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The Constitution, Civil Liberties and John Marshall Harlan

By FLORIAN BARTOSI

I. A Neglected Constitutional Statesman

When John Marshall Harlan died in 1911 after almost thirty-four years of faithful service as an associate justice of the Supreme Court, it was generally assumed that he was assured of a niche in our judicial hall of fame.1 An editor of Bench and Bar prophesied:

The judicial history of this country will not fail to accord to him a most honorable, exalted and enduring fame;2

while another author wrote:

[H]is dissents will always be referred to with a respect due to their learning, their manifest patriotism and their careful exposition of the law.3

This jurist, whose length of service upon our highest court has been exceeded by only the great Chief Justice in whose honor he was named and Mr. Justice Field,4 had been a diligent and prodigious worker, and the hallmarks of his judicial accomplishments were independence of thought and tenacity of conviction. The author of over 1100 opinions, he spoke for the Court 703 times and produced 100 concurring opinions, and he merited for

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1 For example, see Proceedings on the Death of Mr. Justice Harlan, 222 U.S. v (1911); “John Marshall Harlan,” 56 Ohio Law Bull. 399 (1911); “John Marshall Harlan,” 17 Va. L. Reg. 497 (1911); and Brown, “The Dissenting Opinions of Mr. Justice Harlan,” 46 Amer. L. Rev. 321 (1912).
2 “John Marshall Harlan,” 27 Bench and Bar 1, 4 (1911).
4 Harlan served for a period of thirty-three years, ten months and twenty-five days; Marshall, thirty-four years, five months and five days; and Field, thirty-four years, six months and ten days.
himself the title "The Great Dissenter" by differing with the majority of his brother justices in 380 cases and expressing his dissent in 316 opinions. There can be no doubt that Justice Harlan played a major role in developing the function of the dissenting opinion in our judicial system. Together with Justice Miller, he forms a bridge from "the first dissenter," Justice William Johnson, and that champion of the states' rights cause on the Taney Court, Justice Peter V. Daniel, to the glorious days of "Holmes and Brandeis dissenting." In the words of Edward S. Corwin, Harlan's dissenting opinions kept "the spark of life going in the corpus juris of our constitutional law during a very damp season."

There was a second prophecy made upon the death of Mr. Justice Harlan:

Some of them [his dissents] will doubtless become the basis of future legislation, and perhaps for a reversal by the Court itself.

Our legal history records an astonishing fulfillment of this prophecy: on no less that eight vital issues Justice Harlan's dissents have been vindicated by constitutional amendments, legislative action or Court reversals. The sixteenth amendment of 1913 was necessitated by the narrow view on income taxation taken by the Court in the Pollack case, while the twenty-first amendment of

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5 "John Marshall Harlan," 27 Bench and Bar 1, 4 (1911); "John Marshall Harlan," 17 Va. L. Reg. 497, 503 (1911); "John Marshall Harlan, Remarks of W. L. Granbery," 56 Ohio Law Bull. 402, 404 (1911); and "John Marshall Harlan," 44 Chicago Legal News 85 (1911). In his remarks at the Sixth Circuit's memorial session upon Justice Harlan's death, W. L. Granbery recounted: "Last winter I was in the courtroom and heard a young lawyer cite a case and say that the opinion was delivered by Mr. Justice Harlan. Mr. Justice Lurton, with that delightful merry twinkle in his eye, which we all know so well, leaned forward and said: 'Was that one of Justice Harlan's dissenting opinions?' The young lawyer replied: 'No, your honor, that was one of the few times the court agreed with him.' Then feeling that some apology was needed, he added: 'But I got the supreme court of Tennessee to adopt one of Justice Harlan's dissenting opinions as the law of that state.' Mr. Justice Harlan, with a broad smile said: 'That was after Judge Lurton left that court, wasn't it?" 56 Ohio Law Bull. 402, 404 (1911).

6 Three of his colleagues joined Harlan in dissent 107 times.

7 See Fairman, Mr. Justice Miller and the Supreme Court 386 (1939).

8 See Morgan, Justice William Johnson, the First Dissenter (1954).


10 Corwin, Constitutional Revolution, Ltd. 89 (1941).


1933 in making the traffic in liquor a matter of state regulation undid *Leisy v. Hardin* (1889). The Court’s 1897 opinion in *Robertson v. Baldwin* was corrected by the Federal Seamen’s Act of 1915. In the field of civil rights, *Morgan v. Virginia* (1946) overruled the segregated railroad accommodation cases of 1890 and in 1954 the Court discarded the *Plessy* “separate-but-equal” shibboleth that had been relied upon since 1896 to cast an aura of legality about racial injustice. The unrealistic 1899 *E. C. Knight* concept of inter-state commerce that had hamstrung the nation’s lawmakers for almost forty years was rectified by *NLRB v. Jones & Laughlin Steel Corp.* (1937). With respect to state minimum hour and federal interstate railway injuries legislation, the Court, with an assist from Congress, was more quick to amend its ways.

That the second prophecy made upon Justice Harlan’s death has been abundantly fulfilled makes the nonfulfillment of the first even more difficult to understand. For despite the remarkable vindication of his dissenting opinions, the biographers have ignored him, most compilers of casebooks have slighted him, and Mr. Justice Frankfurter has “respectfully” dismissed him as “an eccentric exception.” And only one work has been devoted

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13 135 U.S. 100 (1889).
14 165 U.S. 275 (1897).
16 328 U. S. 372 (1896).
17 Louisville, New Orleans & Texas Ry. v. Mississippi, 183 U.S. 587 (1890); Chesapeake & Ohio Ry. v. Kentucky, 179 U.S. 338 (1900).
21 301 U.S. 1 (1937).
24 Not a single biography has been written. See Watt and Orlikoff, “The Coming Vindication of Mr. Justice Harlan,” 44 Ill. L. Rev. 14, 15 (1949). Harlan’s papers are divided into two parts: a collection of letters and scrapbooks deposited in the University of Louisville Law School Library and his personal and family papers collected by his son Richard who had planned to write a biography. The latter collection has been available to David G. Farrelly, Associate Professor of Political Science, University of California at Los Angeles, and Alan F. Westin, Assistant Professor of Gov’t, Cornell University, each of whom is writing a biography of Harlan.
25 But see 1 Freund et al., *Constitutional Law* xxxix (1954) and 2 Freund et al., *Constitutional Law* 810, 932, 971, 1475, 1566 (1954).
to the study of his constitutional doctrines—a 1915 doctoral thesis! The whole story is significantly told by the title of one of the handful of law review articles that have been written concerning the Great Dissenter—"John Marshall Harlan: A Justice Neglected.""28

II. The Man, His Life and His Times

A descendant of Quaker immigrants who first settled in Delaware in 1687 and then moved west, James Harlan of Boyle County, Kentucky, became a distinguished lawyer and Whig politician. When a son was born to him on June 1, 1833, he displayed no little prescience in naming the boy after the Great Chief Justice. Preordained to the law, John Marshall Harlan was graduated from Centre College at the age of seventeen, pursued his legal studies at Transylvania College, was admitted to the bar in 1853, and at the age of twenty-five was elected county court judge.

After an unsuccessful bid for a Congressional seat, he served as a presidential elector on the Bell-Everett ticket which carried his home state, and in 1861 he formed a law partnership with W. F. Bullock in Louisville. When war rent the nation asunder, young Harlan labored successfully with his father and Attorney General Speed to prevent the secession of Kentucky. Breveted a colonel in the Union Army, he recruited the Tenth Kentucky Infantry, led his men into battle, and became the acting-commander of a brigade. In 1863 President Lincoln sent his name to Congress for appointment as a brigadier-general, but the elder Harlan died and his son resigned from the Army to succeed his

father as Attorney General of Kentucky. He returned to private practice in 1867.

The future Justice was first a Whig, as his father before him, then a conservative Republican, and finally he became a radical one. He had initially resented the abolition of slavery as "a flagrant invasion of the right of self-government," but by the 1868 presidential campaign he had so modified his earlier position that in supporting Grant he could vigorously defend the war amendments. Personally, he was not a successful politician: he was twice defeated as his party's candidate for the governorship—in 1871 and again in 1875—and his backers failed to secure his nomination for vice-president in 1872. Four years later, however, as the head of the Kentucky delegation to the Republican Convention he played a major role in securing the nomination of Hayes by switching his state's vote from Bristow, his law partner, to the future president at a crucial moment in the balloting. Then at Grant's request Harlan accepted an appointment to the controversial Louisiana Commission which assisted in the settlement of the Hayes-Tilden electoral contest in that state, and he appears to have fulfilled his duties with honor and integrity.  

