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## A Struggle Within: The Rise and Fall of Kentucky Nationalism and the Political Transition of John Marshall Harlan

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A Struggle Within: The Rise and Fall of Kentucky Nationalism and the Political  
Transition of John Marshall Harlan

Luke Glaser

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## Introduction

In the recent Supreme Court case *Arizona v. United States*, the nine justices were charged with determining whether or not Arizona's recently passed immigration law had usurped the jurisdiction of the United States Government. The argument, which on the surface dealt with immigration, contained roots even more deeply engrained into American society. Embodying that conflict in his dissent, Justice Antonin Scalia wrote, "If securing its territory in this fashion is not within the power of Arizona, we should cease referring to it as a sovereign State."<sup>1</sup>

States' Rights have long been a polemical issue in this country, since its very inception. Scalia's charged language is one of the more recent arguments in a long chorus of voices that have debated the rights reserved for the states and the authority of the Federal government, and the topic, as evidenced by the Supreme Court case above, is still germane to the continuing legal and historical development of the United States.

I initially undertook this project in order to explore that contentious history, and the unique place Kentucky holds in the matter. The Commonwealth's exclusive position in this long-debated issue, particularly in the first half of the nation's history, is evident in some of the first documents written on the topic. Jefferson's *Kentucky Resolutions* are arguably the earliest texts written in defense

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<sup>1</sup> *Arizona v. United States*, 567 U.S. \_\_\_\_ (2012)

of the rights of states, and if searched on Wikipedia, will even appear under the subhead, "Events leading to the U.S. Civil War."<sup>2</sup>

Although still unstable today, the modern tensions between the states and the Federal government pale in comparison to the levels they reached in 1860. The Civil War, a violent culmination of the strain between the states and the Federal government, would claim the lives of 3% of the national population, in sanguineous homage to an argument that Scalia embodies in the language of his dissent, over one hundred and fifty years later. Kentucky's prominence in the arena of States Rights reasserts itself during the Civil War. A neutral state, it walked a very thin line between the two warring factions. Kentucky was a slave state, and its citizenry fiercely supported their rights and the rights of the Commonwealth to determine its own legal principles regarding the matter. Slavery became the preeminent issue in the argument between the rights of the states and the federal government. From this contentious topic would arise 'Kentucky Nationalism,' an eclectic term for an eclectic Commonwealth that supported States Rights, yet also held the Union to be the highest and most inalienable of structures. The events preceding and catalyzing the Civil War placed Kentucky at the very heart of the conflict, slavery versus freedom, Union versus Confederacy, states versus Federal government. The war itself wrenched the Commonwealth apart, creating a political landscape of both Unionists and

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<sup>2</sup> 'Kentucky and Virginia Resolutions,' accessed February 2, 2013, [http://en.wikipedia.org/wiki/Kentucky\\_and\\_Virginia\\_Resolutions](http://en.wikipedia.org/wiki/Kentucky_and_Virginia_Resolutions).

Southern sympathizers, complete with a provisional Confederate government that moved around the state as sides shifted.

Amidst these more popular debates and historical markers, lost in these higher arguments of States Rights, Civil War, and slavery, lies a Kentuckian whose voice has been largely drowned out by his louder contemporaries and those who come after him. The name of John Marshall Harlan is, for the most part, unknown, save in a few circles of legal and historical academics. A lawyer and politician in Kentucky before he was appointed to the Supreme Court of the United States, Harlan's career in the state largely escapes notoriety. His claim to fame lies in a case that came before the Supreme Court, over one hundred years before *Arizona v. United States* added fresh fuel to a long-raging fire.

On May 18, 1896, eight justices walked into the Supreme Court of the United States and delivered a decision in favor of John Howard Ferguson. The plaintiff, a man named Homer Plessy, had been arrested for refusing to move from a "whites-only" trolley car in New Orleans four years earlier. *Plessy v. Ferguson* was one of the first cases to be brought before the Supreme Court testing the constitutionality of segregationist laws and states' rights to racially separate in public facilities. The decision fell heavily in favor of the defendant, 7-1. Justice David Josiah Brewer (from Kansas) was absent, tending to a sudden death in the family. The seven that voted to uphold segregationist law were Chief Justice Melville Fuller (Illinois), Stephen Johnson Field (California), Horace

Gray (Massachusetts), Henry Billings Brown (Michigan), George Shiras, Jr. (Pennsylvania), Edward Douglass White (Louisiana), and Rufus W. Peckham (New York). All, save White, were justices from northern states. The lone dissent was made by John Marshall Harlan.

The story of Harlan and Kentucky Nationalism is, at heart, a story, one that I wish to tell with literary concepts interspersed with legal and historical analysis. The road that began with *Plessy v. Ferguson* and continues to be paved with the language of *Arizona v. United States* suggests that the argument of States Rights, regardless of the context surrounding the debate, was, is, and will continue to be a topic of debate, germane to the continuous evolution of the country itself. To evaluate the present, one must often look into the past.

This thesis will examine the hand of John Marshall Harlan long before it went up into the air in support of desegregation and federal jurisdiction over the states, specifically the underlying reasons behind his dissent. Despite Harlan's largely undistinguished early life and political career in Kentucky, within these formative years lies the evidence to the question this thesis seeks to answer: Why did the only dissenting vote in *Plessy v. Ferguson* come from the Kentuckian, the southerner, John Marshall Harlan, a man hailing from a southern state and slaveholding family, with a long history of publicly defending the institution of slavery and the preeminence of the states in upholding that institution, in a political climate that, decades after the Civil War, still tendered towards the separation of races?

This thesis will primarily examine two biographies of Harlan in search of the answer. While these are by no means the only two sources on John Marshall Harlan, they are the two that give focus to his early career in Kentucky, as opposed to his more distinguished career on the Supreme Court. Thomas L. Owen attributes Harlan's transition, this phenomenon, this holistic change in political and moral belief, to the judge's "penchant for placing politics above principle,"<sup>3</sup> while Loren P. Beth postulates in his groundbreaking biography "that Harlan's Southern Clay Whig nationalism accounts for most of his major subsequent actions."<sup>4</sup> It is almost unanimously held by the few scholars that have studied Harlan that politics lay behind the man's rationale, and each account differs as to the cynicism employed in dissecting Harlan's conscience (Owen tends to judge Harlan more harshly than Beth, who sympathetically treats Harlan more as a victim of the times). While this thesis will not disagree with existing research in the sense that politics indeed played a large role in Harlan's evolution, it will be innovative in the sense that it will largely disregard the politics of *party*, instead focusing on the dichotomy of *national* political affiliation versus loyalty to the *state*.

This thesis will examine the question in two separate (but equal) pieces. First, it will be an examination of Harlan's life, particularly his political leanings

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<sup>3</sup> Thomas Owen, *The Pre-Court Career of John Marshall Harlan* (Louisville: University of Louisville press, 1970), iii.

<sup>4</sup> Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* (Lexington: University Press of Kentucky, 1992), 2.

and affiliations and how they changed within the context of a changing state. As a southerner, and a staunch defender of slavery and segregation in his earlier years, Harlan's vote would be expected to go in favor of segregation. The opposite being the case, his political ideology must have been shifted by changing politics in his state before his tenure on the court, at some point in the thirty years between the Civil War and the *Plessy v. Ferguson* decision. Kentucky in the late nineteenth century was a hotbed of political change, an established fortress of southern ideology and Democratic value; but also a vulnerable terrain where the rapidly-growing Republican Party sought to gain influence. In the middle of this activity was John Marshall Harlan, a rising political star looking for a movement with which to identify.

It is important to note at this point that I neither intend nor seek to make this thesis a biography of John Marshall Harlan. As stated, the primary interest of this thesis is in the states' relationship to the federal government, with a focus on Kentucky. The primary investigation of this thesis will therefore focus on the political climate of Kentucky from antebellum years to the time of Harlan's nomination to the Supreme Court, culminating in his dissent in *Plessy v. Ferguson*. The aforementioned 'Kentucky Nationalism' is the embodiment of an unstable yet popular political position that Kentuckians, particularly Southern Whigs and their posterity, attempted to emulate. The accepted position of politicians in Kentucky before the Civil War was to staunchly adhere to the rights of states, while simultaneously championing the pre-eminence of the Union and the

Constitution. They sought to have both ways, and the Civil War is validation that compromise and the middle path gave way underneath their feet.

After the Civil War, the southern states broken under the heel of the federal government, the cause of States Rights was all but diminished. It would be Kentucky, the neutral Commonwealth, not broken like its rebellious sisters, but neither the fiercest adherent to the Union, that would take up the feeble torch of States Rights and rekindle the cause. Kentucky, a state simultaneously proud of its southern heritage and northern progressivism, simultaneous defender of States Rights and enforcer of the rights of the federal government, was a battlefield on which war was waged long after the guns of the Civil War had faded.

Fierce political maneuvering was occurring in the Commonwealth; Southern Democrats, ex-Confederate soldiers, entrenched against Republicanism and the changes it sought. In order to combat the Southern Democrats, the very political climate of the state would have to change. Parties would no longer be a measure of *state* loyalties but *national* loyalties. Landmark campaigns would not be for state races, such as the gubernatorial, but for national campaigns, such as the President. The focus of political debate and topic in Kentucky would not be matters reserved to the *state* but matters that effected the *country* as a whole. In response to 'Kentucky Nationalism,' the former word would be dropped in overwhelming favor of the latter.

