar against direct national regulation of nongovernmental education and of 'private' social injustice. But Justice Harlan's dissenting opinion that this seventy-five-year-old ruling rested 'upon grounds entirely too narrow and artificial' may yet prevail.

However, regardless of whether or not the Supreme Court continues to move in the direction taken by Harlan in these cases, the important fact to be emphasized here is the sympathetic attitude toward the individual dignity of the Negro taken by Harlan throughout his tenure on the Court. The striking point is that a man who opposed the right of Negroes to be free three decades earlier, now defended their right to enjoy legal and political privileges enjoyed by all.

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Another area in which Justice Harlan's defense of the individual has been indicated is that involving the small producer—particularly the farmer and the small businessman. In his dissenting opinions against the Supreme Court's weakening of the Interstate Commerce Commission, the evidence is overwhelming that he wished to protect the farmer against the discriminatory and exhorbitant rates of the railroads. His dissent in the Alabama Midlands case warned that the I.C.C. was becoming a useless body as a result of the majority decisions in the cases coming to the Supreme Court before the passage of the Hepburn Act of 1906. He opposed not only unfair treatment of the farmer but any other practice in which one group was discriminated against by the powerful railroads in favor of another group. For example, he opposed a majority decision which placed American manufacturers and shippers at a disadvantage in relation with those of foreign countries thus discriminating against American interests. He also attacked a majority decision which permitted railroads to discriminate against certain population centers to the advantage of others. In another case, Justice Harlan dissented from a decision which, he felt, subverted Congress' intention to divorce production and transportation in order to prevent


coal-producing transportation companies from discriminating against other producers of coal. In all these cases, Justice Harlan was consistent in his belief that the railroads were exercising a power so great that the interests of farmers, small businessmen, and even whole communities were put in jeopardy.

In the anti-trust cases, Justice Harlan continued to support a vigorous enforcement of the Sherman Act against the majority opinions which would weaken it with "rules of reason" and a refusal to apply it to manufacturing establishments. Here, again, he defended the individual against entrenched power—the small businessman against the industrial monopolist. This attitude, apparent in the cases analyzed in Chapter III, is consistent with his defense of national power as the only one adequate to protect the individual against those institutions whose power was greater than that of any state. In a speech delivered at the centennial celebration of the organization of the Supreme Court, Justice Harlan declared the following "vital principles" of constitutional law:

That while the preservation of the States, with authority to deal with matters not committed to general control, is fundamental in the American constitutional system, the Union cannot exist without government for the whole.

That the Constitution of the United States was made for the whole people of the Union and is equally binding upon all the courts and all the citizens.

That America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent.¹⁷

Thus Justice Harlan followed in the tradition of his namesake, John Marshall, by recognizing that the constitution permits the national government to act in behalf of all the people by allowing the Congress to use its discretion in carrying out the "duties assigned to it, in the manner most beneficial to the people."¹⁸

In these cases, as in others, one may challenge Justice Harlan's interpretation of the Interstate Commerce and Sherman Acts, but one cannot fail to see clearly his devotion to the cause of individual rights. First, he recognized the power to enact such laws and then he interpreted them broadly in order that their purpose be fulfilled. This probably accounts for his willingness to see them applied even to labor organizations, as in the Danbury Hatters case. Considering his opposition to the "rule of reason," his concurrence in the court's application of the Sherman Act to the secondary boycott activities of the Hatter's Union should come as no surprise. That he did not defend the labor union in this case does not disprove his support of their cause, but rather

17. 134 US 755 (1890).
proves that he did not take their side when he believed they were acting illegally. Justice Harlan's defenses of the individual which this paper emphasizes is not to be interpreted as a defense based on a blind support of any particular economic group regardless of the legal or constitutional issues involved. Such consistency would be grossly prejudicial. The same refusal to support the employee, per se, is found in the Adair and Debs cases. Here Justice Harlan supported the principles whereby liberty of contract is guaranteed by the instrument of government.