Rutherford B. Hayes was not an ungrateful man: one cannot be elected unless one is first nominated! He wished to have his supporter in his cabinet as his attorney general, a position to which Harlan ardently aspired, but in the end Hayes decided against the appointment, perhaps for political reasons. And when Justice David Davis stepped down from the high court on March 4, 1877, there were many eager candidates for his place on the bench. The President originally decided upon Benjamin H. Bristow, but Hayes, who owed his own nomination to Harlan's shift of support from Bristow to himself, now in turn because of senatorial opposition to Bristow finally determined to nominate Harlan. Despite cries of "pay off" raised by political enemies and the

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31 Under the date of March 12, 1878 President Hayes wrote in his diary: "The most important appointments are the judicial. They are for life, and the Judiciary of the country concerns all interests, public and private. My appointments will bear examination. . . ." Again on March 26, 1878 he observed in connection with a bitter attack made on him by Senator Howe: "His grievance is the failure to appoint him Judge." See 2 Warren, The Supreme Court in United States History 566 (1928).
virulent editorial attacks of Charles Dana, who unfairly dubbed
the newly-appointed forty-two year old Justice “His Fraud-
ulency,” the upper chamber confirmed Harlan’s nomination on
November 26, 1877. It is noteworthy that Harlan had not been
“a railroad lawyer,” but Gustavus Myers has observed that “the
fact that his nomination was confirmed by a Senate controlled
by railroad attorneys and stockholders did not pass unnoticed.”

In 1892 Justice Harlan was called upon to serve as one of the
American Arbitrators on the Bering Sea Tribunal. Eyewitness
Hannis Taylor has recorded his impressions of one of the Tri-
bunal sessions:

I can never forget a scene I once witnessed in Paris, when
the Bering Sea Arbitration Tribunal was sitting there, with
John Marshall Harlan of Kentucky, at one end of the court
and John Tyler Morgan of Alabama at the other. Both were
then in the Indian Summer of their manhood—Harlan with
his noble matchless form, the God-gifted Morgan, with his
beautiful face and head that sculptors might have loved to
copy. My heart swelled with pride as I looked upon those
two great American citizens, who had been opposing gen-

A massive man with a splendid physique and ruddy complexion,
Harlan was endowed with a magnificent and distinguished per-
sonal appearance. He was a golf enthusiast, and it is said that at
seventy-five he participated in a bench and bar baseball game
and hit a triple! His personality was as interesting as his physique
was picturesque. Simple, rugged, robust, he was a man given
to plain, hard thinking. Though not an intellectual giant, he was
a man of great ability and his reasoning was guided by a vigorous
and incisive logic. “Subtle and ingenious verbal criticism” was
foreign to the make-up of this man of sincerity and candor.

32 Concerning the controversial Harlan appointment and confirmation, see
Lewis, “The Appointment of Mr. Justice Harlan,” 29 Ind. L.J. 46 (1953); Farrelly,
“John M. Harlan’s One-Day Dairy, August 21, 1877,” 24 Filson Club History
Quarterly 158 (1930); Frank, “The Appointment of Supreme Court Justices:
Prestige, Principles and Politics,” 1941 Wisc. L. Rev. 172, 204-210; Hartz, “John
M. Harlan in Kentucky, 1855-1877,” 14 Filson Club History Quarterly 18 (1940);
and Fairman, Mr. Justice Miller and the Supreme Court 349-370 (1939).
33 Myers, History of the Supreme Court of the United States 555 (1925).
34 Remarks of Hannis Taylor, Proceedings of the Bar and Officers of the
Supreme Court of the United States in Memory of John Marshall Harlan 30
(1911).
Justice Harlan married Malvina Shanklin of Evansville, Indiana in 1865, and during their long and happy life together three sons were born to them. (A grandson, who bears his name, is at present serving on the Supreme Court.) Harlan was popular in Washington social circles and with his colleagues. Mr. Justice Holmes once confided to a friend: "I do not venture to hope that Harlan and I will ever agree on an opinion, but he has a place in my heart. He is the last of the tobacco-spittin' judges."\(^3\) Later in a letter to Pollack he wrote rather enigmatically: "As to Harlan's qualified concurrence in *Kawananakoa v. Polyblank*, that sage, although a man of real power, did not shine either in analysis or generalization and I never troubled myself much when he shied. I used to say that he had a powerful vise the jaws of which couldn't be got nearer than two inches of each other."\(^3\) An intimate friend of Harlan, Justice Day, had this to say of him:

> As we lived near each other in Washington, the judge and I were much together. We were neighbors in the old-fashioned sense of that term. In such intimacy I soon learned to love him for his kindliness and sympathy, and those great qualities of friendship which endeared him to all who knew him well. He was a simple-hearted, courageous and lovable man, giving fully of his great strength and wisdom to those who sought his counsel.\(^3\)

A deeply religious man, Justice Harlan was dedicated to his life's work. In the words of Attorney General Wickersham, "The Constitution and the Bible were the objects of his constant thought and consideration, and if the latter was to him always vox Dei, the former, vox populi, was no less so."\(^3\) And his colleague, Justice Brewer, once said: "Harlan retires at night with one hand on the Constitution and the other on the Bible, safe and happy in a perfect faith in justice and righteousness."\(^4\)

In addition to performing his judicial duties, Justice Harlan taught constitutional law for twenty-two years at Columbia
(now George Washington) University and also during the summer of 1896 at the University of Virginia Law School. Upon the occasion of his lecturing at the Union College of Law it was reported in the Chicago Legal News: "He is a model lecturer and has but few, if any, equals, and no superiors."

A powerful orator and a man of firm convictions and strong feelings, the Justice did not hesitate to lecture his brothers on the bench when he differed with them. A notable instance occurred when the Court in an 1895 five-to-four decision upheld its earlier decision to strike down a federal income tax. The New York Tribune reported Harlan's conduct on decision day:

Several times he turned in his chair so as to face the Chief Justice and Associate Justices Field and Gray, at whom he fairly glared as he shot forth sentences laden with feeling such as probably never before found expression from an Associate Justice of the Supreme Court in a dissenting opinion. Old lawyers who had practiced at that tribunal for more than a quarter of a century sat aghast as sentence followed sentence.

According to an account of the same incident in the New York Sun:

He displayed a personal excitement during his speech for the Populist income tax which is even described as passionate. He pounded the desk, shook his finger under the noses of the Chief Justice and Mr. Justice Field, turned more than once almost angrily upon his colleagues of the majority, and expressed his dissent from their conclusions in a tone more appropriate to a stump speech at a Populist barbecue than to an opinion on a question of law before the Supreme Court of the United States.

But, as we have seen, he was on the friendliest of terms with his colleagues. They knew that his words and actions were inspired by the sincerity, honesty and integrity of his convictions.

During the thirty-four years John Marshall Harlan served upon the Court the legal problems that came before him for adjudication were varied—they ran the gamut of our complex

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41 Harlan also lectured on private and public international law at Columbian University.
42 "Judge Harlan's Lectures," 24 Chicago Legal News 325 (1892).
44 N.Y. Tribune, May 21, 1895, p. 1, col. 5.
45 N.Y. Sun, May 21, 1895, p. 1, col. 7.
legal system. But it was the extent of the commerce power and the significance of the fourteenth amendment that were the major issues that confronted the nation’s highest tribunal during that period. While Justice Harlan had a keen interest in all phases of the law, he was particularly at home in the field of the constitutional law, and above all else he was intensely and persistently concerned with the preservation of the rights and privileges of the individual citizen. The Justice Black of his times, he did yeoman service in the protection of civil liberties.

III. Justice Harlan’s Civil Liberties Opinions

A. Equal Protection of the Law for the Negro

Radical Republican leaders in Reconstruction Congresses may have been motivated by practical political considerations: they may have sought to perpetuate their power through the establishment of a Republican party in the South. But whatever their motives, the intent of the Constitutional amendments they sponsored and the enabling legislation they enacted was clear—the Negro was not to be a second-class citizen. Even Charles Wallace Collins, archprotagonist of states’ rights and “the survival of the Constitution,” admits the “primary purpose of the adoption of the Fourteenth Amendment was to elevate the negro to a plane of equality with the white people and to protect him in his newly given rights.” He quite honestly and accurately adds, “In its attempts to carry out this ideal, Congress was effectually restrained by the Supreme Court.”