John Marshall Harlan will be the vantage point from which I study these dramatic changes and shifts. Despite Harlan's long history with Kentucky Nationalism, national political influences in post-Civil War Kentucky affected his private and political beliefs, driving him into the Republican camp and ultimately leading to his lone dissent in *Plessy v. Ferguson*. These factors, combined with Harlan's unique and often tenuous journey through the political landscape of Kentucky, are the underlying cause of the greatest dissent of "The Great Dissenter."<sup>5</sup> This thesis seeks to prove that Harlan was at the forefront of a much larger movement that transcends politics and ambition; the very nature of civic relations between the states and federal government would drastically change during Harlan's time, and would cause him and many others to reevaluate their very ideologies, which in his meant case Kentucky Nationalism.

While much has been written and said about this topic, this thesis proposal maintains several advantages that allow it to approach the subject from a novel vantage. Several biographies have been written about John Marshall Harlan, and much has been studied regarding his dissent. The difference is these aforementioned studies have all specifically examined Harlan and his decision using the political upheaval of the time and law as context. I wish to bring politics to the forefront of the conversation. In order for Harlan to

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<sup>5</sup> It seems that each generation of Supreme Court Justices has its own "Great Dissenter." Oliver Wendell Holmes also held the title, and present scholars have even gone so far to give Antonin Scalia the title. Harlan gained this nickname due to his prophetic, and often solitary, dissents on the Supreme Court in relation to Civil Rights cases and *Plessy v. Ferguson*, in the last decades of the nineteenth century.

dissent, Kentucky Nationalism would have had to lose its hold in the post-Civil War era. Republican ideas spread into the state, diluting the power and strongholds of Southern Democrats, and this trend is consummated in Harlan's dissent in *Plessy v. Ferguson*. Harlan was one of two southerners on the Supreme Court at the time of the decision, and not only broke trend with the rest of his fellow justices, but also with the traditional ideology of his home state. It is that traditional ideology I wish to examine through the eyes of Harlan, viewing its shifting principles and the slow ground national politics and policies began to gain in Kentucky itself.

This thesis was carried out through the research of various primary and secondary sources, with the intention of simultaneously reading biographies of Harlan and research regarding the political climate of Kentucky in the years before the Civil War leading up to *Plessy v. Ferguson*. Harlan's papers, in microform at the University of Louisville, offer a first-hand account of his life. His unpublished memoirs in particular, while regrettably only covering a small portion of his career, shed light on the unique political situation in Kentucky and his attempts to assert his beliefs into the discussion. The Harlan collection is substantial, and much is unfortunately illegible (Beth concurs: "The documents that are now available do not, unfortunately, permit the mystery to be entirely cleared up<sup>6</sup>).

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<sup>6</sup> Beth, *John Marshall Harlan*, 6.

While the limited nature of Harlan's Papers has not necessarily negated the goal of this research, the author submits that the work remains partially inconclusive. Until Harlan's personal papers can be more fully developed, and the private psyche of the man can be studied in greater detail, his personal views of slavery, on relationships between Kentucky and the federal government, may never be known. Even language in newsprint and the statements of his contemporaries do not reflect the private thoughts of the man, a necessity in uncovering his shifting political and ideological thoughts. The secondary goal of this thesis, then, is to shed light on both Harlan and the political climate of Kentucky, each reinforcing the other through this enigmatic man and his *bildungsroman*, a story that begins with a political climber and fierce adherent to the principles of States Rights and slavery, and culminates in Harlan's transformation as a champion of Civil Rights and racial equality, his lone dissent in *Plessy v. Ferguson* containing language far, far ahead of its time.

“So bitter was the feeling”

John Marshall Harlan’s ascent into politics began at an inconvenient time to be a Whig. “John’s entrance onto the statewide political stage coincided with the decline and eventual disappearance of the Whig Party, which also was drastically affected in Kentucky by the death of Henry Clay.”<sup>7</sup> Clay was a titan of national politics, and a demigod in his home state of Kentucky. His founding of and leadership in the Whig Party made it the most powerful political faction in the country, much less Kentucky, for a time.

Founded in 1833, with origins dating much earlier, the Whig Party’s popularity in Kentucky is relatively surprising, due mostly to its members’ “common ground in support of a nationalist conception of government.”<sup>8</sup> Kentucky was also proud of its tradition as a champion of States’ Rights. The Kentucky Resolutions of 1798, passed by the state legislature, held “that the several States composing, the United States of America, are not united on the principle of unlimited submission to their general government.”<sup>9</sup> Such language, the first phrase of the resolution itself, suggests a people in firm belief of their state’s sovereign rights. The credit for Whig success, then, can only be attributed to the dynamic leadership and popularity of the Commonwealth’s native son, Henry Clay. Due to his national prominence, Kentucky, which had voted for Democratic-Republicans—the Jeffersonian-based, States’ Rights

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<sup>7</sup> Beth, *John Marshall Harlan*, 29.

<sup>8</sup> E. Malcolm Carroll, *Origins of the Whig Party* (Durham: Duke University Press, 1925), 31.

<sup>9</sup> *Kentucky Resolutions of 1798*, Kentucky State Legislature, November 10, 1798.

champion—since the election of 1796, would be a solid Whig base in presidential elections from 1832 to 1856.<sup>10</sup>

However, the party's decline coincided with the physical decline of its leader. "Basically, the party's troubles stemmed from the sectional and emotion-laden character of the slavery issue, especially as it was influenced by the battle over the extension of the peculiar institution to the territories."<sup>11</sup> Slavery, an act defended by the Democratic Party (particularly in the South), was an institution that the Whigs could not cope with. Northern Whigs flatly opposed slavery, while Southern Whigs felt that the issue belonged to the states. Clay's last great piece of legislation, the Compromise of 1850, chimed the death toll of the party. Two years later, its architect would also pass away.

Harlan had already been adjutant general in Kentucky for four years, but he truly began playing the political game in 1855. The Commonwealth was a scene of political chaos, which Beth describes as "the most confused decade in our history as far as the party situation was concerned."<sup>12</sup> The dissolution of the Whig Party catalyzed an exodus of party members looking for a new faction with which to align their interests. This task was particularly difficult in Kentucky, a state proud of its individual rights, yet also devoted to the Whig idea of nationalism through the powerful legacy of Henry Clay. E. Merton Coulter attempts to explain the delicate and exclusive situation of the border state:

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<sup>10</sup> "Atlas of U.S. Presidential Elections," last modified 2012, <http://uselectionatlas.org/>.

<sup>11</sup> Beth, *John Marshall Harlan*, 29.

<sup>12</sup> *Ibid.*

Kentucky's unionism was not based on any assumption that the rights of the states were in anywise incompatible with the rights of the Union...The preservation of the rights of the states was in every way as important as the preservation of the rights of the Union, and must be insisted upon with equal force. The eternal contention of Kentuckians was that the two could exist together, and they must be made to do so.<sup>13</sup>

This passage suggests the foundations of Kentucky Nationalism, and its principles of simultaneous championing of States Rights and devotion to the Union would guide the political leaders of Kentucky as long as such contrasting beliefs could be held together.

At this time, 1855, the question of States Rights went hand in hand with that of the 'peculiar institution.' Although a border state, slavery had a long tradition in the Commonwealth. Kentucky had the third highest number of slave holders in the country, after Virginia and Georgia. With 225,483 slaves, it was by no means a small issue in the border state.<sup>14</sup> Harlan himself was from a slave-owning family, and, at this early point in his life, had little moral repercussions about his position; it was simply the norm of the Kentucky society that surrounded him. Harlan's views of slavery itself are complex; throughout his writings and those of others his opinion on the practice fluctuates. Even Harlan's wife, an abolitionist Yankee, after living with the practice, was victimized by the moral enigma of slavery in the Commonwealth, admitting that her "former views

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<sup>13</sup> E. Merton Coulter, *Civil War and Readjustment in Kentucky* (Chapel Hill: University of North Carolina Press, 1926).

<sup>14</sup> U.S. Census Bureau, *Eighth Census, Population* (Washington, DC, 1850), 599.

of the awful institution of slavery would have to be somewhat modified.”<sup>15</sup> Few Kentuckians saw the slavery question as spinning upon a moral compass. Despite following and voting for Clay’s nationalist policies, Kentucky fiercely supported and protected its ‘right’ as a state to slavery.

Nevertheless, in light of Harlan’s future decisions on the judiciary, it is crucial to point out that he did indeed own, and fiercely support, slavery. “John himself soon would get caught up in elective politics. Although there were out-and-about abolitionists in Kentucky, they were not elected to public office.”<sup>16</sup> Whatever his moral reservations, reservations that would reveal themselves much later in life, Harlan had a desire to be a politician, and thus played to his constituency. Early records of Harlan’s speeches portray a racist, devoted to the institution that, whether directly or indirectly, was ripping the country apart.

Southern Whigs thus had the choice of joining the pro-slavery, and quickly becoming secessionist, Democrats, or the abolitionist parties that would eventually form the Republican Party. In 1851, Democrat John Breathitt won the position of Governor—the first non-Whig to do so in more than a decade. For all extent and purposes, the Whigs were politically dead, and those in Kentucky would have to choose another party. In slave-holding Kentucky, becoming an abolitionist Republican would have been political suicide. Joining the Democratic movement would have betrayed the Whig principles of nationalism

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<sup>15</sup> Malvina Harlan, *Some memories of a long life, 1854-1911* (New York: Modern Library, 12).

<sup>16</sup> Beth, *John Marshall Harlan*, 27.

and antisecession. The lost and nomadic Harlan attempted to grope for the middle way.