In spite of these cases, however, it can still be claimed that Justice Harlan, on the whole, supported the small businessman, the farmer, and the laborer as individuals in their quest for economic justice against their more powerful adversaries.

Although written as an obituary and thus subject to exaggeration, the following evaluation of Justice Harlan seems to be borne out by the analysis of his opinions in this paper:

It was his instinct to support the cause of liberty and popular right. He hated injustice, tyranny, and oppression in whatever guise. And with this key to his character as a man, it is not difficult to see the general consistency of all of his great judgments in opposing the Government's imperialistic contentions in the insular cases, and in his later insistence upon the strict enforcement of the Anti-trust Law and his repugnance to judicial law-making; there is discernible the man's fidelity to what he conceived to be the public welfare. If we call him a great democrat on the bench
rather than distinctly and pre-eminently a pro-
found jurist, the essence of our estimate, per-
haps, becomes entirely clear.\(^{19}\)

His support of liberty is possibly his most dominant
characteristic because it runs like a thread throughout his
opinions—those involving the Negro, the defendant, the
small producer, the worker and even the employer (as in the
Adair case). His steadfast belief (as a lone dissenter) in
the incorporation of the Bill of Rights in the Fourteenth
Amendment is one of the best examples of his devotion to the
principle of "equal justice under law." Maybe he was eccen-
tric on this point, as Justice Frankfurter said, but it was
the result of a stubborn insistence on "liberty and justice
for all."

In the insular cases dealing with procedural due pro-
cess for colonials, Justice Harlan evidenced particular con-
cern over the danger that commercial interests would "sweep
away the safeguards of real freedom and give us parliamen-
tary in place of constitutional government."\(^{20}\) Here Justice
Harlan warned against legislative supremacy which would en-
able Congress, like the British parliament, "to do every-
thing but make a man into a woman," irrespective of any con-
stitutional limitations. Here again Justice Harlan spoke

Quoted from an editorial in the *Springfield Republican*, (no date).

20. See Chapter IV, Footnote No. 56.
in defense of the right of colonial inhabitants accused of crime to the same procedural rights as those guaranteed in federal courts to inhabitants of the United States. In the light of subsequent cases on this issue, these views of Justice Harlan may also be called "eccentric," but they are views based on the conviction that all accused persons coming within the jurisdiction of the United States government should be guaranteed what he regarded as the fundamental procedures prerequisite to a fair trial. His faith in the role of the judiciary as a co-equal branch of the government with the duty to restrain those excesses of the legislative branch which would subvert our constitution is emphasized in a speech he made on the retirement of Mr. Justice Brown, in which he said:

We all take pride, in the American judicial system. It is the mainstay of our civilization. As so organized, it is unique among the systems established for the safety of the people and for the security of personal rights and individual freedom. It is unique because, in this land, the judgments of our courts cannot, as in some countries, be reviewed or set aside by other departments of the government....With us, the legislative department is not paramount, except within the limits of the authority granted to it. The great doctrine of the separate, independent exercise of judicial authority, as distinguished from legislative and executive authority, is essentially American in origin, for, while the thought was suggested by a European publicist shortly prior to the Revolution, it was not distinctly formulated or embodied in any governmental document until that was done in this country in 1776.21

Therefore Justice Harlan did not hesitate to invoke judicial review when he felt it necessary to protect the rights of all persons whose liberties were threatened by oppressive legislation. In a speech given at a banquet in his honor in New York in 1907, Justice Harlan made clear his opposition to judicial interpretation of laws according to a slavish following of the whims of a popular majority when such interpretation twists the meaning of the constitution as he saw it. The constitution should not be made to mean what a majority of the people think at any given time it ought to mean. Said he:

Such theories of constitutional construction find no support in judicial decisions or in sound reason....The National Government...is one of limited and delegated powers, and is not a pure democracy in which the will of the popular majority, as expressed at the polls at a particular time, becomes immediately the supreme law. It is a representative Republic in which the will of the people is to be ascertained in a prescribed mode, and carried into effect only by appointed agents designated by the people themselves in a manner indicated by law. It would be a calamity unspeakable if our institutions and the sacred rights of life, liberty and property should be put at the mercy of a majority unrestrained by a written supreme law, binding every department of government, even the people themselves.22