A major battle in the war for Negro rights was lost before the appointment of Justice Harlan to the high court. In the Slaughter-
House Cases\textsuperscript{51} and the Reese and Cruikshank decisions\textsuperscript{52} the Supreme Court had developed the thesis that fundamental civil rights were for the most part incidents of state, not national citizenship. Charles Warren, "the Supreme Court's most orthodox historian," has opined:\textsuperscript{53}

Viewed in historical perspective now, however, there can be no question that the decisions in these cases were most fortunate. They largely eliminated from National politics the Negro question which had so long embittered Congressional debates; they relegated the burden and duty of protecting the negro to the States, to whom they properly belonged; and they served to restore confidence in the National Court in the Southern States.\textsuperscript{54}

Whether one is likely to agree with Mr. Warren, depends upon the price one is willing to pay for peace and upon the value one places on human rights. In any event, because of these decisions, Justice Harlan could but wage a sniper's war throughout his long years of service on the bench. Yet, if he was defeated in many a skirmish, he fought nobly on the side that was eventually to win the war, after the loss of many battles.

In 1883 five cases—one each from Kansas, California, Missouri, New York and Tennessee—came before the Court. In each was presented the common question of the constitutionality of the Civil Rights Act of 1875. Section One of the Act provided that all persons regardless of race, color or previous condition of servitude "shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land and water, theatres and other places of public amusement," while Section Two imposed penalties upon violators. Four of the Civil Rights Cases involved discrimination against Negroes: in a railway train, a theatre and in hotels. In the New York case, discrimination against a person whose race was not stated, was alleged to have been practiced in an opera house.

The Court, speaking through Mr. Justice Bradley, declared unconstitutional both sections of the Act as applied to the cases in

\textsuperscript{51} 83 U.S. 36 (1873).
\textsuperscript{52} United States v. Reese, 92 U.S. 214 (1875); United States v. Cruikshank, 92 U.S. 542 (1875).
\textsuperscript{53} Rodell, Nine Men 113 (1955).
\textsuperscript{54} 2 Warren, The Supreme Court in United States History 608 (1928).
question. The fourteenth amendment had given Congress the power of enacting only corrective legislation against state action, not that of individuals. The challenged legislation was defective, according to Bradley, because “it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any sufficient action of the State or its authorities.” This exceeded Congressional authority, for the “civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals.” The Justice drew a neat distinction between the possession of rights and their enjoyment. The aggrieved parties no doubt found it a little difficult to understand that an “individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror.” But perhaps it all became clear when the spokesman for the majority went on to admit that an individual could “by force or fraud, interfere with the enjoyment of the right in a particular case.” While the analysis may have been philosophically sound, its application made for political injustice in the real world of human relations.

The Court likewise rejected the contention that the Civil Rights Act was a valid legislative enforcement of the thirteenth amendment: “Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude?” According to Justice Bradley, “It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.”

Justice Harlan was the lone dissenter. To him it seemed that the majority opinion rested upon grounds “entirely too narrow and artificial,” and that “the substance and spirit” of the war amend-

55 Civil Rights Cases, 109 U.S. 3, 14 (1883).
56 Id. at 17.
57 Ibid.
58 Ibid.
59 Id. at 24.
60 Ibid.
ments had been sacrificed through a "subtle and ingenious verbal criticism:'"61

Constitutional provisions, adopted in the interest of liberty, and for the purpose of securing, through national legislation, if need be, rights inhering in a state of freedom, and belonging to American citizenship, have been so construed as to defeat the ends the people desired to accomplish, which they attempted to accomplish, and which they supposed they had accomplished by changes in their fundamental law.62

The Great Dissenter reasoned that the thirteenth amendment was intended to effect more than the mere exemption from technical slavery, the ownership of one person by another; he pleaded for a more realistic and humane understanding of what constitutes "a badge of slavery." Further, he made the point that the very states which had violently opposed the abolition of slavery would not insure the enjoyment of fundamental rights to the recently emancipated Negro. With respect to the fourteenth amendment, he argued for a broader concept of the public nature of business enterprises: the fundamental rights of citizens should be free from infringement, not only by the state and state officials, but also by "any corporation or individual wielding power under State authority for the public benefit or the public convenience."63 It was Justice Harlan's contention that the "appropriate legislation" clauses of both the thirteenth and the fourteenth amendments provided the authority for the federal Civil Rights Act:

Under given circumstances, that which the court characterizes as corrective legislation might be deemed by Congress appropriate and entirely sufficient. Under other circumstances primary direct legislation may be required. But it is for Congress, not the judiciary, to say that legislation is appropriate—that is—best adapted to the end to be attained. The judiciary may not, with safety to other institutions, enter the domain of legislative discretion, and dictate the means which Congress shall employ in the exercise of its granted powers.64

61 Id. at 26.
62 Ibid.
63 Id. at 59.
64 Id. at 51.
... With all respect for the opinions of others, I insist that the national legislature may, without transcending the limits of the Constitution, do for human liberty and the fundamental rights of American citizenship, what it did, with the sanction of this court, for the protection of slaves and the rights of the masters of fugitive slaves.\textsuperscript{65}

... Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be some other race that will fall under the ban of discrimination.\textsuperscript{66}

His \textit{Civil Rights} dissent was Justice Harlan's personal "favorite." An eloquent plea for human rights, it was described by Roscoe Conkling as "the noblest opinion in the history of our country, great in learning and understanding of our system of government and great in statesmanship."\textsuperscript{67}

There was one area of civil rights litigation in which Harlan was able to speak for the Court—the exclusion of Negroes from jury service. In the 1881 case of \textit{Neal v. Delaware},\textsuperscript{68} the Great Dissenter, this time the majority spokesman, reaffirmed the doctrine of the well-known \textit{Strauder} decision\textsuperscript{69} of the year before by determining that the indictment of a colored defendant should be quashed because of the discriminatory exclusion of members of his race from the grand jury. He was also called upon to write the opinion for the Court when in \textit{Smith v. Mississippi}\textsuperscript{70} it was held that the facts stated in an affidavit of an accused must be verified by independent evidence of discrimination to warrant the quashing of an indictment.

While it is to the Court's credit that it would not tolerate racial discrimination in the selection of jurors, it was not as courageous

\textsuperscript{65} Id. at 53.
\textsuperscript{66} Id. at 62.
\textsuperscript{67} As quoted in Knight, "The Dissenting Opinions of Justice Harlan," 51 Amer. L. Rev. 481, 499 (1917).
\textsuperscript{68} 103 U.S. 370 (1881).
\textsuperscript{69} Strauder v. West Virginia, 100 U.S. 303 (1880).
\textsuperscript{70} 162 U.S. 592 (1896). For other opinions on this subject by Justice Harlan, see Bush v. Kentucky, 107 U.S. 110 (1883); Gibson v. Mississippi, 162 U.S. 565 (1896); and Martin v. Texas, 200 U.S. 316 (1905). For other cases decided during Harlan's tenure on the Court, see Virginia v. Rives, 100 U.S. 303 (1880); Ex parte Virginia, 100 U.S. 339 (1880); Carter v. Texas, 177 U.S. 442 (1900); Tarrance v. Florida, 188 U.S. 519 (1903); Brownfield v. South Carolina, 189 U.S. 420 (1903); and Rogers v. Alabama, 192 U.S. 226 (1904).
when disfranchised Negroes appeared before it to seek redress. The constitution of Alabama contained provisions that in effect operated to prevent colored persons from voting, and in *Giles v. Harris*\(^7\) it was sought to have these provisions declared unconstitutional and to require the voting authorities to enroll qualified Negroes. The Circuit Court dismissed the petition on the grounds that damages of $2,000 were not averred. Justice Holmes, writing the opinion for the majority of the Court, made short shrift of the jurisdictional quibbling, but he also bypassed the constitutional question. After due deference was paid to the old lawyer's tale that the protection of purely political rights is not within the province of equity, the majority spokesman spelled out two difficulties that were just too much for him. Inasmuch as the plaintiff wanted to be registered under a voting system which he himself claimed was unconstitutional, the Court could not become a party to the unlawful scheme by accepting it and adding another voter to the fraudulent lists. Then, too, Holmes, the realist, got the better of Holmes, the idealist: if the people of Alabama did not want Negroes to vote, there was not much the Court could do about it! Justice Harlan did not do too much better. He devoted over ten pages to explaining why the Court should not have passed on the merits of the case at all because the Circuit Court did not have jurisdiction. He did add, though, that it was his conviction that "upon the facts alleged in the bill (if the record showed a sufficient value of the matter in dispute) the plaintiff is entitled to relief in respect to his right to be registered as a voter."\(^{72}\) On this point, he and dissenting Justice Brewer were in agreement. Justice Holmes in his opinion had suggested that if the aggrieved party were to proceed at law, perhaps his position would be sustained. The plaintiff took the Justice up on this and brought an action for damages, but he fared no better. Resort was again had to narrow technical reasoning: how could the election board deprive the plaintiff of his federal rights if the board had no authority to act? Justice Harlan again dissented.\(^{73}\)

Shortly before Justice Harlan became a member of the Court,

\(^{71}\) 189 U.S. 475 (1903).