Many joined him. Deep-seeded animosity against the Democratic Party and its quickly-ripening zeal for secession forced almost the entirety of the Whig camp into the Know-Nothing Party—a movement they did not fully understand. Originally known as the Native American Party, the Know-Nothings “espoused anti-foreign, anti-Catholic policies...which, it was hoped, would bind together the North and the South on an issue dissociated from the slavery question.”<sup>17</sup> To be a member of the party, one had to be male, protestant, and of British-American, what they termed as “Native American,” heritage. The anti-Catholicism for which the party is now infamous delved from the fact that most Catholics were foreign Irish and German immigrants. The party gained popularity by playing to the xenophobic fears of a predominantly-Protestant Kentucky. The movement culminated in what was known as ‘Bloody Monday.’ On August 5, 1855, Protestant mobs attacked an Irish Catholic community in Louisville. Accounts put the death toll at anywhere from 12-22 people.<sup>18 19</sup>

Harlan did not merely join this violent movement; he quickly ascended the ranks to its leadership. Campaigning rigorously for the Know-Nothings in 1855, he “charged that foreigners were antislavery; accused them of pauperism and

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<sup>17</sup> Agnes G. McGann, *Nativism in Kentucky to 1860* (Washington DC: Catholic University Press, 1944), 59.

<sup>18</sup> McGann, *Nativism in Kentucky*, 95.

<sup>19</sup> William S. Hutcheson, Jr., *The Louisville Riots of August, 1855* (Frankfort: Kentucky Historical Society, 1961), 150-172.

criminality; and feared the European ideas and practices that might undercut the sturdy values of traditional America.”<sup>20</sup> Publicly, Harlan judiciously embraced the ideas of Nativism. The man who would provide the lone dissent in the Supreme Court decision that would reinforce legal segregation for the next half-century was one of the fiercest proponents of the party that very publicly murdered those they thought ‘dangerous,’ and held slavery to be legal, in any manner of question.

Looking back on his life, Harlan would say “I was very uncomfortable when the oath was administered to me. My conscience, for a time, rebelled against.”<sup>21</sup> Readings from and about Harlan at this time portray a man of political desperation, who sought promotion in any manner possible, and would join the movement that would most efficiently expedite the process. In a nation that was fast-abandoning old principles, Kentucky was a lone island of Whig idealism, a bastion of old party members who refused to let the movement die at the state level. In his same reflection on Know-Nothingism, wrestling a guilty conscience, Harlan notes, “I observed that the old whig leaders of the city, including my father, were present, and I had not the boldness to repudiate the organization.”<sup>22</sup> It is not tremendously difficult to imagine a twenty-two year old Harlan nervously uttering the oath of the party in an attempt to fit in with elder

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<sup>20</sup> Beth, *John Marshall Harlan*, 35.

<sup>21</sup> John Marshall Harlan, “The Know-Nothing Organization—My first appearance as a Public Speaker and Participation in the Presidential Campaign of 1856” (Library of Congress Special Collection), 1.

<sup>22</sup> Harlan, “Know-Nothing,” 1-2.

and more powerful colleagues. His zeal in promoting the party, however, leaves doubt as to the validity of the misgivings in his later memoirs. Even then, years later, Harlan would justify a political habit that would remain a staple of his career: he ascended the ranks of the Know-Nothing Party and “remained in it...it was best for *any* organization to control public affairs rather than to have the Democratic Party in power.”<sup>23</sup> Any party, even one so violently antagonistic to specific foreign demographics, was better than the Democrats.

Harlan soon found himself once again adrift in the political sea. The Know-Nothing party disintegrated almost as quickly as it had come upon the scene. In 1856, the only Presidential election in which the party truly had a candidate (Millard Fillmore, the last Whig president), the Democrats won Kentucky for the first time since Andrew Jackson in 1832. The Know-Nothings won only one state.<sup>24</sup> In his memoirs, Harlan made no reference to this landslide defeat, choosing instead to highlight his blossoming skills as a public speaker (though he does not comment on the perhaps inflammatory details of his speeches). Harlan’s memoir, coupled with the infamous history of the Know-Nothing party, further promotes the idea of a young and desperate political climber, whose disdain for the Democratic Party put him in bed with a virulent group of people, whose erroneous beliefs, espoused so ardently by a young Harlan, would be regretted much later.

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<sup>23</sup> Harlan, “Know-Nothing,” 3.

<sup>24</sup> “Atlas of U.S. Presidential Elections,” last modified 2012, <http://uselectionatlas.org/>.

At this point, with the country inching ever closer to violent secession, Harlan pointed his campaign elocution to what he saw as the most important issue: that of keeping the nation together. Thus, after only a brief hiatus, the old Whigs of Kentucky were again without a party through which to achieve electoral success. One of the few Whig/Know-Nothings to escape untarnished from the collapsed party was Harlan, whose skill as an orator and political stumper had achieved him fame throughout the state.

The old Whigs had again found themselves in a familiar and undesirable position: political drifters in an increasingly sectional state. The Republicans were growing more popular in the north, but were also displaying increasingly abolitionist viewpoints. The cries of the Democrats, rising from the south, were growing louder for secession and the right to slavery. The desperation of the situation is shown by the formation of a new statewide party in 1859. Upon the brink of a Lincoln election, which would almost certainly mean secession and war, the old Whigs and Know-Nothings formed a new party, simply called the Opposition. "Nativism was conspicuously not one of the planks of their platform...They concentrated on the need and necessity of the Union and accused their opponents of threatening to destroy it."<sup>25</sup> Beneficial to the hesitant Harlan, gone from the platform were the hateful diatribes against Catholics, Irish, and Germans. The primary goal of the party would be to keep the Union from splitting apart; Kentucky, as a border state, had the unique

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<sup>25</sup> W. Darrell Overdyke, *The Know-Nothing Party in the South* (Baton Rouge: Louisiana State University Press, 1950), 285.

position of power to do so. Even state Democrats considered secession only the most extreme of measures, though the idea was there. John C Breckinridge, who would run against Lincoln as a Southern Democrat in 1860, said in a speech to the Kentucky legislature, "I am an American citizen, a Kentuckian, who never did an act nor cherished a thought that was not full of devotion to the Constitution and the Union."<sup>26</sup> Loyalty to the Union was still of paramount importance to many in the state, Democrat, Republican, or any variation of Whig. The Opposition, then, could hardly argue their pro-union advocacy to win elections in 1859. When the party nominated Harlan for the Congressional seat once held by Henry Clay (interestingly enough, Harlan still names it the Know-Nothing Party in his memoirs), the upcoming debates against the popular Democratic candidate would have to be about something other than secession if he were to win.

That issue would be slavery. William E. Simms, as the Democratic candidate (and turncoat Whig), was a staunch advocate of the practice, while Harlan was accused of being soft on the issue. In retaliation, fighting for his political life, Harlan portrayed himself as a fierce proponent of slavery and its spread. An editorial in the *Paris Citizen*, an anti-Democrat paper covering a debate between Harlan and Simms, gives light to Harlan's specific views on slavery at the time:

Congress had the power, and it was its bounded duty, to pass such laws as might be necessary for the full protection of the rights of the slave

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<sup>26</sup> *Kentucky Statesman*, July 20, 1860.

owner in the Territories, whenever the local legislatures shall either attempts to destroy his right by unfriendly legislation or shall fail to pass such laws as are necessary for his protection. He showed, from newspaper articles in several Democratic papers in Kentucky...that the power as well as the policy of Congressional intervention for the protection of slavery in the Territories was denied by a large portion of [Democrats] in this State, who took the ground, that whatever Territorial legislatures might do for the purpose of driving slavery out, Congress had no right to interfere.<sup>27</sup>

While the editorial discusses Harlan's political rather than moral attitudes towards slavery, it nonetheless portrays two men who fiercely argue who supports slavery more than the other. Harlan's view reflects the difficulty of the times regarding his party platform and its attempt to grope an ambiguous middle way. A Unionist who supported States' Rights, two conflicting views, Harlan attempted to walk a very fine line. He believed that Congressional action has authority over the Territories, and through said action they indirectly support the rights of states to the practice of slavery. His politically intelligent move to cite Democratic papers as pro-territorial, and therefore anti-slavery, painted his opponent Simms as less-supportive of slavery than himself. According to the paper, Harlan successfully argued his point of Federal precedence vindicating States Rights, although this must be taken with a grain of salt, given the editorial slant of the newspaper (in reference to Simms: "We really don't think that any man, and especially a Whig, ought to thank God for the mere fact of having become a Democrat"<sup>28</sup>). It is a confusing and topsy-turvy argument, reflective of a confusing time and a country, and political party, in disarray.

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<sup>27</sup> *Paris Western Citizen*, June 10, 1859.

<sup>28</sup> *Ibid.*

So fierce were Harlan's attacks on Simms that the *Frankford Tri-Weekly Commonwealth* deemed him "the standard bearer, and defender of Southern rights, and Southern interests."<sup>29</sup> Democratic charges that he was in bed with the Republicans and had defended slaves in court only sharpened his dedication. Thomas Owen, in his thesis, points out this noticeable departure from Harlan's earlier public views on the slavery question:

While the change in his position on slavery between his days as a 'Know Nothing' and 1859 is clearly more a matter of emphasis than content, it is noteworthy that he had moved from an earlier position that avoided a clear stand in favor of slavery by stressing the greater danger of foreign influence to a position that celebrated his adamant support of slavery.<sup>30</sup>

While Owen's thesis is catered towards his assertion that Harlan's beliefs and ideological stances were purely the motives of a political climber, his analysis is correct in the fact that this editorial reveals one of Harlan's earliest published views on slavery, and the young candidate expressed great support for the cause. This viewpoint extends into more radical territory, considering the old Whig principle of slavery as the 'necessary evil,' and Clay's idea of gradual emancipation for all slaves. In the election of 1859, to cater to his voters, Harlan's views on slavery extended farther into Democratic territory than his Whig forefathers would have ventured, which makes his eventual transition into the Republican party all the more drastic.