Although these statements may appear to contradict his defense of positive government reflected in the Interstate

Commerce and Anti-trust Acts, actually they reflect a deep conviction in favor of the protection of minority rights within a system which includes majority rule as one of its fundamental principles. There is also an articulation here of a belief in a combination of limited government to protect and guarantee the rights of the individual in his struggle against political tyranny and of positive government to protect and guarantee the rights of the individual in his struggle against economic tyranny. Throughout his career, Justice Harlan was aware of the fact that true democracy provides an environment in which the individual can reach maximum fulfillment only through the maintenance of a balance between a political system which is strong enough to protect its citizens against the tyranny of private institutions and groups, and limited enough to guarantee them fundamental freedoms against arbitrary policies of an autocracy. In other words, Justice Harlan was a constitutionalist in the purest sense in that he believed in a government limited in its exercise of arbitrary power, responsible to the wishes of the people but also strong enough to provide for the general welfare. He seemed to realize instinctively that the extent to which the interests of the individual were ignored or placed in jeopardy, to that extent democracy was in peril.

Many writers who observed at close range the career of Justice Harlan described him in much the same way as he has
been analyzed in these pages. One observer wrote two months before Justice Harlan's death:

All his opinions, whether in dissent or concurrence...tell the same story. They show how for thirty-four years he has loved liberty and its institutions, hated sham and pettifogging, reverenced democracy, and been loyal to the people's will.... For thirty-four years he has contemplated the vision of a society in which all men may live as nearly a human life as they would like to live. 23

Another writer, referring to Justice Harlan's attack on the "rule of reason," stated:

His performance was finished and excellent enough to make him the hero of the consumer and to bring upon him the abuse and execrations of sundry well-known corporations, including their component parts, officials, and attorneys. 24

Mr Hay also described Justice Harlan in the most vivid and colorful phraseology this writer has seen anywhere:

Poising himself every day at 7 A.M. on a rising and resilient stack of dissenting opinions, he does a parabolic leap, takes a header into the pel­ lucid depths of the Fountain of Youth, and comes to the surface in the court-room, shaking the iridescent drops from his brow, letting out a yowling yip for the people's rights, and proclaiming to the world that his eight brethren on the highest bench in the land have lost their way in the dusty by-paths and blind alleys of labyrinthine law. 25


25. Ibid., p. 534.
Charles H. Rutler, a former Reporter of decisions of the Supreme Court, wrote of a conversation he heard between Justice Peckham and Chief Justice Cullen of one of the Courts of Appeals in which they were apprehensive about the increase in state statutes passed under the police power governing labor relations. Both were opposed to such laws and Justice Peckham remarked, "Ed, we must stand together now." Rutler writes:

Then he expressed himself as greatly in fear of what has happened. He mentioned no particular Justice, but it was evident to me that he was afraid of Justices Harlan and Holmes, and regarded them, as far as police statutes were concerned as the dangerous elements in the Court. 28

After his death (as a result of acute bronchitis) on October 14, 1911, a number of obituaries describing his life and work appeared in newspapers and magazines throughout the land; and although many contained the amount of exaggeration one expects in such commentaries, one, in particular, expressed precisely what this paper has attempted to prove. The most accurate paragraph from it is the following:

The truest social vision that in many years has looked out from the cloistered seclusion of the Supreme Court upon the world of affairs was denied forever when John Marshall Harlan died. He keenly felt that modern civilization makes

inevitable a constant clash between human rights and property interests; and in that struggle his instincts aligned him with the human side. This was the key to most of his dissenting opinions, the pigment that colored his views.27

In a recent symposium devoted to John Marshall Harlan two statements are made which provide a fitting conclusion to the thesis presented in this paper:

Often John Marshall Harlan stood alone; but he always stood firmly and proudly as the stalwart judicial champion of the dignity of man and the protector of human rights.28

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 antebellum slaveholder. His focus was unmistakably on the individual.29

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