\(^{72}\) Id. at 504. See also the dissenting opinion of Justice Brewer at 488. Justice Brown also dissented.

\(^{73}\) *Giles v. Teasley*, 193 U.S. 146 (1904).
it had been decided in *Hall v. DeCuir*\(^{74}\) that a statute enacted by a carpetbag Louisiana legislature *prohibiting* racial discrimination on carriers was unconstitutional as a burden on interstate commerce. Then, in 1888 Mississippi passed a statute that *required* racial segregation on its railroads. The state supreme court *said* the statute applied only to intra-state commerce, and the Supreme Court, distinguishing *Hall v. DeCuir*, gave its approval.\(^75\) Harlan did not have quite as much confidence in the Mississippi court as seven of his brothers did, and he was nonplused by the majority's reasoning. Justice Bradley joined him in the spirited dissent by which he expressed his disapproval:

> In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation on interstate commerce, and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character.\(^76\)

When a case involving a similar Kentucky statute came before the high court ten years later, the majority reached the same conclusion; Harlan again *dissented*.\(^77\) It took some time, but at last in 1946 the Court in no uncertain terms proscribed segregated accommodations and seating arrangements in inter-state transportation.\(^78\)

The year 1896 was a fateful one in the history of Negro civil liberties—it was the year of *Plessy v. Ferguson*.\(^79\) By this time Louisiana had ousted the carpetbaggers, and a typical "Jim Crow"

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\(^{74}\) 95 U.S. 485 (1877).


\(^{76}\) Id. at 594.


\(^{79}\) 163 U.S. 537 (1896).
law was in force. Railways carrying passengers in the state were required to furnish “equal but separate accommodations for the white, and colored races” either in separate coaches or by partitions, and no persons were “to occupy seats in coaches other than, the ones, assigned to them, on account of the race they belong to.”\(^8\) Criminal sanctions were provided for non-complying railroads and recalcitrant passengers. A Negro by southern definition—the person was an octoroon who could have passed for a Caucasian—was arrested for having violated the law. The Supreme Court, which consisted of six justices appointed by Republican presidents and three Cleveland appointees, gave its blessing to segregation and sanctioned the unfortunate “separate-but-equal” shibboleth by holding that the Louisiana statute was a valid exercise of the police power. Justice Brown in a rather cynical and superficial opinion observed that the state law merely implied a legal distinction between the races and if the Negro considered it as a badge of inferiority that was only because he chose to put that construction upon it. Thus did a decision of the nation’s highest court become the bulwark of segregation for almost sixty years.

All the Justices on the Court except Harlan were either born in the North or appointed to the bench from that part of the country. An ex-slave-owner, who had at one time protested against the abolition of slavery by federal authority, he alone dissented,\(^8\) and he did so with both indignation and eloquence:

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\text{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. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.}\(^8\)
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\(^8\) La. Acts 1890, No. 111, p. 152.
\(^8\) Justice Brewer did not sit on the case. \(^8\) 163 U.S. 637, 559 (1896).
The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude, wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

... We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.8

The "separate-but-equal" doctrine soon found its way into the field of education. A Kentucky statute made it unlawful, under pain of heavy penalties, for a school to admit both Negro and white students. Berea College, a private corporation, was convicted under the law, and upon appeal to the state court of appeals the constitutionality of the entire act was upheld. On writ of error to the United States Supreme Court, Justice Brewer, speaking for the majority, sidestepped the constitutional question; the conviction was sustained on the grounds that the state court had considered the provisions of the statute to be separable and that a state might adopt such regulations with respect to its domestic corporations.84 Justices Holmes and Moody concurred in the result, while Harlan and Day dissented. (Justice Day in the 1917 case of Buchanan v. Warley85 interpreted the Berea College case as affirming the Kentucky state court "solely" upon the reserved power of the state legislature to amend, alter or repeal the charters of its domestic corporations.) Justice Harlan realistically stressed that "[i]t was the teaching of pupils of the two races together, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent. The manifest purpose was to prevent the association of white and colored persons in the same school."86 He thought it the Court's duty to consider the validity of the entire statutory scheme, and he felt that "in its essential parts the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action and is, therefore, void."87

83 Id. at 562.
84 Berea College v. Kentucky, 211 U.S. 45 (1908).
85 245 U.S. 60 (1917). See also the citation of the Court to the Berea case in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
86 211 U.S. 45, 62 (1908).
87 Id. at 67.
He observed that “in the eye of the law, the right to enjoy one’s religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law.”

Justice Harlan loved the blue-grass country—he once shed tears when a Kentucky case was being argued before the Court—and he loved its people. But above all else, he desired justice for all Kentuckians, colored and white. His Berea College dissent, which was subjected to no small amount of criticism in his home state, underscores his adherence to the principles in which he believed. Indeed, the American Negro has had no greater judicial defender and champion than John Marshall Harlan of Kentucky.

It took the Court a long time, but eventually it began to see the light—Gaines, Sipuel, Sweatt v. Painter, and McLaurin, established rigid tests of equality for separate state graduate and professional school facilities. Finally, fifty-eight years after Plessy v. Ferguson, Justice Harlan’s dissent was in effect adopted by the Warren Court as its unanimous opinion with respect to the field of public education. A solemn anathema was pronounced against the “separate-but-equal” doctrine: “separate,” per se, can never be “equal”; “separate”, per se, is “inherently unequal.” The Court has indicated that it feels the same way concerning segregated city bus facilities and state-enforced segregation on intra-state private carriers, and it is soon likely to administer the technical legal coup de grâce to segregation in these areas. Moreover, the Court has consistently refused to reverse lower court decisions requiring integration in public parks, playgrounds,

88 Id. at 68.
89 Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950); and McLaurin v. Oklahoma State Bd. of Regents, 339 U.S. 637 (1950). For the latest development in this area of the law, see Florida ex rel. Hawkins v. Bd. of Control, 350 U.S. 413 (1956), in which the Court held that a Negro is entitled to prompt admission to a state law school under the rules and regulations applicable to other qualified candidates; the decision in Brown v. Bd. of Education, infra note 90, which contemplates some delay in the desegregation of public elementary and secondary schools, was held to have no application to a case such as this.
91 See e.g., South Carolina Elec. & Gas Co. v. Fleming, 351 U.S. 901 (1956), dismissing appeal from 224 F. 2d 752 (4th Cir. 1955).
swimming pools, beaches and golf courses.\textsuperscript{92} It would seem that the “separate-but-equal” doctrine is legally dead as far as public facilities are concerned. Nor is it too much to hope for that in the end the nation will see, as Justice Harlan did so clearly, that to travel on non-segregated “private” common carriers, to shop in non-segregated “private” stores and to frequent non-segregated “private” places of amusement are not merely social privileges, but civil rights!

B. \textit{The Bill of Rights, the States and the Fourteenth Amendment}

Whether the first eight amendments were intended to be made applicable to the states through incorporation in the fourteenth would seem to be an open historical question.\textsuperscript{93} Be that as it may, the Supreme Court has consistently held from \textit{Hurtado}\textsuperscript{94} and \textit{Twining}\textsuperscript{95} through \textit{Palko}\textsuperscript{96} to \textit{Adamson}\textsuperscript{97} and \textit{Rochin}\textsuperscript{98} that the entire bill of rights has not been carried over and made applicable to the states by either the due process or the privileges and immunities clause of the fourteenth amendment. Instead, the Court has adopted a pick-and-choose technique under the due process clause which, according to Justice Black, has resulted in the substitution of the Court’s “day to day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of Rights

\textsuperscript{92} See e.g., Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) and Holmes v. Atlanta, 350 U.S. 879 (1955).


\textsuperscript{94} Hurtado v. California, 110 U.S. 516 (1884).

\textsuperscript{95} Twining v. New Jersey, 211 U.S. 78 (1908).


\textsuperscript{97} Adamson v. California, 332 U.S. 46 (1947).