Despite his fierce advocating for the institute of slavery, Harlan lost the

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<sup>29</sup> *Frankford Tri-Weekly Commonwealth*, May 30, 1859.

<sup>30</sup> Owen, *Pre-Court Career*, 15.

election. It would prove a very crucial moment in his personal transition from proponent of slavery to denunciator of segregation, within the context of States' Rights and federal government. It had little to do with ideological epiphany or realization. Harlan was, quite simply, embittered by the politics of Kentucky. Voter fraud was asserted in his memoirs, and the evidence would have given him victory over Simms, but Harlan simply did not have enough support. As a disenfranchised Whig, with no stable political constituency, it had become almost impossible to win state elections, or contest the result of those elections. "I belonged...to a local political party known as the Opposition Party. Its members were all old Whigs by training and by association. We had, however, no national political alliance."<sup>31</sup> As a member of a party not aligned with the Democrats, Harlan would have to win elections on the votes of the Republican party, which "would have ruined me politically—so bitter was the feeling in Kentucky at that time, against the Republican or Abolition party."<sup>32</sup> To incorporate and unite with the Republicans would mean political ruin, and Harlan, despite intrinsic personal misgivings, could not align himself with the abolitionist policies that were seen as radical in his state. Nevertheless, in this disillusionment, Harlan took his first steps away from Kentucky Nationalism.

In one last desperate attempt, Harlan and the Whigs aligned themselves with the Constitutional Union party in the Presidential election of 1860. Their primary goal was attached to their party's name and slogan—paramount was

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<sup>31</sup> Harlan, "Know-Nothing," 10.

<sup>32</sup> Ibid.

the salvation of the Union itself; their banner: "The Union, the Constitution, and the Enforcement of the Laws."<sup>33</sup> Growing ever-cynical about Kentucky's political landscape, Harlan did not hold out much hope for the party's candidate, John Bell. Events at that point were out of control, the country spiraling towards inevitable schism and war. Kentucky, the last stronghold of the old Whig proponents, would go for the Constitutional Unionists, but there was little comfort for Harlan. Lincoln's success meant the end of the Union that he had fought so hard to preserve. Harlan's disillusion with state politics would be put on hold for a far more austere situation; a Civil War. He would, for the next four years, fight both physically and politically to remain Union, in a border state that would find itself wrenched apart in the rising conflict.

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<sup>33</sup> Harlan, "Know-Nothing," 12.

## The 'Sovereignty' Conspiracy

While the tumultuous period of 1860-61 reveals little more than a continuation of the political dichotomy which continued to grip John Marshall Harlan and the citizenry of Kentucky, it is crucial due to the fact that Harlan's memoirs, written much later in his life, give the one first-hand account, the man's own testament, as to his actions and motivations. Harlan's memoirs unfortunately cover a small span of time, but their quality, particularly the memoirs covering the early part of 1861, demand their presence in this thesis:

In the early part of '61 I removed from Frankfort, Kentucky, where I had resided with my parents since 1841, to Louisville...I did not contemplate, at the time of my removal to Louisville, that a dissolution of the Union would be seriously attempted or that it could be effected.<sup>34</sup>

Harlan's fierce devotion to the Union may have blinded him to the reality of the times when he moved to Louisville to begin a new law practice. By "early '61," seven states had seceded from the Union, and conflict was inevitable to most, if not all, save perhaps the small band of Unionist Whigs in Kentucky. After Fort Sumter, even they conceded that war had descended upon the nation, and realized the perilous condition Kentucky was in.

In the spring of '61 it became apparent that the secession movement was a very serious one and that possibly there would result an armed conflict between the general Government and those who sought the destruction of the Union...Every day in the spring of '61 added to the seriousness of the crisis and made the position of the Union men of Kentucky very uncomfortable.<sup>35</sup>

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<sup>34</sup> Harlan "Memoirs" (microform, Law Library, University of Louisville), 3

<sup>35</sup> Ibid.

Chaos ruled the day in the state of Kentucky. Sister states, neighboring states, states with which they shared similar devotion to States Rights and slavery, were seceding. Pressure was mounting from Lincoln's new government to adhere to the Union. Internally, sectionalism had wrenched apart any hope of political compromise or fraternity. "Party lines were now in a state of greater uncertainty than they had ever been since the days of Clay and Jackson."<sup>36</sup> Kentucky Democrats, perhaps recognizing the devotion to Union that was inherently tied to Kentucky Nationalism, had taken a conciliatory approach to the elections of 1860, even to the extent of splitting their own party to form the ranks of the Northern Democrats.

Once secession became inevitable, once Kentuckians inescapably had to choose a side, secession became the battle cry of the Democratic Party. On January 17, 1861, while Harlan naively disavowed "that a dissolution of the Union would be seriously attempted," a special session of the legislature was called, "and there now began a period of more anxious searching of souls and minds than had ever occurred before throughout the history of the state."<sup>37</sup> This special session, however, produced no effective solution, and subsequent sessions and national conferences later that year proved equally fruitless.

The bombardment of Fort Sumter in March was the point of no return, and still Kentuckians and proponents of Kentucky Nationalism attempted to grope the middle way:

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<sup>36</sup> Coulter, *Readjustment*, 19.

<sup>37</sup> Coulter, *Readjustment*, 26.

In their extreme zeal to defend the Union without appearing to support the Republican Party and its principles, they resorted to arguments too theoretical and metaphysical to be convincing to others than Kentuckians. They maintained that the government and the administration were entirely separate and distinct from each other; the one was permanent and unchanging, the other, temporary and transitory.<sup>38</sup>

Coulter's apt analysis of the position is a telling revelation of the first half of 1861, a landmark time period in the evolution of Kentucky politics. He details the strange positions Kentuckians attempted to take, "too theoretical and metaphysical" to make sense to anyone other than inhabitants of the state; this type of Kentucky Nationalism was impossible in any other state. If parallels can be drawn, Southern nationalism led to secession, which more states were adopting after Fort Sumter. Northern nationalism promoted fierce loyalty to the nation, and left no room for States Rights or slavery.

Kentucky Nationalism attempted to compromise the two. The confounding, thorny, and unsustainable political maneuver is best described in a speech by the hastily-formed Union state central committee: "The present duty of Kentucky is to maintain her present independent position—taking sides not with the Government and not with the seceding states, but with the Union against them both."<sup>39</sup> Thus the state attempted to adhere to the United States without directly doing so. Kentucky Nationalism was revived and cultivated by Kentuckians stubbornly holding on and rising above the separation of the

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<sup>38</sup> Coulter, *Readjustment*, 35.

<sup>39</sup> Lewis Collins, *History of Kentucky Volume I* (Covington: Collins & Company, 1882), 88.

southern states and the federal government. For a short time, there would be three sides in the Civil War—the Union, the Confederacy, and the Commonwealth of Kentucky.

Despite political attempts to retain Kentucky Nationalism, as the above passages suggest, Kentucky politics at this time revolved almost solely around issues greater than the state itself. State politics no longer encompassed the dealings of Kentucky; times were far too complicated, and small actions had the potential to result in drastically dangerous consequences that extended far beyond the boundaries of any one state. At this juncture, politics in Kentucky meant response to proposals set forth by the national government and by other states. The isolationist desire of Kentuckians became, far and wide, impotent and impossible. Kentucky Nationalism, it appeared, would have to be shelved in the wake of war. Lawmakers continued to ignore these trends when they adopted their policy of neutrality. In May of 1861, the Kentucky legislature resolved “that this state and the citizens thereof shall take no part in the Civil War now being waged, except as mediators and friends to the belligerent parties; and that Kentucky should...occupy a position of strict neutrality.”<sup>40</sup>

The contents of Harlan’s memoirs go hand in hand with the popular sentiment of Kentucky Nationalists at the time:

Kentucky was in a perilous condition, by reason of the fact that the then Governor of the State and nearly all of the state officers were in sympathy with the proposed movement to dissolve the Union. They did not openly

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<sup>40</sup> Kentucky House of Representatives Resolution of Neutrality, as quoted in Lowell H. Harrison, *The Civil War in Kentucky*, (Lexington: The University Press of Kentucky, 1975), 5.

declare in favor of secession, but they did nothing to discourage that movement and expressed sentiments that were calculated to encourage those who really contemplated the destruction of the Union.<sup>41</sup>

Harlan's writing is predictably politically charged. Governor Beriah Magoffin's views were largely in line with those of Harlan, in support of States Rights and the right to own slaves and secede, but against secession for Kentucky. He was, nevertheless, a Democrat, and thus vulnerable to Harlan's biased scrutiny. In Harlan's defense, it is known that Governor Magoffin harbored Confederate sympathies, and entered into secret negotiations with the Confederacy as early as the firing on Fort Sumter. But the sentiment of the Governor and other Kentucky politicians at the time was overwhelmingly in favor of compromise and neutrality, more so for the sake of caution than political ideology.

Kentucky was certainly in perilous condition in the eyes of Unionists, even if it was not the direct result of the Governor. Inaction in the spring of 1861 created a productive breeding ground of southern supporters, and "the pronounced Southern sympathizers...were gradually becoming crystallized into an aggressive group."<sup>42</sup> Despite their beginnings as a relative minority, Southern Rights clubs and the Southern Rights Party were becoming more powerful, and their calls for secession, with the number of seceding states growing ever larger, became more pronounced. Harlan and the Kentucky Unionists sprang into action to counter the surge:

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<sup>41</sup> Harlan, "Memoirs," 3.