\textsuperscript{98} Rochin v. California, 342 U.S. 165 (1952).
guarantees." A full carry-over has been accorded only the first amendment freedoms of religion, speech and the press.90

While Justice Harlan has not been an "eccentric exception" on the question,100 he was the chief judicial proponent of the incorporation doctrine until recent times. In *Hurtado v. California*101 the Court through Mr. Justice Matthews decided that due process of law does not require as one of its essential elements the indictment by a grand jury for a capital crime. Matthews concluded that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, ["certain fundamental rights"] must be held to be due process of law."102 Justice Harlan, relying in large part upon an historical argument, dissented. According to his interpretation, "Due process of law," within the meaning of the National Constitution, does not import one thing with reference to the powers of the States, and another with reference to the power of the general government."103 Governmental action which is forbidden by a constitutional provision or by the customs and practices of the English legal tradition cannot constitute due process of law. The Great Dissenter differed with his brethren because they "while conceding that the requirement of due process of law protects the fundamental principles of liberty and justice," adjudged "in effect, that an immunity or right, recognized at the common law to be essential to personal security, jealously guarded by our National Constitution against violation by . . . the general Government, and expressly or impliedly recognized, when the 14th Amendment was adopted, in the Bill of Rights or Constitution of every State . . . is, yet, not a fundamental principle in governments established, as those of the States of the Union are, to secure for the citizen liberty and justice and, therefore, is not involved in that due process of law required in proceedings conducted under the

100 See supra note 26.
101 110 U.S. 516 (1884).
102 Id. at 537.
103 Id. at 541.
sanction of a State. He reaffirmed these views by dissenting in *Baldwin v. Kansas* and *Bolln v. Nebraska.*

In *O’Neil v. Vermont,* a case involving the applicability to the States of "the cruel and unusual punishment" proscription of the eighth amendment, a writ of error was dismissed on the ground that the record did not present a federal question. Justice Field dissented; he felt that the commerce clause provided a basis for the Court’s jurisdiction and that the punishment inflicted upon the defendant (54 years for 370 liquor violations) was forbidden by the eighth amendment as incorporated in the fourteenth. Harlan, who also wrote a dissenting opinion, in which Justice Brewer "in the main" concurred, agreed "with Justice Field, that since the adoption of the Fourteenth Amendment, not one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." And among them is "immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the States."

There are two trial-by-jury cases in which Justice Harlan was the spokesman for the Court: in *Callan v. Wilson* it was held that the provisions in the Constitution relating to trial by jury must be observed in the District of Columbia, and in *Thompson v. Utah* a section in the constitution of Utah, providing for the trial of non-capital cases by a jury of eight, was struck down as *ex post facto* in its application to felonies committed before the territory became a state. But he did not write the majority opinion in *Maxwell v. Dow,* which involved a conviction by an eight-man jury for a robbery committed after Utah’s admission as a state. Rather, it was Justice Peckham, who, after reaffirming

104 Id. at 588.
105 129 U.S. 52 (1889).
106 176 U.S. 83 (1900).
107 144 U.S. 323 (1892).
108 Id. at 370.
109 Ibid.
110 127 U.S. 540 (1888).
111 170 U.S. 343 (1898).
112 176 U.S. 581 (1900).
the Hurtado doctrine that the due process clause does not require indictment by a grand jury in a state prosecution, and after deciding that the privileges and immunities clause does not necessarily include all the rights protected by the first eight amendments, went on to hold that Utah's scheme for trial by a jury of eight, instead of twelve, did not violate the provisions of either clause. This was a matter for the people of each state to decide for themselves, as long as the same procedure was used for all. The Peckham opinion intimated that with respect to the fourteenth amendment a distinction was to be made between matters of mere procedure and more fundamental rights. Here was a clear indication that the Court was on its way toward turning the amendment on its head by enshrining the doctrine of substantive due process, while minimizing its procedural aspects.

A vigorous dissent was registered by Harlan, and he again grounded his argument upon the history of the Anglo-American legal system. He was shocked to think that the due process clause of the fourteenth amendment would preclude the taking of private property by a state without just compensation, but would allow a citizen to be deprived of life and liberty by a procedure which is repugnant to that authorized at the time the Constitution was adopted and which is expressly forbidden in the national Bill of Rights. "If the court had not ruled otherwise," he wrote, "I should have thought it indisputable that when by the Fourteenth Amendment it was declared that no State should make or enforce any law abridging the privileges and immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, the people of the United States put upon the States, the same restrictions that had been imposed upon the National Government in respect as well of the privileges and immunities of citizens of the United States as of the protection of the fundamental rights of life, liberty and property." He concluded his dissent rather prophetically with an eloquent admonition that was to go unheeded:

If I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English-speaking people have

\(^{113}\) Id. at 614.
for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freemen.\footnote{Id. at 617.}

In 1908 came \textit{Twining v. New Jersey}\footnote{211 U.S. 78 (1908).} with the important question whether exemption from compulsory self-incrimination in the state courts is secured by any of the clauses of the fourteenth amendment. An answer in the negative was given by Justice Moody for the Court, and by this time there was no difficulty in citing authorities the Court itself had created. Of course, the fourteenth amendment does protect against state infringement of those rights and privileges that were part of the "law of the land" prior to the separation of the colonies from the mother-country, those which constitute an element of due process of law, BUT—exemption from compulsory self-incrimination, the Court said, is not one of them. Justice Felix Frankfurter has observed that \textit{Twining} is an example of the "judicial process at its best."\footnote{Concurring opinion, Frankfurter, J., \textit{Adamson v. California}, 332 U.S. 19, 59 (1947).} Of course, any such evaluation as this depends upon one's concept of the judicial process and its function, and what one expects of it. While the \textit{Twining} majority spokesman, Justice Moody, admitted that the incorporation-of-the-first-eight-in-the-fourteenth "view has been, at different times, expressed by justices of this court . . . and was undoubtedly that entertained by some of those who framed the Amendment," he concluded that it was "not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court."\footnote{211 U.S. 78, 98 (1908).} Is this the Court at its best or its worst?

Once again the Great Dissenter was the lone dissenter. He had another look at history and reached the same conclusion—the fourteenth amendment was intended to secure against encroachment by the states "the privileges and immunities mentioned in the original amendments, and universally regarded as our heritage of liberty from the common law"\footnote{Id. at 122.} Not only was the right to immunity from self-incrimination thus protected against state contravention by the privileges and immunities clause, but in addition it was guaranteed by the due process clause. Inasmuch
as the court had "heretofore, upon the fullest consideration, declared that the compelling of a citizen of the United States, charged with crime, to be a witness against himself, was a rule abhorrent to the instincts of Americans, was in violation of universal American law, was contrary to the principles of free government and a weapon of despotic power which could not abide the pure atmosphere of political liberty and personal freedom," Justice Harlan could not "agree that a State may make that rule a part of its law and binding on citizens, despite the Constitution of the United States."\textsuperscript{119}

The high watermark of adherence to John Marshall Harlan's views was the 1947 case of Adamson v. California.\textsuperscript{120} By a five-to-four decision the Court still maintained its traditional position, but Justices Black, Douglas, Murphy and Rutledge, those staunch judicial champions of civil liberties, were of the opinion that the fourteenth amendment had carried over and incorporated the Bill of Rights to the extent of making the first eight amendments applicable to the states. Justice Black refused to "consider the Bill of Rights to be an outworn 18th Century 'strait jacket' as the Twining opinion did,"\textsuperscript{121} and he bolstered his opinion by an appendix devoted to the legislative history of the fourteenth amendment.\textsuperscript{122} But Justice Black seemed to imply that the amendment protected against state infringement only the rights and privileges guaranteed by the Bill of Rights. Justices Murphy and Rutledge were not prepared to agree to this limitation, for occasions might arise "where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."\textsuperscript{123}

Although the untimely deaths of Justices Murphy and Rutledge have made it unlikely that the Court will reverse itself in the near future, it is not inconceivable that eventually the position of John Marshall Harlan will prevail in this matter as it has

\textsuperscript{119} Id. at 127.
\textsuperscript{120} 332 U.S. 19 (1947).
\textsuperscript{121} Dissenting opinion, Black, J., Adamson v. California, 332 U.S. 19, 89 (1947). But see Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1949) and other material cited in footnote 93 supra.
\textsuperscript{122} Id. at 92-123.
\textsuperscript{123} Dissenting opinion, Murphy, J., Adamson v. California, 332 U.S. 19, 124 (1947).
with respect to the protection of the civil liberties of the Negro race.

C. *A Miscellany of Cases*

One of the principal ways in which the protection of civil liberties has been assured over the years has been by an insistence upon strict compliance with procedural requirements in criminal prosecutions. In *Crain v. United States* the accused was convicted of having violated a federal forgery statute, but the record failed to show that he had ever been formally arraigned or that he had pleaded to the indictment. The Supreme Court split five-to-three, reversed the conviction and remanded the case so that the defendant might be properly arraigned, plead to the indictment and be retried. Justice Harlan, speaking for the majority, conceded that "the Constitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment." He was of the opinion, however, that "due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed." He concluded that the record "should show distinctly, and not by inference merely, that every step involved in due process of law, and essential to a valid trial, was taken in the trial court."

When the Court was presented with the question whether the written waiver of a jury by a defendant invalidates his conviction for a petty offense, eight of the Justices thought not, but Justice Harlan dissented. Assuming for the purposes of argument that the jury trial provisions of the Constitution should be interpreted in the light of the fact that at common law trials concerning minor offenses were conducted without a jury, *if parliament so provided*, he contended that "[n]o criminal offense or crime against the United States can be tried except by jury, if the plea be not guilty, unless it be a petty offense or crime, and unless the legislative department declare that it may be so tried." Since congress had

124 162 U.S. 625 (1896).
125 Id. at 645.
126 Ibid.
127 Ibid.
129 Id. at 98.
not done so with respect to the offense at issue, the convictions should have been reversed.

An extremely interesting factual situation as well as a significant legal issue came before the Court in the case of Mahon v. Justice. Mahon, who had been indicted for murder in Kentucky, escaped to West Virginia. While consideration was being given by the Governor of West Virginia to an application from the Governor of Kentucky for the surrender of Mahon as a fugitive from justice, a body of armed men illegally abducted him to Kentucky, where he was taken into custody by the local authorities. The Governor of West Virginia and Mahon petitioned for a writ of habeas corpus to secure his release and safe return to West Virginia. Seven of the Justices upheld the lower court’s denial of relief: no right secured by the Constitution or the laws of the United States had been violated by the arrest of Mahon in Kentucky and his imprisonment there. Mr. Justice Bradley, however, was of the opinion that Mahon had been kidnapped and carried into Kentucky in violation of the Constitution and was detained there in continued violation thereof inasmuch as the Constitution provides a peaceable remedy for the surrender of fugitives. And even “if the party himself is precluded from setting up his wrongful abduction as a defense to an indictment and perhaps precluded from demanding his discharge on habeas corpus,” here West Virginia had intervened for Mahon’s protection and sued out the writ. Further, Mahon’s own application for the writ was well-grounded, for he was “not in the situation of a criminal who had been abducted from a State, which takes no interest in his case.” Since Mahon’s restoration had been demanded by the state of West Virginia, the writ had been properly issued at his own instance and/or that of the state, and he should have been discharged and permitted to return to West Virginia. Mr. Justice Harlan concurred in Bradley’s opinion.

D. Indians, the Chinese and Justice Harlan

John Elk, who had been born a member of one of the Indian tribes, severed his tribal connections and took up his residence

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130 127 U.S. 700 (1887).
131 Id. at 718.
132 Ibid.
among the white citizens of Nebraska. When he was denied the right to vote, the question arose whether he was a citizen of the United States. The lower court's decision against his contention that the refusal of the registration officer to place him on the voting rolls constituted a violation of the fourteenth and fifteenth amendments was sustained by the Supreme Court.\footnote{133} Justice Gray reasoned that Indians could become citizens only through the regular process of naturalization; Elk had not been naturalized; ergo,—. That Elk had been born in the United States was immaterial. Indians could not make themselves United States citizens just by living apart from their tribes, and since Elk was not a citizen, he had no right to vote.

In a dissenting opinion, Justice Harlan, after an examination of the legislative history of the fourteenth amendment, especially that of the rejected proposal to insert after the words “subject to the jurisdiction thereof” the words “excluding Indians not taxed,” reached the conclusion that the amendment was intended “to grant national citizenship to every person of the Indian race in this country who was unconnected with any Tribe and who resided, in good faith, outside of Indian reservations and within one of the States or Territories of the Union.”\footnote{134} Moreover, a Congressional act of 1866 has provided: “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”\footnote{135} Since Elk had been born in the United States, had cut himself off from his tribe, had become a bona fide resident of Nebraska and was subject to taxation in that state and other burdens imposed upon its residents of every race, he was a citizen of the United States. If this were not the case, then, Justice Harlan observed, “the 14th Amendment has wholly failed to accomplish, in respect of the Indian race, what we think was intended by it,” and, the Great Dissenter concluded, “there is still in this country a despised and rejected class of persons, with no nationality whatsoever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of

\footnote{133} Elk v. Wilkins, 112 U.S. 94 (1884). 
\footnote{134} Id. at 118. 
\footnote{135} 14 Stat. 27 (1866).
any political community nor entitled to any of the rights, privileges or immunities of citizens of the United States.\textsuperscript{3186}

The *Elk* case was decided in 1884; in 1887 Congress made citizens of all Indians in Elk's situation regardless of their personal desires.

Another Indian case worthy of note is *Talton v. Mayes*,\textsuperscript{137} in which eight of the Nine Men determined that neither the fifth amendment nor Congressional enactments applied to legislation of the Cherokee nation so as to require the initiation of criminal prosecutions by grand jury indictment. As might be expected in the light of his views expressed in the *Hurtado* case,\textsuperscript{3138} Mr. Justice Harlan dissented—this time without opinion.

Justice Harlan wrote two opinions interpreting the Chinese Restriction Act of 1882, as amended in 1884. In the *Chew Heong* case\textsuperscript{139} as majority spokesman he construed the Act's provisions concerning the certificate of identification which was to be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States as not being applicable to a Chinese laborer who had become a resident under a valid treaty and had left the country before the Congressional enactment. But in the case of *United States v. Jung Ah Lung*\textsuperscript{140} Harlan registered a dissent which was not in keeping with his characteristic liberalism. A Chinese laborer, who had resided in this country for three years, returned to China in 1883 after having obtained a certificate of identification. Unfortunately, a band of Chinese pirates robbed him of his certificate. When he presented himself for re-entry into the United States at San Francisco, there was no doubt that he was the Jung Ah Lung to whom a certificate had been issued—the records proved it. The 1882 Act expressly provided that a Chinese laborer was not permitted to re-enter the country by land without producing a certificate, and the 1884 amendment made such a certificate the "only evidence permissible" to establish the right of re-entry. Justice Harlan, together with Justices Field and Lamar, felt that Congress in 1882 could not have intended one rule for re-entry by land and another

\textsuperscript{136} 112 U.S. 94, 122 (1884).
\textsuperscript{137} 163 U.S. 376 (1896).
\textsuperscript{138} See p. 426 supra.
\textsuperscript{139} Chew Heong v. United States, 112 U.S. 536 (1884), Field and Bradley, J.J., dissenting.
\textsuperscript{140} 124 U.S. 621 (1888).
for re-entry by sea, and that the 1884 "only evidence" amendment did not declare a new rule but only indicated more clearly the 1882 intent of Congress. Harlan expressed the view that if Jung Ah Lung's "certificate was forcibly taken from him by a band of pirates while he was absent," that was "his misfortune." "That fact ought not to defeat what was manifestly the intention of the legislative branch of the government."  

The majority of the Court, however, held that Jung Ah Lung should be allowed to re-enter the country: the 1884 amendment was not retroactive—the Court cited Harlan's Chew Heong opinion—and the 1882 Act did not say that a Chinese laborer returning by a vessel could not re-enter without producing a certificate.

In United States v. Wong Kim Ark the Court determined that a child born in the United States of Chinese nationals with a permanent domicile and residence here becomes a citizen of this country at the time of birth by virtue of the first clause of the fourteenth amendment. But Harlan concurred in a dissenting opinion of Chief Justice Fuller that sought to avoid what might reasonably be considered to be an arbitrary, compulsory imposition of dual nationality.

When the civil liberties of Chinese aliens were imperiled, Justice Harlan entered the lists with his usual vigor and devotion. A band of men in California by force and intimidation drove a group of Chinese aliens from their homes and places of business and from the town in which they resided, and for several hours held them captives on a steamboat barge. The men were convicted of having violated the Civil Rights Act. Upon appeal by one of the defendants to the Supreme Court, his conviction was reversed. The Court, while admitting that the federal government had the power to provide for the punishment of those guilty of depriving Chinese subjects of any rights guaranteed them by an 1880 treaty, concluded that it had not done so. One section of the Civil Rights Act was declared invalid, another inapplicable,
and a third was held to pertain only to the protection of citizens, not aliens. Justice Field wrote a dissenting opinion, as did the Great Dissenter. Harlan again spoke out in favor of the constitutionality of the entire federal Civil Rights legislative program and again voiced his disapproval of the Court's decision in the Civil Rights Cases. He expressed the view that the "denial by the State of the equal protection of the laws to persons within its jurisdiction may arise as well from the failure or inability of the state authorities to give that protection, as from unfriendly enactments." Further, he interpreted an admittedly valid key section of the Civil Rights Act as applicable to both aliens and citizens. It seemed to Harlan that the majority were saying that "if Chinamen, having a right under the Treaty [of 1880-81] to remain in our country, are forcibly driven from their places of business, the Government of the United States is without power in its own courts to protect them against such violence, or to punish those, who, in this way subject them to ill treatment." The champion of civil liberties for all persons was quick to warn that "if this be so, as to Chinamen lawfully in the United States, it must be equally true as to the citizens or subjects of every other foreign Nation, residing or doing business here under the sanction of treaties with their respective governments."