<sup>42</sup> Coulter, *Readjustment*, 36.

In the spring or early summer of 1861 there was a called session of the Kentucky Legislature, at which the rebel sympathizers attempted to pass a legislative enactment for what was then styled a 'Sovereignty' State Convention...to determine the attitude and course of Kentucky in the crisis then pending. The rebels believed that they could elect a majority of delegates to such a convention, and they hoped to have that body formally declare either that Kentucky, as a State, would ally itself directly with the States which had assumed to secede from the Union, or be neutral throughout the contest between the Union Government and the Confederates. It was hoped that in this way Kentucky would, under the forms of law, assist the movement for dissolution of the Union.<sup>43</sup>

In the time mentioned in Harlan's memoirs, three conventions were held in Frankfort in discussion of the question. It cannot be discerned from his writings which convention Harlan is discussing, but assumedly he is making reference to the convention of May 6<sup>th</sup>. This convention fits most appropriately into the time scheme and is also the convention where the Southern Rights Party sought to gain the most ground. It is notable that, at this time, Harlan seemed to be foregoing his adherence to his party's adopted policy of neutrality. According to Harlan, to even stay neutral in the impending crisis would be to "assist the movement for dissolution of the Union". Earlier than perhaps most of his mindset, Harlan jumped off the beloved fence of the Constitutional Unionists and threw in fully with the Union. The writing on the wall had finally been read. Neutrality, while publicly favored and instituted, was a hopeless tactic, used to buy time for the state to prepare more than anything else. A side had to be chosen, and Harlan allied himself with his old Whig principle: that of fierce devotion to the Union. Despite wavering political beliefs throughout his life, Harlan would never

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<sup>43</sup> Harlan, "Memoirs," 2.

abandon his loyalty to the nation. After showing their true colors, Harlan and his Unionist allies worked tirelessly to defeat the calls of secession:

I labored constantly for weeks with members of the Kentucky Legislature for the purpose of defeating the scheme for calling a 'Sovereignty' Convention—believing that the defeat of that scheme would result in holding the State in the Union and depriving those intending to assist the rebels of the pretext that in their so doing they would obey the command of the *State*...<sup>44</sup>

Analyzing Harlan's writing, Kentucky Nationalism may not necessarily be *dead*, but it has certainly been put on hiatus. The Unionists are working with the motive of keeping Kentucky in the Union, and defeating those who claim to be working for the State (Harlan intentionally emphasizes the words "State" in his memoir). While neutrality was the official position of Kentucky at the time, while most Kentuckians were adverse to the idea of war, they were preparing for the inevitable contest. Harlan and the Unionists attained a brief victory. "We beat the 'Sovereignty Covention' conspiracy, and I returned to Louisville and resumed the work supporting the Union cause."<sup>45</sup>

The internal struggle for Kentucky was long from over though. "During the summer of 1861 nothing was talked of in Kentucky except Union and Disunion."<sup>46</sup> Harlan and his compatriots had moved away from their position of preventing war to preparing for war. Their strategy involved simultaneously educating the

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

people of the region and securing weapons for Union men. Harlan recognized the difficult path he had taken:

The business interests of Louisville were mainly with the people of the States south of us where the institution of slavery existed. It was, therefore, not unnatural, that persons residing in Louisville should sympathize with the people further south. It was correspondingly difficult for native citizens of Kentucky to identify themselves with the States from the Union cause.<sup>47</sup>

Scholars disagree with Harlan's approach. Beth even writes that "the business ties of the community with the North also accounted for its strongly Unionist sympathies, and it was doubtless Louisville sentiment more than any other single factor that prevented the state from joining the Confederacy."<sup>48</sup> Coulter more specifically blames Southern embargoes against the North, which inadvertently cut off trade with Kentucky. "The Federal government worked toward ultimate ends, and it won the bigger rewards...The South, too impatient to be tolerant and too impetuous to be tactful, lost the greatest prize."<sup>49</sup>

So, if his economic fears were untenable, Harlan's difficulty must have stemmed from his frustration with the seemingly inferior position that Kentucky Unionists had. That the state would remain in the Union seemed likely. In the summer elections of 1861, Unionists overwhelmingly defeated the Southern Rights candidates. Harlan wrote, "that the State was favorable to the Union, although on the surface it was 'Neutral,' was shown by the special Congressional election at that time—the Union men carrying, I think, every

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<sup>47</sup> Harlan memoirs, 3-4.

<sup>48</sup> Beth, *John Marshall Harlan*, 41.

<sup>49</sup> Coulter, *Readjustment*, 80.

Congressional District”<sup>50</sup> (they would actually carry nine out of ten<sup>51</sup>). Unionists also carried the state elections, further slimming the chances that Kentucky would officially side with the Confederacy.

The *strength* of Unionists when the state officially chose a side was a slightly more tenuous issue, one that Harlan emphasized in his aforementioned passage referring to actions in Louisville and the southern support he combated. Despite southern alienation, Kentuckians and Louisville’s traders had a rich economic history in the South, and must have been somewhat sympathetic even in light of the embargo against them. Thus the summer of 1861 consisted of stump speeches, Union recruitment and an attempt to “educate the people”.

Union and Confederate forces were camped just across state lines ready at a moment’s notice. Internally, covert forces were supplying each side with weapons and gunpowder. Kentucky would explode; it simply depended upon who would strike the match. On September 4, 1861, General Gideon Pillow of the Confederacy invaded and occupied Bowling Green. The internal war for Kentucky had ended. The national war in, and for, Kentucky, had begun.

In the midst of the chaos stood John Marshall Harlan, a man of notable political power and sway who, at the time, held no political office; a lawyer in Louisville whose stable practice made up for the instability that had defined the last decade of his life. Harlan had lost the Whig party, and floated through three

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<sup>50</sup> Harlan, “Memoirs,” 4.

<sup>51</sup> Harrison, *Civil War*, 11.

newly-conceived and quickly abandoned parties in search of an ideological home. His desires to adhere to the Union, remain neutral, and craft a national compromise had failed. He and his party made every attempt to thwart war, and war had still come.

On the spectrum of Harlan's political ideology, the far left being the young Harlan of 1855 and the far right being the Harlan of *Plessy v. Ferguson*, the lawyer (and soon to be Union Colonel) at this time remains on the former side. He fiercely supported slavery, and the self-determination of states in that matter. His support for the Union itself, the Union that Henry Clay had so adamantly adhered to, a Union not necessarily inherently connected with the federal government, was the catalyst that forced him onto the Union side. This did not convert his ideology. In late September of 1861, Harlan recruited a regiment, inviting those who shared his views. "Union men...I mean those who, while differing from their brethren in the Northern States as to some aspects of the war, yet openly avowed their purpose to stand by their country at all hazards."<sup>52</sup> The 'differences' Harlan implied were most directly in reference to slavery, and the course the war would take in determining the ultimate fate of that institution could not have been foreseen by Harlan, nor perhaps anyone in the state of Kentucky.

Kentucky Nationalism had been forced to undergo changes due to circumstances largely out of control of those who upheld its principles. Fierce

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<sup>52</sup> Harlan, "Memoirs," 3.

proponents of simultaneous devotion to the Union and States Rights, those who had held the course of neutrality to its furthest extent, had been forced to choose between what they saw as the lesser of two evils between the Union and the Confederacy. The state could no longer hold to itself in the time of crisis, and would never return to the fierce and unique principles that created the foundation of Kentucky Nationalism. The war created a brief, yet crucial, interruption in the development of that ideal, and for better or worse, the Kentucky Nationalism that emerged from the Civil War would be a shadow of its former self.

"You must go to one or the other"

Harlan's Civil War career brought a hiatus to his political ambitions and activities. His actions in the war itself merit little significant contribution; his Company served at the Battle of Mill Springs and the Battle of Perryville, but saw no action. In fact, Harlan's only Civil War deed that merits any contribution to this paper is his resignation, which was given in March 1863. While Harlan's immediate reason for resignation was the death of his father, there is some debate as to more subliminal motives. That same month, Harlan was nominated by the new Union Party for Attorney General of Kentucky. His acceptance speech "vigorously condemned Lincoln for suspending the writ of habeas corpus and with even greater violence attacked the Emancipation Proclamation of 1862 as unconstitutional and null and void."<sup>53</sup> The harsh manner of Harlan's rebuke of Lincoln's policies, and the quick turnover from soldier to candidate, yield the suspicions that Harlan may have resigned in protest of Lincoln's actions, and that perhaps he knew of his impending nomination. These postulations are not without merit, but as strong as Harlan's critics are, his ubiquitous devotion to the Union is even stronger. In his resignation letter to Brigadier General James Garfield, he wrote:

If, therefore, I am permitted to retire from the army, I beg the commanding general to feel assured that it is from no want of confidence wither in the justice or the ultimate triumph of the Union cause. That cause

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<sup>53</sup> Louis Hartz, *John M. Harlan in Kentucky 1855-1877* (Louisville: Filson Club, 1940), 28.

will always have the warmest sympathies of my heart, for there are no conditions on which I will consent to a dissolution of the Union<sup>54</sup>

Harlan's letter suggests that he left the army with no acrimony, devoted to the "Union cause". By 1863, however, that cause had been radically altered.

Lincoln's Emancipation Proclamation had made the war a referendum on slavery, publicly displaying what had been quietly believed: the war was not simply a battle of states versus Union, but a moral contest against or for slavery. This change of policy soured the mentalities of many Kentuckians towards Lincoln and the Union, but Harlan would continue his Kentucky mantra of rising above the sectionalism. His election rhetoric mirrored that of his resignation letter: Harlan was for neither secession nor emancipation, but Unionism. This twinned attack on the secessionist faction and the "radical" pro-Lincoln faction proved successful. Harlan again walked the well-worn middle path, and won the only elected office he would ever hold.