E. Peonage and Slavery

In Clyatt v. United States the defendant was indicted on the charge of "returning" certain persons to a condition of peonage in violation of the federal Anti-Peonage Act which provided for the criminal punishment of "every person who holds, arrests, returns, or causes any person to be held, arrested, or returned . . . to a condition of peonage." The majority spokesman, Mr. Justice Brewer, determined that the statute was constitutional as appropriate legislation to effectuate the purposes of the thirteenth amendment, and he admitted that there was abundant evidence from which the jury could have found that the defendant went to Florida and caused the arrest of two Negroes on the charge of larceny as an excuse for securing their custody so he could take

145 Id. at 700.
146 Id. at 694.
147 Ibid.
148 197 U.S. 207 (1905).
them back to Georgia to work out a debt. But since there was "not a scintilla of testimony to show that Gordon and Ridley [the Negroes] were ever theretofore in a condition of peonage," the defendant could not possibly have "returned" them to peonage as charged in the indictment; hence, the conviction was reversed. Justice Harlan dissented, observing that the "accused made no objection to the submission of the case to the jury." He felt that it was "going very far to hold in a case like this, disclosing barbarities of the worst kind against these negroes, that the trial court erred in sending the case to the jury." In another case—Hodges v. United States—the Court, again speaking through Mr. Justice Brewer, reversed the conviction of defendants who had attempted by force and intimidation to prevent several Negroes from making or carrying out contracts of labor. The federal legislation under which the defendants had been tried was held to be invalid as applied to the facts of the case: it could not be justified by the fourteenth and fifteenth amendments since they are restrictive upon only state action, nor by the thirteenth since the acts complained of did not operate to reduce the individuals to a condition of slavery. It was maintained that the protection of the rights violated was within the jurisdiction of the states. After all, Congress had not made the Negroes wards of the nation, but rather gave them citizenship "doubtless believing that thereby in the long run their best interests would be subserved, they taking their chance with other citizens in the States where they should make their homes." Justice Harlan, with whom Justice Day concurred, dissented on the ground that the majority had given an entirely too narrow construction to the thirteenth amendment. The disability to make valid contracts for one's services was an inseparable incident of the institution of slavery, and by reason of the amendment Congress had the power not only to prevent the establishment of slavery, pure and simple, but also to "make it impossible that any of its incidents or badges exist." The Great Dissenter also reaffirmed the stand he had taken in the Civil Rights Cases concern-

149 Id. at 222.
150 Id. at 223.
151 203 U.S. 1 (1906).
152 Id. at 20.
153 Id. at 27.
ing the fourteenth amendment's applicability to the acts of individuals.

*Bailey v. Alabama*¹⁵⁴ came before the Court for the first time in 1908. It was obvious that the Alabama legislature had established what amounted to nothing more than a system of peonage, but Justice Holmes, speaking for the Court, refused to consider the constitutional issue, even though it had been raised in the state court, and denied relief to the oppressed Negro on the basis of a technical procedural nicety—the petitioner was before the Court prematurely; he was attempting to take a “shortcut” in seeking to be discharged from custody in advance of his trial. (It may be noted that even when the case came up to the high court for the second time in 1911¹⁵⁵ Holmes dissented from Hughes' majority opinion which held the Alabama scheme unconstitutional as violative of the thirteenth amendment. This was certainly carrying the “states-as-experimental-stations” theory a long way!) Justice Harlan, again joined by Justice Day, admitted that it might have been deemed a “shortcut” if the defendant had sought a writ of habeas corpus in a federal court. But the Alabama Supreme Court “recognized the proceeding by *habeas corpus* to be in accordance with the local law,”¹⁵⁶ never intimated that the accused was taking any “shortcut” and by its final order passed upon the constitutionality of the state statute. The Great Dissenter thought it to be “a curious condition of things” if the United States Supreme Court “must remain silent when the question comes before it regularly, whether the final judgment of the high court of a State does not deprive the citizen of rights secured to him by the Supreme Law of the Land.”¹⁵⁷

That John Marshall Harlan was unalterably opposed to slavery in any form whatsoever is clearly shown by his dissent in *Robertson v. Baldwin*.¹⁵⁸ The majority of the Court upheld the power of Congress to vest judicial power in state courts to compel seamen to carry out the contractual provisions contained in their shipping articles. Stressing the point that historically the contract of a sailor has always been treated as an exceptional one involving

¹⁵⁴ 211 U.S. 452 (1908).
¹⁵⁵ 219 U.S. 219 (1911).
¹⁵⁶ 211 U.S. 452, 457 (1908).
¹⁵⁷ Id. at 459.
¹⁵⁸ 165 U.S. 275 (1897).
to a certain extent the surrender of personal liberty, Mr. Justice Brown concluded that the thirteenth amendment was never intended to apply to such a contract. Harlan in an opinion that has been described as "bristling with a spirit of the rights of human beings," contended that slavery exists "wherever the law recognizes a right of property in a human being," and that the "condition of one who contracts to render personal services in connection with the private business of another becomes a condition of involuntary servitude from the moment he is compelled against his will to continue in such service." Drawing a clear distinction between the public duties of sailors who serve in the United States Navy and those of seamen engaged in purely private business, he maintained that the "placing of a person, by force, on a vessel about to sail, is putting him in a condition of involuntary servitude, if the purpose is to compel him against his will to give his personal services in the private business in which that vessel is engaged." The argument that "the statute in question is sanctioned by long usage among the Nations of the earth" did not impress Justice Harlan one bit, for "these enactments of ancient times" were "enforced by or under governments possessing arbitrary power inconsistent with a state of freedom." The past or present practices of other governments, even those of England, were of no consequence. In fact, pre-thirteenth amendment American practices were not controlling, for although "prior to the adoption of the Thirteenth Amendment the arrest of a seaman and his forcible return under any circumstances to the vessel on which he was engaged to serve could have been authorized by an Act of Congress, such deprivation of the liberty of a free man cannot be justified under the Constitution as it now is." In conclusion Harlan remarked with some sarcasm that under the Court's view of the Constitution "we may now look for advertisements, not for runaway servants as in the days of slavery, but for runaway seamen," and he added with eloquent vigor: "In for-

160 165 U.S. 275, 292 (1897).
161 Id. at 301.
162 Id. at 292.
163 Id. at 293, 294.
164 Id. at 299.
165 Id. at 303.
mer days, overseers could stand with whip in hand over slaves, and force them to perform personal service for their masters. While, with the assent of all, that condition of things has ceased to exist, we can but be reminded of the past when it is adjudged to be consistent with the law of the land for freemen who happen to be seamen to be held in custody that they may be forced to go aboard private vessels and render personal services against their will.”

It is significant that the reasoning and sentiments expressed by John Marshall Harlan in his *Baldwin v. Robertson* dissent were in large part embodied in the Seamen’s Act of 1914.

F. Imperialism and the Insular Cases: Does the Constitution Follow the Flag?

With the acquisition of Puerto Rico and the Philippines as a result of the Spanish-American War the cry of “Imperialism” was heard in the United States. The war and its aftermath gave the politicians issues to talk about and made business for the Supreme Court, too. Beginning in 1899 came the prize cases involving important points of international law and a series of taxation cases. Then from 1901 to 1905 came what have since become known as the Insular Cases, which presented the question whether the newly acquired territories were to be considered subjugated colonies or integral parts of the United States. What was their constitutional status? Did the Constitution apply to them?

At this time President McKinley nominated to important posts in Puerto Rico the sons of Justices Harlan and McKenna. Gustavus Myers has pointed out that “this fact led to biting comments by Senators Pettigrew, Teller and Butler on the subverting of the independence of the judiciary; the appointments, they declared, singularly coincided with the fact that the question of the status of the colonies was before the Supreme Court at that precise time.” Myers continues: “The general effect of the

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166 Ibid.
167 See cases cited in 2 Warren, *The Supreme Court in United States History* 707 (1928).
168 See cases cited in 2 Warren, op. cit. supra, note 167, at 711.
169 See cases and law review articles cited in 2 Warren, op. cit. supra, note 167, at 708. See also *The Insular Cases Comprising the Records, Briefs and Arguments of Counsel . . .* (compiled by Albert H. Howe) (1901).
170 Myers, *History of the Supreme Court* 647 (1925).
various associated decisions was certainly in line with that desired by McKinley and the capitalist groups behind him. "The Constitution did not follow the flag," the Supreme Court decided, thereby reducing the insular conquests to mere appendages." This may have been so, but it is neither true nor fair to imply that Harlan was in any way influenced to decide in favor of administration policies, for his answer to the question presented by the Insular Cases was, as we shall see, a most emphatic "The Constitution does follow the flag!"

Boudin in his *Government by Judiciary* has made an acute and penetrating analysis of the positions taken by the various Justices in the Insular Cases. Here we shall center our attention on the opinions of Justice Harlan. But first, a summary of the leading holdings of the Court. The *DeLima* and *Downes* cases were both five-to-four decisions: four of the *DeLima* majority became the *Downes* dissenters, with Mr. Justice Brown serving as the "swing-man." In the first case it was determined that Puerto Rico had ceased to be a "foreign country" and that goods imported from the island before the passage of the Foraker Act could not be subjected to duties under the Dingley Tariff Act. But the Court decided in the second case that even though Puerto Rico had ceased to be a foreign territory, it did not become part of the United States within the meaning of the constitutional provisions concerning duties; hence, Congress could lay duties upon imports from the island at any rate it chose—the Foraker Act was constitutional. Then the Court held that the Constitution of its own force—without legislation—did not carry the right of trial by jury to the unincorporated Philippines, but that it did to the incorporated territory of Alaska. Finally, in the words of Charles Warren, the "capsheaf of the doctrine of incorporation was applied in *Puerto Rico v. Tapia*, in 1918, when the Court held that rights guaranteed by the Constitution

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171 Id. at 648.
174 The majority in the *DeLima* case consisted of Chief Justice Fuller and Justices Harlan, White, Peckham and Brown, while in the *Downes* case Brown joined Justices Gray, Brewer, Shiras and McKenna to form the majority.
177 245 U.S. 639 (1918).
might be withheld by Congress from an unincorporated territory even though Congress had granted United States citizenship to the inhabitants of such territory."

Now for Harlan's views on the Insular Cases and the question of imperialism. It was inconceivable to this civil liberties champion that Congress could govern any territory of the United States as a subjected colony. According to the Great Dissenter, the provisions of the Constitution in their plenitude were equally as applicable to the possessions of the United States as to the mainland territories. In his dissenting *Downes* opinion he maintained that the "Constitution is supreme over every part of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained." He could not admit that the meaning of the Constitution depends upon "accidental circumstances" nor would he grant that we may "violate the Constitution in order to serve particular interests in our own or in foreign lands." He has a ready reply for the imperialists: "We heard much in argument about the 'expanding future of our country.' It was said that the United States is to become what is called a 'world power;' and that if this Government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of the nation should be extended otherwise than in accordance with the Constitution." As for Mr. Justice (soon to be Chief Justice) White's theory of incorporation, Harlan was constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In *Hawaii v. Mankichi* the defendant had been convicted.

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178 2 Warren, op. cit. supra, note 167, at 711.
180 Ibid.
181 Id. at 386.
182 Id. at 391.
183 190 U.S. 197 (1903).
of manslaughter by a verdict of nine of the twelve jurors in accordance with local law. By a five-to-four decision the Court upheld the conviction since, it was reasoned, Congress had not intended by its annexation resolution to extend all the constitutional rights and privileges to the islands. Justice Harlan, while agreeing in dissent with Chief Justice Fuller and Justices Brewer and Peckham that "by the specific language" of the annexation resolution "no legislation which was contrary to the Constitution of the United States remained in force," went on to contend, as might be expected, that the issue could not rightly be approached from the viewpoint of Congressional intent. In his opinion, "the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to the Islands. It then became controlling, beyond the power of Congress to prevent." He felt that he "could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by mere non-action, to withhold vital constitutional guaranties, from the inhabitants of a territory governed by the authority, and only by the authority, of the United States."

In the course of his Mankicki dissent Justice Harlan wrote that he stood by "the doctrine that the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction." And it was this view to which he consistently and courageously adhered in all the Insular Cases and that he expressed in his concurring opinion in Rasmussen v. United States and in his dissents in the Dorr and Trono cases. He fought a losing battle, though, for it was Chief Justice White's theory of incorporation that eventually prevailed as the Court's doctrine. It is reported that White later expressed his strong

184 Id. at 223.
185 Id. at 238.
186 Id. at 240.
187 Ibid.
188 197 U.S. 516, 528 (1904).
feelings on the imperialism issue by exclaiming: "Why, sir, if we had not decided as we did, this country would have been less than a Nation." The concern of John Marshall Harlan, however, had been not with national pride and power, but rather with the dignity of man and the protection of civil liberties.

IV. Conclusion—The Court and the Constitution

A student and disciple of the Great Chief Justice in whose honor he was named, John Marshall Harlan was a staunch, unswerving federalist. When the Centennial Celebration of the Organization of the Federal Judiciary was held in New York on February 4, 1890, he was on hand to reply to the toast "The Supreme Court of the United States," and he spelled out what he considered to be the "vital principles" enunciated by the high court on the subject of federalism:

That while the preservation of the States, with authority to deal with matters not committed to national control, is fundamental in the American Constitutional system, the Union cannot exist without a government of the whole;

That the Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens;

That the general government, though limited as to its objects, is yet supreme with respect to those objects, is the government of all, its powers are delegated by all, it represents all, and acts for all; and,

That America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent.

Upon the occasion of his lecturing at the Union College of Law in 1892 the Chicago Legal News had this to say of Justice Harlan:

He is a great admirer of the organic law, but believes in a construction of it for the whole people, while he discards the doctrine of "State Sovereignty" as dangerous and iniquitous.

192 Address of Mr. Justice Harlan, Centennial Celebration of the Organization of the Federal Judiciary, 134 U.S. 751, 755 (1890).
Nine years later in his dissenting Downes opinion, Harlan himself wrote: "Although the States are constituent parts of the United States, the Government rests upon the authority of the people of the United States, and not on that of the States." He went on to endorse warmly Webster's concept of an established-by-the-people-of-the-United-States Constitution and to reject emphatically a constitutional system founded upon a states-in-union or compact-of-states federal structure.

Judicial legislation in any shape, degree, manner or form was abhorrent to Justice Harlan, and it is interesting to note that his first and last dissenting opinions were devoted to execrating what to his mind was the most dreadful of the capital judicial sins. He concluded his Standard Oil dissent with what "may almost be looked upon as parting words from a great judge to his country:"

After many years of public service at the national capital and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. . . . The supreme law of the land, which is binding alike upon all,—upon Presidents, Congresses, the courts and the people,—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids any restraints of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all.

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105 Id. at 377.
106 See id. at 377-378.
108 Clark, Constitutional Doctrines of Justice Harlan 201 (1915).
109 Standard Oil Co. v. United States, 221 U.S. 1, 105 (1911).
Yet in the course of his lectures on Constitutional law at George Washington University Harlan frankly confided to his students: "I want to say to you young gentlemen that if we don't like an act of Congress, we don't have much trouble to find grounds to declare it unconstitutional." 200

Justice Harlan was wont to refer to himself as a strict constructionist, but he might more accurately be termed a liberal one. Although he revered the Constitution and the Founding Fathers, it seems likely that had he been on the Court during the 'thirties, he would have been inclined to attribute to the Fathers both the wisdom of having neither desired nor intended to rule future generations from the grave and also the foresight to have realized that with changing social and economic conditions, constitutional provisions should and would be given new and expanded meanings. It is arguable that he would have subscribed to the theory that our basic legal document is a living one—a growing, changing, fruitful one; that "We, the People" were not merely the citizens of the 18th century, but are the citizens of each succeeding generation.

Never a casuist, Harlan had little use for semantic-gymnastics, argumentation or any intellectual exercise contrived as a vain display of learning. Perhaps he did lack an acute power of analysis—it is this alone that might keep him from being named on the roster of the all-time-great Justices—but his direct, incisive logic, sound common sense, simple, rugged realism and especially his penchant for independent thinking made him a courageous liberal dissenter second to none. Chief Justice White rather ponderously, but quite accurately described the motivating force of Harlan's entire judicial career as being the "purpose to do justice as it was given him to see it, a justice not resting upon mere metaphysical conceptions or distinctions of casuistry concerning the lines of separation between right and wrong, but a justice based upon what seemed to him to be a common sense of justice, begetting an ever-present and vivid purpose to uphold the right and to frustrate the wrong, and ever to see to it that the weak were not mastered by the strong." 201

Of one thing we can be sure: Justice Harlan never hesitated

200 As quoted in Corwin, Constitutional Revolution, Ltd. 38 (1941).
201 Proceedings on the Death of Mr. Justice Harlan, 222 U.S. xxvi (1911).
to speak out courageously and eloquently against every infringement of civil liberties—the preservation of the fundamental rights guaranteed by the Constitution, as he read that document, was his constant concern. He was for his time Justices Black-Douglas-Murphy-Rutledge all-in-one! On occasions even Holmes would not go as far as his "brilliant precursor in liberalism and dissent." Often John Marshall Harlan stood alone; but he always stood firmly and proudly as the stalwart judicial champion of the dignity of man and the protector of human rights.