Harlan's campaigning did not solely occur in the state of Kentucky, however. He took time to travel to Indiana to campaign against the Republican incumbent, Governor Morton. This action suggests the beginnings of Harlan's changing aspirations, and the changing nature of politics, both in Kentucky and the country at large. Despite his devotion to the Commonwealth, despite his running for an office solely contested within his state, despite a lifelong career campaigning, politically and militarily, in Kentucky, Harlan traveled to other

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<sup>54</sup> Harlan letter to Brigadier General Garfield, March 2<sup>nd</sup>, 1863, (microform, University of Louisville Law Library).

states to help campaign against Republicans. He gives no reason for his out-of-state campaigning, but campaigning outside of Kentucky while simultaneously holding a state office would have been risky, as the pro-Lincoln *Frankfort Commonwealth* was quick to point out:

Is it not inconsistent and ungrateful for any citizen of Kentucky professing Unionism—much more so for an incumbent of state office—to take an active part in the attempt to defeat Governor Morton?...Col. Harlan, once an unconditional union man has cast in his lot with those who were from the first with the rebellion...<sup>55</sup>

Harlan must have concluded that the benefits outweighed the damages to his political reputation. The Presidential election of 1864 saw Harlan campaign harder than he ever had for an election outside the boundaries of his home state. The Civil War would not end for another six months, and Harlan's astute political barometer had correctly predicted political trends. The war had changed the nature of politics and elections. Candidates were no longer judged based on their views unique to state issues. They were elected based on Pro-Union stances or otherwise, positions of national consequence. These trends would not consummate until later, but Harlan was already prepared, despite his candidate losing the election to Lincoln.

These nationalistic political developments were not enough to overcome Harlan's long-standing views on slavery, one of the most fiercely-protected tenets of Kentucky Nationalism. Kentucky had entered the Civil War on the side of the Union, confident that Lincoln would not move to abolish slavery outright.

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<sup>55</sup> *Frankfort Commonwealth*, Sep. 30, 1864.

Harlan's ferocity in campaigning for McClellan can be tied to his belief that McClellan would retain slavery in Kentucky. He vehemently spoke up against the Emancipation Proclamation and Thirteenth Amendment as blatant Federal disregard for state sovereignty. His tenure as Attorney General would prove that the majority of the state agreed with him.

Harlan represented the Commonwealth in several cases relating to the slavery question in the chaotic legal landscape of post Civil-War Kentucky. The most famous of these is *Palmer v. Commonwealth*.

In the final year of the Civil War, Major General John M. Palmer had been the head of the Department of Kentucky, a military governor of the state appointed by Lincoln. His General Order Number 32 allowed slaves "claiming to be free" to leave the state for Indiana if they could find no work in the city of Louisville. Enraged slave-owners charged him with violating Kentucky law. Attorney General Harlan, representing the Commonwealth, sought to validate Palmer's guilt.

Palmer's defense was that, at the time of his issuing the Order, martial law had been declared in Kentucky. The court rejected this argument, and its rationale resonates with the position the state had taken throughout the crisis. "Martial law in Kentucky—always a champion of the Union—still self sacrificingly adhering to it in its severest trial, *and thereby saving when her recreance would have destroyed it*—was as causeless as it was ungrateful and humiliating."<sup>56</sup>

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<sup>56</sup> *Commonwealth v. John M. Palmer*, 65 KY 570 (1865), Kentucky Reports.

While displaying an unwavering loyalty to the Union, the Court completely chastised the implementation of that same Union's martial law. Further, in flagrant Kentucky Nationalism, the Court credited Kentucky with the very salvation of the Union itself.

Thus, refuting martial law, the Kentucky Court of Appeals decided "according to law and the admitted facts, John M. Palmer was guilty of the felony well-charged in the indictment."<sup>57</sup> Harlan, under the employ of the Commonwealth, had successfully argued that Palmer was guilty of helping slaves escape; that no Federal jurisdiction or order undermined state law. Palmer's position in this remarkable case was merely that of pawn in the game played between the neutral state and the Union which it begrudgingly held to. The Court of Appeals of Kentucky, in affirming Palmer's guilt, affirmed the guilt of the federal government and warned the United States of attempts to subvert the Commonwealth. "Neither the Secretary of War nor even the Federal government, therefore, had constitutional power to abolish slavery in Kentucky by military force."<sup>58</sup> By declaring Palmer's guilt, the judicial branch of state government, in conjunction with the other branches of government and the majority opinion in the state, staunchly protested Federal encroachment.

Harlan not only represented the Commonwealth's pro-slavery position in the case, but also privately repudiated Palmer's actions, thus aligning himself with popular thinking in the state. In a letter to Col. John Combs (in which,

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<sup>57</sup> Ibid.

<sup>58</sup> *Commonwealth v. Palmer*

interestingly enough, he refuses a request to run for Congress), Harlan condemned the infamous Palmer Passes, "whereby Kentucky's 'large slave population is suddenly freed...and the power taken from the State by proper legislation to effect the removal of blacks...or protect her white citizens from the ruinous effects of such a violent change'." <sup>59</sup> Harlan goes on to claim that these radical movements towards abolishing slavery and preventing Kentucky control over its black population "will destroy the peace and security of the white man in Kentucky...there should be a thorough union of all citizens who...are opposed to the admission of the negro to the ballot box or the enjoyment of other political priveleges."<sup>60</sup> Despite the upheaval of the Civil War, Harlan's position on slavery and blacks in society had, if anything, become more obstinate. His view on slavery, and its fluctuations, was representative of the majority of the state itself.

Kentucky, once a Whig bastion, had long been in favor of "gradual emancipation" of slaves. The events starting with the dissimulation of the Whig Party and culminating with the Civil War created an increasingly-sectional state: Democrats and Confederate veterans on one side, and Republican, abolitionist, Union veterans on the other. The Cincinnati Gazette eloquently summarizes the quandary: "there are two parties in Kentucky. You must go to one or the other. If you choose to attempt to form a middle party, well and

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<sup>59</sup> *Lexington Observer and Reporter*, June 10, 1865, as quoted in Hartz, *John M. Harlan*, 29.

<sup>60</sup> *Ibid.*

good. In some places the rebels will beat you; in others the Radicals.”<sup>61</sup>

Kentucky Nationalism could not subsist in this polarizing environment, and the slavery question put most Kentuckians in camp with the Democrats. Most shared Harlan’s views that Kentucky, a Union state, had been betrayed by the likes of Palmer and the government he represented. Harlan’s private feelings on slavery are, unfortunately, ambiguous. All that is known is discerned from his public record, which shows a man who viewed Federal encroachment, the 13<sup>th</sup> amendment and Emancipation Proclamation, and later institutions such as the Freedman’s Bureau, as subversive to the Constitution and the rights guaranteed to the states. His brief stint as Attorney General was spent defending this position.<sup>62</sup>

While many of Harlan’s mentality chose to go over to the Democrats, Harlan continued to fight for the middle way. His foresight in campaigning in other states did not extend to his political position within the state of Kentucky. His Conservative Unionists were handily defeated in the election of 1867, and Harlan would never again be elected to a public office. Even the Republicans had gained more votes than his party, proving that even stalwart Kentucky was becoming increasingly sectionalized. As Owen writes, “In a state where Unionism in any form evoked the specter of Republican military repression, moderation

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<sup>61</sup> Cincinnati *Weekly Gazette*, July 13, 1866, as quoted in Beth, *John Marshall Harlan*, 77.

<sup>62</sup> Other notable cases Harlan prosecuted for the state involving slavery or the question of African Americans in Kentucky are *Bowlin v. Commonwealth* (65 KY 5 (1867), Kentucky Reports), and *Jones v. Commonwealth* (64 KY 34 (1866), Kentucky Reports).

was not the order of the day.”<sup>63</sup> The last ebbs of Whig influence were fading away.

All accounts of Harlan’s transition to the Republican Party depict it as an abrupt and sudden decision. Harlan unfortunately gave no personal testament as to his rationale. It must have been a difficult decision, because throwing in with the Republicans meant aligning himself with a group that favored abolition and racial equality—two ideas he had so vigorously fought against in the political arena. It is almost unanimously agreed that Harlan detested the Democratic Party as an anti-Union group, a level he could never bring himself to descend to. And yet to become a Republican in Kentucky meant almost certain defeat at the polls.

Regardless, by the election of Grant in 1868, Harlan was vigorously campaigning for the Republican platform, traveling as far as Maine to do so. His opponents back home were quick to point out the fact that Harlan was staunchly supporting positions he had reviled four years earlier. In Harlan’s campaigns for Governor in 1871 and 1875, every speech was populated by hecklers who would read Harlan’s earlier and contradictory speeches aloud. Harlan’s only defense was to bluntly admit this reversal of positions and toss his earlier political positions away as antiquated views of his youth, eroded by maturation and the upheaval of civil war. His recants would be particularly strong in relation to the Know-Nothing Party. Harlan stated, “Let it be said that I

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<sup>63</sup> Owen, *The Pre-Court Career*, 94.

am right rather than consistent,"<sup>64</sup> an allusion to the famous quote by his idol, Henry Clay, and the Whig Party that Harlan perhaps never quite gave up on, if only in spirit.

Harlan lost every election he ran in as a Republican. His ideas were simply not popular in the state, and he must have known that he faced long odds in every election. This fact weakens the argument that Harlan was a man solely driven by ambition, though it does not altogether uproot the notion. Harlan was an ambitious man, as every person of political success must be. His ambitions simply became focused in a different direction. In November of 1870, Harlan wrote to his equally ambitious law partner, Benjamin Bristow, regarding an opening on the United States Supreme Court, "I know of no more desirable position," he wrote, "It lifts a man high above the atmosphere on which most public men move, and enables him to become in every sense, an independent man..."<sup>65</sup> Harlan's ambitions had changed, in tune with the changing nature of politics. He had long been disenchanted with the game of political campaigning in Kentucky. His success record was too low and no party he had joined or formulated, all seeking a middle ground between Democrats and Republicans, showed no signs of gaining electoral success in Kentucky. The Republican Party supported the Federal government and its initiatives, and Harlan began to seek accomplishment in that camp.

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<sup>64</sup> Beth, *John Marshall Harlan*, 93.

<sup>65</sup> Letter from Harlan to Bristow, November, 16, 1870, as quoted in Beth, *John Marshall Harlan*, 90.

Although he saw little personal success in the state of Kentucky, Harlan's work as a Republican gained him national attention, and subsequently the laudation he had long hungered for. Harlan had made the Republican Party a viable and competitive option on Kentucky ballots. The party saw few victories, but they were gaining more votes due to his leadership and organizational skills. This capability caught the eye of Washington lawmakers, including Presidents Grant and Hayes, who often sought Harlan's council regarding the political mood of the region. This attention would have only pushed Harlan further into camp with the Republican Party. His desire to get votes for his party's candidates led him to support initiatives to encourage black and immigrant votes, two groups he had previously condemned.

Harlan's hypocrisy was an insurmountable obstacle in his quest for ambition within Kentucky, but his reputation as a Republican vote-getter continued to make him a popular figure outside of his state. The decade from his transition to the Republican party to his nomination to the Supreme Court witnessed a man who became one of the most known Republicans in the country, whose political activity would occur outside of Kentucky more and more frequently. In 1877, Harlan was chosen by President Hayes to lead a commission to end reconstruction in Louisiana, mediating between two rival governments within the state. This was perhaps done as a political favor, since it was only due to Harlan's powerful Kentucky delegation and its votes that Hayes had received his party's nomination for President. Harlan had become a

national figure in the Republican Party, and although it would not yield electoral success, Harlan finally achieved a position of notoriety. On October 16, 1877, Hayes continued to reward Harlan by submitting his name as a Justice on the United States Supreme Court. During the difficult nomination process in the Senate, Harlan's recent conversion to Republicanism arose as an issue, and his loyalty to the party and its ideas was vigorously defended; not just by Harlan, but by old friends in Kentucky, including several Kentucky Democrats. A letter from James Speed, Lincoln's former attorney general, to the Senate Judiciary Committee best sums up Harlan's conversion, with faint allusions to Kentucky Nationalism: "From the beginning of our civil troubles till General Harlan became anti-slavery the idea that had led his course was the integrity of his country. For that he was ready to sacrifice everything."<sup>66</sup> The conversion was complete; Harlan's Kentucky Nationalism and Kentucky ambition were no more than memories. Ahead, a very rewarding and very Republican career on the Supreme Court.

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<sup>66</sup> Letter from James Speed to Senator Edmunds quoted in Beth, 126.

## "The Supreme Law"

While this thesis attempts to examine Harlan's life before his tenure on the Supreme Court, Harlan's political ideology continued to develop in the two decades leading up to the landmark *Plessy v. Ferguson*, albeit from a judicial as opposed to political standpoint. If anything, they became increasingly and almost radically Republican. Harlan would earn the title of "The Great Dissenter" through a long history of dissents in which he stood alone, a history that would begin with his work on a group of five cases known conjointly as The Civil Rights Cases. At this point, Harlan had been on the court for over a decade. While slavery was long extinguished, segregation ruled the day. These cases involved segregation in hotels, trains, and theaters. Harlan, the only dissenter on the court, wrote a long treatise on the overarching argument of the relationship between the federal government and the states. He wrote in his dissent:

A prohibition upon a State is not a power in *Congress* or *in the national government*. It is simply a *denial of power* to the State...the prohibition upon State laws in hostility to rights belonging to citizens of the United States was intended...only as an express limitation on the powers of the States, and was not intended to diminish in the slightest degree the authority which the nation has always exercised of protecting, by means of its own direct legislation, rights created or secured by the Constitution.<sup>67</sup>

Harlan appears to give a two-faced argument in this rationale of imposing law upon the states. According to his dissent, prohibiting states the right to segregate facilities is not a power of the national government; it is a matter of

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<sup>67</sup> <sup>67</sup> Civil Rights Cases, 109 U.S. 3 (1883),  
[http://www.law.cornell.edu/supct/html/historics/USSC\\_CR\\_0109\\_0003\\_ZD.html](http://www.law.cornell.edu/supct/html/historics/USSC_CR_0109_0003_ZD.html)

whether or not the states have the power to segregate. In Harlan's opinion, with rights belonging to all United States citizens foremost in his mind, they do not. The plausibility of his argument notwithstanding, this is a radically different Harlan than he who had condemned the 13<sup>th</sup> amendment and the Emancipation Proclamation twenty years earlier. The very notion of limiting state powers is an idea that most Kentuckians, Harlan included, has always held in contempt. Judge Harlan now utilized the independence of the judiciary, free of the political consequence of his decisions. With this independence, Harlan could espouse whatever principles he so chose—and his loyalty and belief in the precedence of the federal government cannot be denied.

Harlan's conversion to the ideals of Republicanism, his abandonment of Kentucky Nationalism and the principles of States Rights reached its apex at the point of *Plessy v. Ferguson*, which arrived to the Supreme Court three years after the Civil Rights Cases. This was the first case that dealt with segregation in full exposure; previous cases had granted states the right to legislate separation. This case would decide whether or not African Americans were actually required to sit in the separate cars. Did this state discrimination violate the Fourteenth Amendment? The majority agreed with Louisiana in saying it did not, and wrote the opinion that originated the famous "separate but equal" doctrine. In a nutshell, separating races was not in itself illegal. In this case, so long as the white train car was not itself physically superior to the black train car, there was no question of inferiority implied in the segregation.

Harlan alone disagreed. Unlike his dissent in the Civil Rights cases, this dissent touches very little upon the relationship between the federal government and the states. Rather, Harlan delves into the very heart of the matter—the very separation of races. His dissent is almost poetic, a passionate elocution on a fully-evolved belief that, in the eyes of law, all races are equal. Foregoing judicial precedent, both Federal and State, Harlan instead chose to examine the intent of the law, and very bluntly called the racially-driven segregation for what it was:

The destinies of the two races in this country are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. 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 cannot 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.<sup>68</sup>

Harlan has, in word and deed, placed both races on equal footing. From the very outset of this passage, his dissent treats whites and blacks as equal entities. His language seems to transcend normal legal jargon, alluding to the history of “race hate” in the United States, in which he had willingly participated in. His past is behind him, and this Harlan, far ahead of his time, is disgusted by legal validation of the separation and ostracism of the black race. Rather than relying on legal precedence, Harlan accused Louisiana of legally requisitioning the

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<sup>68</sup> *Plessy v. Ferguson*, 163 U.S. 157 (1896).

inferiority of colored citizens. Regardless of the law's language, and the assertions of seven other Supreme Court Justices, Harlan called the law out for what it was, and was so bold as to say that "all will admit to" the more nefarious intentions that lie beneath the surface of the law.

Reviewing Harlan's *Plessy v. Ferguson* dissent in the context of his political development, the Great Dissenter wrote a number of telling passages. Once the Supreme Court had validated the law in their majority opinion, Harlan put forth several hypotheticals, one of which suggests that, "if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation of railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?"<sup>69</sup> This call for equality to all demographics, not simply in relation to color but in relation to ethnicity and religion as well, was written by the man who once swore loyalty to the party that declared superiority over anyone who was not a white Protestant of Anglo-American descent, who charged political opponents of being anti-slavery, pro-immigrant, and loving the pope more than their country. Harlan later said in his memoirs that his conscience rebelled against the idea. The dissent suggests that Harlan's conscience is not only rebelling; it is making amends.

These quotes and his dissent do not support the fact that Harlan personally viewed whites and blacks as equals. His personal writings unfortunately offer very little as to his sentiments on the subject. On record in this

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<sup>69</sup> Ibid.

dissent though—perhaps a more diluted version of his private beliefs—is his view that “the white race deems itself to be the dominant race in this country. And so it is in prestige, in achievement, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage...”<sup>70</sup>

Despite being ahead of his time, the rational Harlan is only looking at racial equality through the legal perspective. He not only proudly asserted the domination of the White race in all facets of society, but hoped that it would continue to do so, in keeping with its “great heritage”. His views on racial division, slavery and equally-disreputable terms of bondage, had unquestionably changed since he entered the Kentucky political scene. To suggest complete and total equality of the races, Harlan would have been in very short company, an incredibly small minority who were incredibly ahead of their time. As far as legal purposes are concerned, despite his notion of racial superiority, Harlan’s dissent was a very liberal interpretation debunking segregation. The evolution of Harlan’s ideology on race can be best summed up in the words of his dissent: “But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>71</sup>

Harlan does devote a small portion of his dissent to the standing relationship between the federal government and the states. His view had

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid

radically altered in his thirty years of political involvement, and from the fortress of the judicial bench, he freely gives his opinions, free of the political consequence that could result. Harlan forwent the option of looking at judicial precedent in his *Plessy v. Ferguson*, feeling that state precedent was not germane to his reasoning:

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some...were made at a time when public opinion in many localities was dominated by the institution of slavery, when it would not have been safe to do justice to the black man, and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law.<sup>72</sup>

Despite his previous career as a lawyer who argued similar cases, despite his record as Attorney General, defending the very notions in the very courts he is now dismissing as antiquated, Harlan's views are inarguably clear. He chastised the very state he called home when he criticized those localities dominated by slavery or race prejudice. These segregationist laws, state laws, had once been the supreme law of the land, if not legally than realistically. Far from Kentucky, geographically, chronologically (he had been a Supreme Court Justice for nearly ten years), and ideologically, the man who once held Kentucky Nationalism as one of his core political beliefs had abandoned the idea of state supremacy, even equal legal footing with the federal government. The "supreme law" is in reference to the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> amendments to the

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<sup>72</sup> Ibid.

United States Constitution. He had left his state and his old politics far behind him in adherence to the supremacy of the federal government, and his interpretation of its amendments gave that government far more power than his seven other colleagues, six from Northern states, were willing to give.

It would be these ideas, not simply his ideas on racial equality, but on the relationship between federal government and the states, that Civil Rights leaders would use as a rallying cry for the next half-century. Harlan's dissent gained its deserved fame when *Brown v. Board of Education* overturned *Plessy v. Ferguson* in 1954. It would be the final vindication for a man who lived and judged far beyond the tumultuous times in which he lived. Harlan was never one to acquiesce to popular opinion. He remained with the Whigs long after the party was impotent. He became a Republican at a time when it was unfavorable to do so. And, despite being one of the only Southerners on the bench, he was often the only Justice writing dissents against segregationist laws. It is from this desire, driven by principle, ambition, or the much larger context of Federal and state governments, that Harlan would finally achieve the notoriety and legacy he hungered for all his life.

## Conclusion

In his *Plessy v. Ferguson* dissent, Harlan wrote, "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."<sup>73</sup> The Great Dissenter's life is a story of one who desperately attempted to hold on to an ideal past, only to turn around at the last moment and become a man far ahead of his time. Earlier, in his first campaign for office, Harlan's expressed the opposite opinion, that "Congress had the power, and it was its bounded duty, to pass such laws as might be necessary for the full protection of the rights of slave-owners in the Territories,"<sup>74</sup> a view in full and harmonious agreement with the Supreme Court's *Dred Scott* decision. How could one man so radically alter his views, and be remembered for his foresight rather than his hypocrisy?

Posterity can hardly blame Harlan for living in the time he did. His lifetime, particularly the years 1855-1867, the year he entered politics until the year he entered the Republican Party, marked a period of great change for Kentucky. The Whig Party had disintegrated from the most powerful political coalition in the state to a nostalgic group relegated to the history books and a few stubborn men unwilling to let go. Kentucky had gone from a national political power to an embattled southern bulwark, stubbornly fighting federal reforms. It is the cruel fate of chance and history that Harlan was politically baptized at a tumultuous time within his state. In another, more harmonious time, his skills as a politician

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<sup>73</sup> Ibid

<sup>74</sup> *Paris Western Citizen*, June 10, 1859.

and orator would have given him great success at the state and perhaps even national level.

The sectionalism that would emerge in these twelve years, though, were the political winds that blew Harlan every which way. He went through five parties in ten years: the Whigs, the American/Know-Nothing, the Opposition, the Constitutional Union, and the Conservative Union. Throughout these nomadic wanderings, the one principle that drove Harlan and his shrinking number of companions was Kentucky Nationalism. The principles of this term have been made abundantly clear: strict defense of States' Rights, particularly regarding slavery; neutrality in the face of a divided country; but, above all, devotion to the Union. Harlan fought to make Kentucky Nationalism a continually viable idea, but he worked in vain against much larger forces. Kentucky Nationalism was an idea that could only work in a state of isolationism, a Commonwealth concerned only with its own political development and well-being. The Civil War wrenched the state out of that naiveté, and its physical neutrality. Harlan and Kentucky's "middle ground," for all of its altruistic ideals, could not overcome the divisive issue of slavery, and war would prove the catalyst that forced each fence-sitter to choose sides. Harlan's devotion to the Union itself would propel his decision to fight for Union forces, and this devotion to the Union would remain with him long after the war was over. That devotion and his desire to see

Kentucky Nationalism reincarnated moved him to formulate his last middle-way political party, and its defeat proved that Kentucky Nationalism could no longer survive in the Commonwealth.

The relationship between the federal government and the states had changed dramatically. Though the reasons behind the war are often disputed—proponents of the “Lost Cause” ideology postulate that the war was about States’ Rights, while others argue that slavery was the main drive—the effects of the war cannot be disputed. The federal government held unequivocal authority over the states. Despite the best efforts of Harlan and Kentucky, be that through the courts or the legislature or direct and blatant violence against federal bureaucracy, the change proved inevitable. The author concludes that, while his political ambition certainly played into all of his decisions, Harlan was influenced by the larger forces of the federal government over the state government. The very relationship between the two had changed. There was no longer equal footing between the two, and while most Kentuckians felt betrayed, and the ex-Confederate Democrats dominated the state, Harlan’s political ideology and ambition crept closer to the still fledgling ideas of Republicanism. His beliefs, specifically his devotion to the Union, were most aligned with those who favored the preeminence of the government in Washington over that in Frankfort, and despite his best wishes to compromise the two, both before and after the war, he was forced to choose a side. Harlan’s

immediate decision to join the Republican Party was perhaps a “lesser-of-two evils” scenario. Once he had adopted the Party, however, Harlan threw his full participation and vigor into campaigning and contributing to the evolution of a fledgling party that was bitterly detested as an agent of the national government in his home state.

To say that Harlan was driven purely by ambition, as Owen does, is a gross overstatement; switching parties would have been no easy decision, particularly an unpopular party in the state of Kentucky. Harlan was an immensely popular political figure, capable of accruing many votes, which explains why national political figures utilized him in other states. Had he joined the Democratic Party, it would not have been difficult for him to gain the electoral success he so desired. In purposefully and deliberately choosing the losing side, though, Harlan would gain the favor of political figures outside Kentucky, and his ambitions would be fulfilled, albeit in a different and more judicial field of notoriety.

Nor is it conclusive to say, as Beth postulates, that Harlan was merely “going with the flow,” one sample in a process of that which all disillusioned Whigs had to endure. Harlan held on to the tenets of Whig ideology long after many of his past political allies had abandoned ship. Many had joined sides before the Civil War, choosing to go over to the Republican Party. Afterwards, those that remained by his side became disenchanted with what they saw as a federal government that was egregiously overstepping its boundaries and

joined the Democratic Party. Harlan always broke rank with the majority, holding fast to Whig principles when others would not, and joining the Republican Party at a time when doing so was nothing short of political suicide. These trends would stay with him on the Supreme Court.

The author therefore concludes that Harlan, one man confined to an obscure shelf in the vast library of men who lived and campaigned and fought and died to be remembered during this time, was a man who fell victim, for lack of a better word, to the strong principles of Kentucky Nationalism, and when the Civil War and the subsequent power of the federal government severely weakened this core belief of the Commonwealth, Harlan would be forced to choose a side he did not originally agree with. While the Republican Party favored outright abolition, and documents like the 13<sup>th</sup> amendment and Emancipation Proclamation, they still retained that principle of Kentucky Nationalism which Harlan held most dear: devotion to the Union. Once enjoined to this Party, Harlan threw his full spirit into campaigning for its beliefs and values. Once chosen for the Supreme Court, he could do so free of political consequence. While Harlan's name holds little when compared to the likes of Lincoln, Grant, even state contemporaries like John C. Breckendridge, his political transition represents a crucial moment in the transitional relationship between the states and the federal government.

Harlan's transition could not have been possible in any other state. Southern states almost unanimously resisted all types of federal encroachment,

and Justice Edward White of Louisiana would predictably vote with the majority in *Plessy v. Ferguson*. Nor would his transition have been possible in the north, whose citizens joined and supported the Republican Party much earlier and with much more vigor than himself, and whose Justices on the Supreme Court unanimously supported Louisiana's separate, but equal, segregation. The northern states did not necessarily understand the South's ties to slavery; they only knew, correctly, that it was morally reprehensible. Harlan, with the knowledge of slavery he had from his life in Kentucky, could therefore see the Louisiana law for what it was—an affirmation of racial superiority. His transition took place in a state that was, and in many ways still is, a place of transition. Kentucky has never been north, has never been south, and has thus been geographically and ideologically open to all possibilities. No state was hit harder by the post-war power of the Federal government, since she had remained loyal to the Union and felt betrayed at its encroachment on her power. Many would futilely fight. Harlan, shedding his Whig identity, saw the Federal government not only for what it was, but what it would be in the future, the clear and unyielding superior of the states. It was this principle adopted, and carried to the Supreme Court, when the man who once fiercely advocated slavery, slave-owners, and States Rights, wrote an eloquent opinion that denied all three, denied Kentucky Nationalism, and prophetically forecasted the future of the federal government, and the United States of America above which it ruled.

States Rights are still a viable issue in political relations today. The origins of this thesis stem from political issues of immigration, gun control, healthcare reform, marriage—all which fall under the overarching and seemingly omnipresent issue of what the federal government has the right to mandate to the states and what it does not. Kentucky Nationalism may not enjoy the political prestige it once had, but States Rights have returned to a position of importance within the national discussion that they have not seen since the Civil Rights Era. The contemporary issues that brought about the resurrection of States Rights are not sullied with the moral reprehension inherent in slavery and segregation. Kentucky still holds a unique geographical and ideological position in the United States, and the time may be ripe for a revitalization of that Kentucky Nationalism that guided John Marshall Harlan.

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